JUDGMENT OF THE COURT (Sixth Chamber)
29 May 1997 *

In Case C-69/94,

French Republic, represented by Edwige Belliard, Assistant Director at the Directorate of Legal Affairs in the Ministry of Foreign Affairs, and Jean-Louis Falconi, Secretary of Foreign Affairs in the same directorate, acting as Agents, with an address for service in Luxembourg at the French Embassy, 9 Boulevard du Prince Henri,

applicant,

v

Commission of the European Communities, represented by Gérard Rozet, 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 the annulment of Commission Decision 93/673/EC of 10 December 1993 fixing the flat-rate reduction to advances on the entry of agricultural expenditure in the accounts in the event of non-compliance with the provisions relating to the forwarding of the annual questionnaire on the application of the arrangements for additional levies in the milk sector introduced by Council Regulation (EEC) No 3950/92 (OJ 1993 L 310, p. 44),

* Language of the case: French.

THE COURT (Sixth Chamber),

composed of: J. L. Murray, President of the Fourth Chamber, acting as President of the Sixth Chamber, C. N. Kakouris, P. J. G. Kapteyn, G. Hirsch (Rapporteur) and H. Ragnemalm, Judges,

Advocate General: G. Tesauro,
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 27 June 1996, during which the French Government was represented by Frédéric Pascal, Attaché of the Central Administration at the Legal Affairs Directorate of the Ministry of Foreign Affairs, acting as Agent, and the Commission by Gérard Rozet,

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 21 February 1994, the French Republic brought an action under Article 173, first paragraph, of the EC Treaty for the annulment of Commission Decision 93/673/EC of 10 December 1993 fixing the flat-rate reduction to advances on the entry of agricultural expenditure in the accounts in the event of non-compliance with the provisions relating to the forwarding of the annual questionnaire on the application of the arrangements for

additional levies in the milk sector introduced by Council Regulation (EEC) No 3950/92 (OJ 1993 L 310, p. 44, hereinafter 'the contested decision').

2 As part of the common organization of the market in milk and milk products, an additional levy scheme for milk was introduced by 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), and by 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). The scheme, which was extended up to 31 March 1993, was reintroduced for seven consecutive periods of 12 months each, with certain modifications designed to improve and simplify it, 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).

3 The nature and purpose of the levy are described in Article 10 of Regulation No 3950/92 as follows:

'The levy shall be considered as intervention to stabilize agricultural markets and shall be used to finance expenditure in the milk sector.'

4 Using the power conferred on it by Article 11 of the regulation, which provides that 'the detailed rules for the application of this regulation and in particular the characteristics of milk, including fat content, which are considered representative for the purposes of establishing the quantities of milk delivered or purchased shall be adopted in accordance with the procedure provided for in Article 30 of Regu-

lation (EEC) No 804/68', the Commission adopted Regulation (EEC) No 536/93 of 9 March 1993 laying down detailed rules on the application of the additional levy on milk and milk products (OJ 1993 L 57, p. 12). Article 8, fourth indent, of that regulation provides:

'Member States shall notify the Commission of:

— ...

— ...

— ...

— before 1 September each year, the duly completed questionnaire as set out in the Annex. Where that time-limit is not observed, the Commission shall make a flat-rate reduction to advances on the entry of agricultural expenditure in the accounts'.

5 As regards failure to comply with that time-limit, it is stated in the fifth recital in the preamble to the regulation that:

'... experience gained has shown [that] major delays in both the transmission of figures on collections or direct sales and payment of the levy have prevented the arrangements from being fully effective; ... therefore, lessons should be learned from the past and the necessary conclusions drawn by laying down strict requirements as regards notification and payment deadlines and providing for penalties where deadlines are not met'.

6 With reference to the fourth indent of Article 8 of Regulation No 536/93 the Commission adopted the contested decision, which comprises the following three articles:

'*Article 1*

Where the questionnaire annexed to Regulation (EEC) No 536/93 has not been forwarded by 1 September of each year, the Commission shall, vis-à-vis the Member States concerned, make a reduction in respect of the month of September to advances on expenditure as booked of 1% of the overall amount paid to the Member State concerned for the milk and milk products sector under the previous budget year.

Article 2

Where, on the basis of the data notified in response to the questionnaire annexed to Regulation (EEC) No 536/93, the calculation of the levy owing to the Community is incorrect by more than 10%, the Commission shall, vis-à-vis the Member States concerned, make a reduction to advances on expenditure as booked of 0.5% of the overall amount paid to the Member State concerned for the milk and milk products sector under the budget year preceding that in which the calculation was shown to be incorrect.

Article 3

Where the questionnaire annexed to Regulation (EEC) No 536/93 has not been duly completed, the Commission shall, vis-à-vis the Member States concerned, make a reduction to advances on expenditure as booked of 0.04% for each item of missing data of the overall amount paid to the Member State concerned for the milk and milk products sector under the previous budget year.'

7 The French Republic relies on three pleas in support of its application for annulment:

— breach of Article 8, fourth indent, of Regulation No 536/93, of Article 11 of Regulation No 3950/92 and of essential procedural requirements;

— breach 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), and

— breach of the principle of proportionality.

First plea: breach of Article 8, fourth indent, of Regulation No 536/93 and Article 11 of Regulation No 3950/92

8 The plea is in two parts.

Breach of Article 8, fourth indent, of Regulation No 536/93

9 The French Government submits that Article 8, fourth indent, of Regulation No 536/93 was an adequate legal basis for the adoption of Article 1 of the contested decision, but not for Articles 2 and 3. It provides for a flat-rate reduction to advances on the entry of agricultural expenditure in the accounts only where the questionnaire is communicated to the Commission late, that is to say, after the time-limit; it does not, therefore, cover the case of a questionnaire which is inaccurate, as referred to in Article 2 of the contested decision, or incomplete, as referred to in Article 3 thereof.

10 As regards in particular the penalties applicable for inaccurate or incomplete questionnaires, general principles of law, in particular that requiring a legal basis for the alleged offence, require that all the penalties be specifically provided for and given a strict interpretation.

11 The Commission contends that Article 8, fourth indent, of Regulation No 536/93 is an adequate legal basis for the adoption of the contested decision providing for financial consequences for failure to complete a questionnaire correctly. The information supplied on the questionnaires is essential to ensure the efficacy of the milk quota scheme and the performance by the Commission of its management responsibilities in due time. Failure to complete questionnaires adequately compromises performance of that task.

12 The first sentence of the fourth indent of Article 8 of Regulation No 536/93 imposes a twofold obligation on Member States: they must not only communicate the questionnaire to the Commission before the date given, 1 September of each year, but must also communicate it 'duly completed'.

13 Accordingly, the obligations imposed by the first sentence of the fourth indent of Article 8 of Regulation No 536/93 cannot be regarded as having been fulfilled if the contents of the questionnaire communicated in due time are neither accurate nor complete. A flat-rate reduction to advances, as indicated in the second sentence of that provision, is to be made therefore when one of the three cases listed in the contested decision occurs, that is to say, where the questionnaire is not communicated before 1 September, or where it is communicated by that date but is incomplete or contains a specified degree of error.

14 That interpretation is borne out by the aims of the questionnaire and its role in the management of the additional levy scheme introduced by Regulation No 3950/92.

15 Both the Member States and the Commission have been made responsible for the management of that scheme, which created a mechanism entailing financial responsibilities in the form of the additional levy. It requires two main kinds of activity: in the first place collection and supervision of the application of the levy and payment of the proceeds to the Community, and in the second place the adoption, where necessary, of intervention measures to take account of structural trends and adjustments, as indicated in the 16th and 17th recitals in the preamble to Regulation No 3950/92.

16 In accordance with the second recital in the preamble to Regulation No 536/93, that regulation lays down rules regarding the checks necessary to ensure that the levy has been duly collected. According to Article 7 of the regulation, those rules are the responsibility of the competent national authorities, which are obliged, according to Article 8, fourth indent, of the regulation, to inform the Commission annually by means of the questionnaire of the results showing the situation as regards collection of the levy.

17 According to statements made by the Commission and not contested by the French Government, the Commission must obtain that information regarding collection of the levy in order to assess in good time whether and how the intended effects of the milk quota scheme on production have been achieved and to determine their impact on the budget for the current year and those to come following production trends. The revenue produced by the levy collected by each Member State is paid by the latter to the Community, more precisely to the European Agricultural Guidance and Guarantee Fund ('the EAGGF'), which uses it to finance expenditure on stabilizing and regulating the market in milk products, as provided for in Article 10 of Regulation No 3950/92.

18 The questionnaire can only be of assistance to the Commission in properly completing its tasks under the budgetary procedure if it accurately reflects the situation regarding collection of the levy. It can only do so if the information it contains is accurate and complete.

19 The Commission can only propose intervention measures if it has correct and comprehensive information. In view of the fact that sufficient and appropriate measures may need to be adopted to follow actual trends, the questionnaire must be reliable, that is to say, it must contain information which is accurate and complete.

20 Lastly, the Court has held, in Case C-342/89 *Germany* v *Commission* [1991] ECR I-5031, paragraph 16, and Case C-346/89 *Italy* v *Commission* [1991] ECR I-5057, paragraph 16, that the Commission has power to reduce payments of amounts due under monthly advances when it establishes that the national body has, contrary to Community law, failed to collect certain payments intended for the EAGGF.

21 The Commission cannot exercise the power thus conferred on it, independently of the power it enjoys under the fourth indent of Article 8 of Regulation No 536/93, unless the information in the questionnaire is accurate and complete and thus enables it to ascertain whether the national authorities have failed to collect levies payable by producers who have exceeded their quotas.

22 The French Government's plea that Article 8, fourth indent, of Regulation No 536/93 has been breached must accordingly be rejected.

Breach of Article 11 of Regulation No 3950/92

23 The French Government submits that Articles 2 and 3 of the contested decision could not be based on Article 11 of Regulation No 3950/92, either. That article authorizes the Commission to adopt detailed rules for the application of the additional levy scheme under what is known as the management committee procedure in accordance with Article 30 of Council Regulation (EEC) No 804/68 of 27 June 1968 (OJ, English Special Edition 1968 (I), p. 176). Even if the penalties provided for in Articles 2 and 3 of the contested decision could be regarded as 'detailed rules' within the meaning of Article 11 of Regulation No 3950/92 the management committee, whose participation in the procedure for adopting the measures in question is expressly required, was not consulted on the adoption of the contested decision.

24 The Court notes that the contested decision lays down the conditions for exercising the power to reduce advances which is conferred on the Commission by Article 8, fourth indent, of Regulation No 536/93, so that it cannot be regarded as a detailed rule for the application of the scheme falling under Article 11 of Regulation No 3950/92.

25 The contested decision lays down in terms which are general and applicable for all the Member States the different rates of reduction which are to be applied for the various kinds of defect which may occur in notification of the questionnaire and thus determines, in the interests of legal certainty, the manner in which the Commission will make reductions in advances in various circumstances.

26 For those reasons, the plea of breach of Article 11 of Regulation No 3950/92 is likewise unfounded.

Second plea: breach of Regulation No 729/70

27 In the absence of an express definition of the powers conferred on the Commission by the relevant Community rules, the French Government relies, in support of this plea, on the judgments in *Germany* v *Commission* and *Italy* v *Commission*, cited above.

28 It maintains that, unlike the reduction at issue in those two judgments, the financial penalties for Member States provided for in the contested decision are definitive. The penalties are therefore automatically applicable. The French Government also points out that, from the point of view of observance of the rights of the defence, neither the contested decision nor Regulation No 536/93 makes provision for the Member State concerned to express its views when a reduction is applied against it, in particular as regards explanation for the delay which is to be penalized.

29 That plea must be rejected. In the first place, as stated in paragraph 20 of this judgment, the Court recognized in *Germany* v *Commission* and *Italy* v *Commission*, cited above, that the Commission has power, while awaiting the final decision on the clearance of the annual accounts, to reduce the payment of amounts due under monthly advances where the national body has, contrary to Community law, failed to collect certain payments intended for the EAGGF.

30 In the second place, the Court also held, in paragraph 18 of those judgments, 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.

31 If such a decision to reduce the monthly advances in the event of failure, in breach of Community law, to collect certain revenue intended for the EAGGF is merely interim, provisional and subject to the procedure for clearance of the accounts, the same must be true of a decision to reduce the same monthly advances, under Article 8, fourth indent, of Regulation No 536/93, in the event of failure to duly communicate the information which must be supplied regarding such revenue; accordingly, such a decision cannot be definitive and does not prevent a check from being made in the context of the clearance of accounts.

32 Consequently, contrary to the claim made by the applicant, the fact that a reduction has been applied to advances under Article 8, fourth indent, of Regulation No 536/93 does not preclude verification of the justification for the reduction in the context of the clearance of accounts provided for by Regulation No 729/70. When that verification is made the French Government will be able to present its views on the lawfulness of the reduction of advances so that the rights of the defence will be guaranteed.

Third plea: breach of the principle of proportionality

33 The French Government prefaces its argument with the remark that the questionnaire is not the only source of information for the Commission in managing the milk market, and that there is no relationship between observance of the time-limit for communicating the questionnaire and the efficacy of the scheme.

34 It goes on to cite Case 122/78 *Buitoni* v *FORMA* [1979] ECR 677, Case 181/84 *Man (Sugar)* v *IBAP* [1985] ECR 2889 and Case 358/87 *Drewes* v *Bezirksregierung Lüneburg* [1989] ECR 891 in support of the argument that the duty to communicate the questionnaire before the time-limit is a secondary obligation, failure to observe which cannot attract the same penalty as, or a greater penalty than, that applicable for failure to fulfil a principal obligation, such as failure to collect the additional levy payable by producers who have exceeded their reference quantities.

35 The penalties introduced by the contested decision are disproportionate owing to the fact that they are automatic, uniform and excessive. Flat-rate penalties which are automatically applicable in the event of poor fulfilment of administrative duties are too severe, according to the judgment in *Buitoni*, cited above. The amount of the reduction bears no relation to the financial loss incurred by the EAGGF; in fact that loss, attributable to the delay in collection of the levy, is already compensated for by the interest for late payment payable by producers. Moreover, the penalties provided for in Articles 1 and 3 of the contested decision may be applied to a Member State even where there is no additional levy payable to the EAGGF.

36 There is no provision in Article 1 of the decision for the penalties to vary according to the length of the delay. As for Article 2, the French Government considers that it is difficult to see any reason for penalizing a Member State for fraud which it has itself brought to light as a result of its checks. Moreover, that article permits a penalty to be applied which is often equal to, or even greater than, the adjustment which would be made necessary, when clearing the accounts, by a difference of 10% between the sum actually due and that calculated on the basis of the information communicated on the questionnaire. Article 3 also fails to differentiate the penalties on the basis of the significance of the missing information.

37 The Commission contends that the case-law on primary and secondary obligations is not applicable because it was developed by the Court in the special context of lodging securities. Moreover, it was certainly not an impossible task to notify the information sought by the questionnaire before 1 September, since the Member States were in possession of that information before that date. The adverse financial consequences, in particular those referred to in Article 2 of the contested decision attributable to inaccuracy, apply to only a few of the details to be provided on the questionnaire. For instance, the 10% margin of error penalized under

Article 2 of the contested decision was exceeded by the French Republic only once, during the period 1987/1988, when there was a difference of 12.67%. The Commission concludes that the decision provides for financial consequences to be graded in accordance with the nature of the Member State's failure to fulfil its obligation to communicate the questionnaire before 1 September.

38 In order to determine whether a provision of Community law, in particular in the sphere of the common organizations of agricultural markets, is in conformity with the principle of proportionality, it is necessary to consider whether the measures introduced by that provision exceed the limit of what is appropriate and necessary in order to attain the objective pursued by the rules at issue. More particularly, it is necessary to ascertain whether the means which the provision applies in order to achieve its aim correspond to the importance of that aim and whether they are necessary in order to achieve it (see Case C-319/90 *Pressler* v *Germany* [1992] ECR I-203, paragraph 12).

39 The aim of the contested decision is to fix, in the interests of uniform application and legal certainty, the way in which the flat-rate reduction to advances is applied. To that end, it defines the various ways in which failure to fulfil the duty to communicate the questionnaire in due time may occur and lays down for each of them the corresponding rate of reduction.

40 The first point to note is that neither the existence of other sources of information nor the alleged lack of a relationship between observance of the time-limit for submitting the questionnaire and the efficacy of the scheme can cast doubt on the proportionality of the rules regarding reduction provided for in the contested decision.

41 Even if the Commission has other sources of information it has not been demonstrated that they provide the same information, available on the same date, as that required by the questionnaire.

42 As regards the alleged absence of a relationship between the efficacy of the scheme and the time-limit, it is sufficient to note that the French Republic itself has referred to the role and importance of the time-limit in the context of the budgetary procedure. The results obtained in the context of that procedure as a result of the information communicated by means of the questionnaire enable the Commission to exercise its management role, if only by suggesting to the competent institutions what corrective measures may be necessary.

43 Secondly, as regards the need to distinguish between a primary and a secondary obligation, the French Government's argument on this point must be rejected because a provisional monthly reduction to advances on the entry of agricultural expenditure in the accounts in the event of non-compliance with the time-limit for communicating the questionnaire cannot be compared to a definitive refusal to enter an amount owing to a Member State's unlawful failure to collect a levy.

44 Next, by laying down rates of reduction which vary according to the manner in which the obligation imposed by Article 8, fourth indent, of Regulation No 536/93 has not been fulfilled, the contested decision takes account of the significance of each type of failure for the Commission in carrying out its management role in the additional levy scheme.

45 It is true that despite the fact that the reduction varies depending on the nature of the failure, the reductions laid down in the contested decision are, as the French Government points out, in some respects uniform.

46 For instance, the varying degree of importance of the information in the questionnaire is not taken into consideration for the application of Articles 1 and 3 of the decision; Article 2 makes no link between the amount of the reduction and that of the correction made necessary by a difference of more than 10% between the sum of the levy actually due and that calculated on the basis of the questionnaire; the decision takes no account whatsoever of the financial loss to the EAGGF resulting from failure to observe the obligation imposed by Article 8, fourth indent, of Regulation No 536/93.

47 However, those characteristics attributable to the flat-rate element in the reductions are not sufficient to make the reduction disproportionate, having regard to its aim. The reductions (1% of the overall amount paid to the Member State concerned for the previous budget year, but applicable solely to advances in respect of the month of September, for late notification of the questionnaire, 0.5% of the same overall amount for calculation of the levy which is incorrect by more than 10% and 0.04% for each item of information missing) do not appear to be excessive in view of the importance of due notification for the management of the levy scheme. They are all the less so in so far as they do not apply definitively to the eligible expenditure but only, as indicated by the recitals in the preamble concerning breach of Regulation No 729/70, to monthly advances, so that they are merely provisional, being subject to verification of the justification for them on the occasion of the clearance of accounts.

48 Consequently, the last plea must also be held to be unfounded.

49 In view of all those considerations, the application must therefore be rejected in its entirety.

Costs

50 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the French Republic has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Dismisses the application;

2. Orders the French Republic to pay the costs.

Murray Kakouris Kapteyn

Hirsch Ragnemalm

Delivered in open court in Luxembourg on 29 May 1997.

R. Grass G. F. Mancini

Registrar President of the Sixth Chamber