# JUDGMENT OF THE COURT
20 May 1992 *

In Case C-385/89,

**Hellenic Republic,** represented initially by Constantinos Stavropoulos, Legal Assistant at the Ministry of Foreign Affairs, Special Department for Community Contentious Matters, Ilias Laïos, Legal Assistant at the Ministry for the National Economy and Meletis Tsotsanis, Legal Administrator at the Ministry of Agriculture, assisted by Ioannis Magoulas, Legal Assistant at the Ministry for Agriculture, and subsequently by Vassileios Kontolaimos, a delegated member of the State Legal Council, with an address for service in Luxembourg at the Greek Embassy, 117 Val Sainte-Croix,

applicant,

v

**Commission of the European Communities,** represented by Theofanis Christoforou and Maria-Anna Paraskeva, of its Legal Service, with an address for service in Luxembourg at the office of Roberto Hayder, representative of the Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for a declaration that Commission Decision 89/627/EEC of 15 November 1989 on the clearance of the accounts presented by the Member States in respect of the expenditure for 1987 of the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (OJ 1989 L 359, p. 23) is void,

* Language of the case: Greek.

THE COURT,

composed of: F. A. Schockweiler (President of Chamber), acting as President, F. Grévisse and P. J. G. Kapteyn (Presidents of Chambers), G. F. Mancini, C. N. Kakouris, J. C. Moitinho de Almeida, M. Diez de Velasco, M. Zuleeg and J. L. Murray, Judges,

Advocate General: C. Gulmann,
Registrar: D. Triantafyllou, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 5 February 1992, at which the Commission was represented by X. Yataganas, of its Legal Service,

after hearing the Opinion of the Advocate General at the sitting on 17 March 1992,

gives the following

## Judgment

1 By application lodged at the Court Registry on 29 December 1989, the Hellenic Republic brought an action under the first paragraph of Article 173 of the EEC Treaty for annulment of Commission Decision 89/627/EEC of 15 November 1989 on the clearance of the accounts presented by the Member States in respect of the expenditure for 1987 of the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (OJ 1989 L 359, p. 23).

2 The application seeks first the annulment of that decision as a whole for disregard of essential procedural requirements and for infringement of the Treaty or the rules of law relating to its application by reason of certain reservations contained

in its recitals and the arbitrary and incorrect charging to the Hellenic Republic of a total sum of DR 4 015 480 761 instead of DR 2 323 949 293 and, secondly, the partial annulment of the decision in relation to the refusal to charge to the EAGGF the following amounts:

— DR 213 801 319 as refunds on the exportation of 6 400 tonnes of durum-wheat meal;

— DR 367 402 940 for the administration of animal-feed;

— DR 258 108 000 as co-responsibility levy in the cereal sector for the 1986/87 marketing year;

— DR 1 391 025 367 as expenditure for the storage of tobacco.

3 During the proceedings, the Hellenic Republic abandoned a number of complaints. In the first place, it abandoned the complaint referring to the arbitrary and incorrect charging of the total amount of DR 4 015 480 761 since by its Decision 90/213/EEC of 19 April 1990 (OJ 1990 L 113, p. 32), the Commission formally corrected an accounting error which it had already recognized in a letter from the Director-General for Agriculture dated 22 December 1989. Secondly, the Hellenic Republic abandoned the general objection relating to the reservations expressed by the Commission in the recitals to the contested decision since the Court had already rejected a similar plea in its judgments of 10 July 1990 in Cases C-259/87, C-334/87 and C-335/87 *Greece* v *Commission* [1990] ECR I-2845, I-2849 and I-2875 concerning the clearance of accounts for 1983, 1984 and 1985 respectively. Finally, the Hellenic Republic abandoned the objection relating to the failure to charge to the EAGGF an amount of DR 367 402 940 for administration of animal-feed in view of the judgment of 19 March 1991 in Case C-32/89 *Greece* v *Commission* [1991] ECR I-1321, in connection with clearance of the accounts for 1986 in which the Court rejected a similar plea.

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

**Expenditure in respect of export refunds on 6 400 tonnes of durum-wheat meal**

5 When clearing the accounts for 1986, the Commission did not charge to the EAGGF expenditure declared by the Hellenic Republic for export refunds on 40 000 tonnes of durum-wheat meal. That refusal was based on the finding of active intervention by the Hellenic Republic through the Central Office for marketing national products ('KYDEP'), which had undertaken, by programme contracts, one of which related to meal, to sell on behalf of the State the wheat stocks it held, on terms incompatible with a common organization of markets in the cereals sector. Since of the 40 000 tonnes of meal in question only 33 600 tonnes had been taken into account for the financial correction in relation to the clearance of the accounts for 1986, the Commission adjusted the balance of 6 400 tonnes for the 1987 marketing year and that adjustment amounted to DR 213 801 319.

6 The Hellenic Republic seeks annulment of the contested decision on this point on the ground that it is based on a mistake of fact. According to the applicant, although there had been a programme contract for the exportation of meal, it had never in fact been performed.

7 It must be noted here that in its judgment of 19 March 1991 in Case C-32/89, mentioned above, the Court ruled on the question whether the Commission was entitled, when clearing accounts for 1986, to refuse to charge to the EAGGF expenditure declared by the Hellenic Republic as export refunds on the said 40 000 tonnes of durum-wheat meal. The Court thus ruled that 'the Commission must be held not to have acted in error in concluding that there was a fourth programme contract involving durum-wheat meal' (paragraph 12), that 'the Greek authorities must be held to have controlled KYDEP's operations and covered its deficits' (paragraph 17) and that 'the Commission could therefore justifiably refuse

to recognize the amounts in issue as chargeable to the Fund on the ground that the Greek authorities took measures which interfered with Community policy in the cereals sector' (paragraph 18).

8 In those circumstances, since the amount in question was only part of the total amount which was at issue in Case C-32/89, this head of claim must be dismissed.

**Collection of co-responsibility levy in the cereal sector for the 1986/87 marketing year**

9 With the aim of achieving a better balance in the cereals market and controlling growth, Council Regulation (EEC) No 1579/86 of 23 May 1986 amending Regulation (EEC) No 2727/75 on the common organization of the market in cereals (OJ 1986 L 139, p. 29) instituted from 1 July 1986 a co-responsibility levy. It is payable on cereals produced in the Community when they are processed for the first time or bought in through intervention or exported as grain. The co-responsibility levy was fixed at ECU 5.38 per tonne for the 1986/87 marketing year, collected by the competent national bodies and paid into the EAGGF as a receipt.

10 On clearing the accounts, the Commission checks whether the co-responsibility levy has been correctly and fully collected and paid into the EAGGF. In order to do this it has worked out a method of calculation, which has been notified to the Member States. It is based on various statistical data supplied by the Member States themselves to the Statistical Office of the European Communities (Eurostat) and enables a full and reliable assessment to be made of the actual extent to which the levy has been collected in each of the Member States. Any financial adjustment depends on the quantities of cereals on which the levy has not been collected.

11 One of the basic data of this method is the figure relating to the total domestic use of cereals. In the present case, Eurostat published on 21 July 1988, that is a year after the end of the 1986/87 marketing year, the figure of 5 141 000 tonnes which had been notified by the Hellenic authorities and which the Commission took as basis for the calculation which led to the contested financial adjustment. The amount of that adjustment was notified by letter of 10 February 1989 to the Hellenic authorities which, by a telex message of 17 April 1989, notified a new figure, namely 4 489 000 tonnes, that is 652 000 tonnes less than the first. The Commission refused to take it into account and on 15 November 1989 adopted the contested decision. On 6 December 1989, Eurostat published the amended figure.

12 The Hellenic Republic, which does not challenge the method of calculation as such, alleges that the Commission wrongly took into account the figure originally notified, for it was only provisional. In the applicant's view, the Commission ought to have taken account of the figure subsequently notified, based on a more thorough audit and which, in its opinion, reflects the precise level of total domestic use.

13 According to the Commission, the Hellenic authorities have adduced no evidence to show that the statistical data first notified did not reflect the true position. Its refusal to take account of the figure subsequently notified was thus justified.

14 The Court observes that where, as in the present case, the national authorities subsequently make substantial amendments to statistical data which have a decisive importance in the calculation of the co-responsibility levy, they should supply sufficient specific information to justify such amendments. That is particularly true where, as in the present case, consistent evidence, on matters such as the size, never previously observed, of the variation occurring two years after the end of the marketing year and notified after the results of the Commission's calculation have been known and the fact that the first figure is almost identical to that notified by the Hellenic authorities in the provisional accounts, leads to serious doubts about

the correctness of the second figure. Far from providing, even in reply to a specific written question from the Court, the slightest concrete evidence to prove its contentions, the Hellenic Republic has confined itself to general statements.

15 In those circumstances, this head of claim must also be dismissed.

**Storage costs for raw tobacco**

16 Regulation (EEC) No 1467/70 of the Council of 20 July 1970 (OJ, English Special Edition 1970 (II), p. 497) fixed certain general rules governing intervention on the market in raw tobacco. Article 5 provides that only tobacco corresponding to the minimum quality characteristics to be defined on the basis of classification by variety and quality is to be bought in by intervention agencies. According to Article 6 of Regulation (EEC) No 1727/70 of the Commission of 25 August 1970 on intervention procedure for raw tobacco (OJ, English Special Edition 1970 (II), p. 592), tobacco is to be considered as corresponding to the abovementioned minimum characteristics if it does not have one or more of the characteristics in Annex III to the Regulation.

17 Article 8 of Regulation (EEC) No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy (OJ, English Special Edition 1970 (I), p. 218) imposes a general obligation on Member States to take the measures necessary, *inter alia*, to satisfy themselves that transactions financed by the EAGGF are actually carried out and executed correctly. Article 9 provides that Member States must make available to the Commission all information required for the proper working of the EAGGF and take all suitable measures to facilitate any supervision which the Commission may consider necessary, including inspections on the spot.

18 The Commission based its refusal to charge to the EAGGF expenditure relating to the storage of raw tobacco on the results of checks carried out in Greece in December 1987 by EAGGF officials and confirmed by a succession of analyses

carried out by the SEITA laboratories at Bergerac (France). In particular, the checks showed that a small part of the oriental type tobacco and on average 47% of the Burley tobacco did not meet the minimum standards of quality required for purchase into intervention. Community funding was disallowed for the whole of the Burley tobacco whereas the financial adjustments in relation to the oriental type tobacco were confined to the consignments inspected.

19 In order to demonstrate the unlawfulness of the contested decision the Hellenic Republic challenges both the verification procedure adopted by the EAGGF and the methods of inspection adopted. It also has objections in relation to the representativity of the consignments from which the samples were taken.

20 As regards the checking procedure, the Hellenic Republic contends that, contrary to what in fact took place, the samples ought to have been taken by national experts and then made available to the Commission.

21 Since this plea was raised only at the hearing and is not based on matters of law or fact which came into light during the procedure, it must be rejected as inadmissible under Article 42(2) of the Rules of Procedure.

22 As regards the inspection methods, the Hellenic Republic maintains that in the absence of rules relating to the taking of samples the EAGGF officials ought to have followed those governing international practice, namely the taking of horizontal layers approximately five centimetres thick. The sampling at issue was done by taking leaves. In addition, the number of samples taken was far too limited, being only 0.013% to 0.033% of the consignments considered.

23 According to the Commission, the taking of samples was carried out in accordance with the scientific data and methods adopted at international level, as is its usual practice. Furthermore, the inspections were carried out at premises belonging to the National Tobacco Board, responsible for management by joint agreement with the competent national officials, who always accompanied the Community's inspection team and never raised the least objection.

24 As far as this issue is concerned, neither of the parties has been able to describe sufficiently precisely the well-established sampling practice at the international level which they nevertheless claim exists.

25 In those circumstances, it is to be observed that, although the Commission must adopt appropriate and reliable methods of inspection, it is for the applicant Member State, in cases such as the present, to adduce evidence that the methods adopted by the Commission were not appropriate for the type of inspection to be carried out and that the results obtained were unreliable.

26 The Hellenic Republic has adduced no specific, significant evidence which could cast doubt on the appropriateness of the methods adopted or the correctness of the results of the inspections carried out by the Commission, which were in any event confirmed by analyses carried out by an independent laboratory. In particular, the Hellenic Republic has not produced the results of the inspections which ought to have been carried out pursuant to the applicable Community rules when the tobacco was bought into intervention and has adduced no other evidence to show that the tobacco in question had the requisite minimum quality characteristics whose determination the inadequate sampling is alleged to have prevented.

27 Nor has the applicant contradicted the Commission's statement that the prices obtained upon auction of the intervention tobacco were abnormally low, namely

some 3% of the market price. In the absence of evidence to the contrary, that fact makes it highly probable that the tobacco in question was of bad quality, as found by the Commission.

28 As regard the representativity of the consignments from which the samples were taken, the Hellenic Republic states that the Commission was not entitled to extend the results of the sampling to the whole country since it was carried out only in the storage depots of three towns, namely Salonika, Kavala and Sérrai.

29 As far as this issue is concerned, it must be observed that the Hellenic Republic has not contradicted the Commission's argument that the three towns in question are the most important tobacco production centres in the country.

30 Furthermore, it is to be borne in mind that in an application for annulment of a Commission decision disallowing certain expenditure on the ground that it was incurred as a result of breaches of Community rules imputable to a Member State, it is for the applicant Member State to show that the conditions for obtaining the financing disallowed are satisfied (see, in particular, Case 214/86 *Greece* v *Commission* [1989] ECR 367). That principle also applies in a case such as the present where the Commission, on the basis of conclusive results of inspection by sampling, considers that the Member State in question has not satisfied the obligation of checking the quality of tobacco properly before accepting it into intervention.

31 The Hellenic Republic has not even been able to show that, outside the three centres referred to, inspections would have given rise to different results and that in consequence the refusal to charge to the EAGGF the expenditure relating to the

total quantity of Burley tobacco was not justified. In those circumstances, this head of claim must also be dismissed.

32 It follows, that the application must be dismissed in its entirety.

## Costs

33 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Hellenic Republic has been unsuccessful, it must be ordered to pay the costs, including those of the application for interim measures.

On those grounds,

THE COURT

hereby:

**1. Dismisses the application;**

**2. Orders the Hellenic Republic to pay the costs.**

Schockweiler Grévisse Kapteyn Mancini Kakouris

Moitinho de Almeida Diez de Velasco Zuleeg Murray

Delivered in open court in Luxembourg on 20 May 1992.

J.-G. Giraud,

Registrar

F. A. Schockweiler

acting as President
President of Chamber