JUDGMENT OF THE COURT
2 February 1988 *

In Joined Cases 305/85 and 142/86

United Kingdom of Great Britain and Northern Ireland, represented by its Agent, B. E. McHenry of the Treasury Solicitor's Department, Queen Anne's Chambers, London, and by G. Barling, Barrister, with an address for service in Luxembourg at the Embassy of the United Kingdom, 28 boulevard Royal, Luxembourg,

applicant,

v

Commission of the European Communities, represented by its Legal Adviser, D. G. Lawrence, 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 in Case 305/85 for a declaration that Commission Regulation (EEC) No 1989/85 of 18 July 1985 is void and in Case 142/86 for a declaration that Commission Regulation (EEC) No 728/86 of 11 March 1986 is void, in so far as those regulations concern the calculation of the amount of the annual premium payable per ewe for region 5 (Great Britain),

THE COURT,

composed of: G. Bosco, President of Chamber, acting as President, O. Due and G. C. Rodríguez Iglesias (Presidents of Chambers), T. Koopmans, K. Bahlmann, R. Joliet and F. Schockweiler, Judges,

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

* Language of the Case: English.

having regard to the Report for the Hearing and further to the hearing on 3 June 1987,

after hearing the Opinion of the Advocate General delivered at the sitting on 1 October 1987,

gives the following

Judgment

1 By applications lodged at the Court Registry on 11 October 1985 (Case 305/85) and on 6 June 1986 (Case 142/86), the United Kingdom of Great Britain and Northern Ireland brought two actions under the second paragraph of Article 173 of the EEC Treaty requesting the Court, in Case 305/85, to declare void Commission Regulation No 1989/85 of 18 July 1985 determining for the Member States the loss of income and the level of the premium payable per ewe for the 1984/85 marketing year (Official Journal 1985, L 186, p. 22) and, in Case 142/86, to declare void Commission Regulation (EEC) No 728/86 of 11 March 1986 determining for the Member States the loss of income and the level of the premium payable per ewe for the 1985 marketing year (Official Journal 1986, L 69, p. 6), in so far as those regulations concern the calculation of both the amount of the annual premium payable per ewe for region 5 (Great Britain) and the balance to be paid to producers located in that region who have received an advance on account of the premium.

2 By order of 28 January 1987 the Court joined the two cases for the purposes of the oral procedure and the judgment.

3 The basic regulation, which is Council Regulation (EEC) No 1837/80 of 27 June 1980 on the common organization of the market in sheepmeat and goatmeat (Official Journal 1980, L 183, p. 1), as amended in particular by Council Regulation (EEC) No 871/84 of 31 March 1984 (Official Journal 1984, L 90, p. 35), established a system of production premiums. That system comprises an annual premium payable per ewe, which is intended to compensate sheepmeat producers

in one or more regions for any loss of income during a marketing year and, for region 5 (Great Britain) only, a weekly variable slaughter premium.

4 As regards the annual premium payable per ewe, Article 5 of the basic regulation provides that loss of income represents per 100 kg of carcass weight any difference there may be between the basic price and the arithmetical mean of the market prices recorded for the region in question. The amount of the premium is subsequently obtained by multiplying that difference by a coefficient representing for each region the normal average annual production of lambmeat per ewe, also expressed per 100 kg of carcass weight.

5 As regards the weekly variable slaughter premium payable in region 5, Article 9 of the basic regulation provides that such a premium may be granted every week where the prices recorded in the representative markets of the region fall below a 'guide level' corresponding to 85% of the basic price. The amount of the premium is to be equal to the difference between the seasonally adjusted guide level and the market price. Where the premium is paid, an amount equivalent thereto must be charged when the products leave region 5 (the 'clawback').

6 For the period in question, the detailed arrangements for applying the variable slaughter premium were laid down by the Commission in Regulation (EEC) No 1633/84 of 8 June 1984 (Official Journal 1984, L 154, p. 27). That regulation provides that the premium may be granted either at the time of slaughter or when the animal is first placed on the market with a view to slaughter. In the latter case, however, the animals must either be slaughtered in region 5 or consigned to a location outside that region within 21 days of the date on which they were placed on the market. The regulation also lays down quality standards for animals which are eligible for the premium, but allows the United Kingdom to choose from among the animals which meet those standards those in respect of which the premium is to be paid.

7 The relevant legislation in the United Kingdom generally excludes payment of the premium in respect of ewes. For ewes which are intended to be exported live or as carcasses and in respect of which, upon exportation, the amount equivalent to the premium (the 'clawback') will be charged, the premium is nevertheless granted by offsetting the equivalent amount. Such ewes are subject to a supervisory system known as 'special export certification' (hereinafter referred to as 'SEC').

8 With regard to the relationship between annual premiums per ewe and variable slaughter premiums, the basic regulation provides in Article 5 (6) that, in the case of region 5, 'the weighted average of the variable premiums actually granted' is to be deducted from the loss of income which constitutes the basis for calculating the annual premium. That weighted average, also expressed per 100 kg of carcass weight, is to be obtained 'by dividing the total amount of the premiums actually granted by the production of the certified animals for which the variable premium may be paid when slaughter takes place or, as the case may be, when they are first put on the market'.

9 The contested regulations, namely Commission Regulations Nos 1989/85 and 728/86, determine for the Member States, for the 1984/85 and 1985 marketing years respectively, the loss of income, the amount of the annual premium and the balance which has to be paid to producers who have received an advance on account of the premium, calculated in each case in accordance with the rules laid down by Article 5 of the basic regulation. For region 5, therefore, those regulations were to constitute the application, for the two marketing years in question, of the formula set out in Article 5 (6) above. It is precisely the manner in which the Commission has applied that formula which constitutes the subject-matter of the proceedings in these cases.

10 Although the method of calculation used by the Commission in that regard is not expressly set out either in the provisions of, or in the preambles to, the two contested regulations, it is common ground between the parties that the dividend ('the total amount of the premiums actually granted') was calculated by including the premiums granted under the SEC arrangements and that the Commission excluded the production corresponding thereto when calculating the divisor ('the production of the certified animals for which the variable premium may be paid when slaughter takes place or, as the case may be, when they are first put on the market').

11 In support of their divergent interpretations of Article 5 (6) of the basic regulation, the parties rely on the wording and origins of that provision and on the aims of the system of premiums and the principle of equal treatment.

12 In the first place, the United Kingdom argues that, in order to calculate the average premium, the basic elements of the calculation must be consistent. The

dividend and the divisor should therefore relate to the same animals. In order to arrive at another method of calculation, very clear words would be required which are not to be found anywhere in the applicable provisions.

13 The Commission explains its method of calculation by the difference in the wording used by the Council to describe the dividend and the divisor. In its initial proposal the Commission defined the divisor as 'the production which gave rise to the payment of those premiums', which would have resulted in the interpretation advocated by the United Kingdom. If the Council amended that phrase, it must be taken to have intended to make a distinction between the elements of the divisor and those of the dividend. The Commission construes the amended phrase as excluding from the divisor cases in which payment of the premium is subject to conditions other than the animals being slaughtered or put on the market. Under the SEC arrangements, payment is subject to a further condition, namely exportation of the animals.

14 The United Kingdom replies that the phrase used to describe the divisor refers quite simply to the two cases in which the variable premium may be paid, namely when the animals are slaughtered and when they are first put on the market. Moreover, under the SEC arrangements, the animals are certified in the same manner as all other animals when they are first put on the market with a view to being slaughtered and the condition that they must be exported within a given period applies to all such animals. The grant of premium in respect of animals covered by the SEC arrangements is not subject to any further conditions. Furthermore, the phrase initially proposed by the Commission was amended so as not to exclude from the divisor production which had not given rise to payment of premium for the sole reason that during the week in question market prices had exceeded the 'guide level', a problem which had been raised by the United Kingdom delegation in negotiations that took place within the Council.

15 In that regard, the Commission maintains that the French delegation had raised another point, by asking for ewes covered by the SEC arrangements to be excluded from the calculation. In its proposal for an amendment, which was finally adopted, the Commission sought to resolve both problems. For its part, the United Kingdom acknowledges that the French delegation had criticized the payment of premiums in respect of ewes covered by the SEC arrangements, but it maintains that such criticism was directed at the legality of that payment in general and not at the mechanism in question, consisting of a dividend and a divisor.

16 Secondly, the United Kingdom argues that the system of premiums established by the basic regulation is intended to compensate sheep producers by ensuring that their income corresponds at least to the basic price. The Commission's method of calculation leads to a lower income level for producers in region 5 alone, which is contrary to the aims of the common agricultural policy, as set out in the Treaty, the objectives of the basic regulation and the principle of equal treatment.

17 In that regard, the Commission replies that the amendments made to the method of calculation in Regulation No 1837/80 by Regulation No 871/84 were, on the whole, favourable to producers in region 5. Account should also be taken of the fact that those producers receive weekly premiums unlike other Community producers who must await the end of the marketing year. If the Commission had not excluded animals covered by the SEC arrangements from the divisor in the fraction in question, the overall result would have discriminated against producers in other regions. As a result of the exclusion of such animals, the rules have, according to the Commission, placed all Community producers in more or less the same position.

18 Reference is made to the Report for the Hearing for a more detailed exposition of the arguments of the parties.

19 In the light of those arguments, it is appropriate in the first place to point out that the formula at issue employed in the second subparagraph of Article 5 (6) of the basic regulation seeks to define the method of calculation to be used in order to arrive at 'the weighted average of the variable premiums actually granted', a term which appears in the first subparagraph of Article 5 (6).

20 In order to arrive at an average, it is necessary, as a general rule, for the calculation to be based on commensurate orders of magnitude. That is not the case where, as in this instance, the dividend in the fraction includes quantities which are excluded from the divisor.

21 It is true that the addition of the word 'weighted' may indicate a derogation from that principle. Even so, the intention to introduce such a derogation and the meaning thereof must be clearly apparent from the evidence available. It is therefore necessary to consider whether such evidence may be elicited from the arguments of the parties.

22 In that regard it must be stated that the wording of the formula in question does not support the Commission's argument. As the United Kingdom has pointed out, that wording refers to the two cases in which payment of the premium may be made in accordance with Regulation No 1633/84 and it ensures the inclusion in the divisor of the quantities of meat in respect of which no premium has been paid, where market prices exceed, during the week in question, the 'guide level'. It is true that the latter objective could have been achieved by a simpler form of wording, but the wording adopted does not provide any clear indication that animals covered by the SEC arrangements must be excluded from the divisor.

23 Nor can any such indication be derived from the origins of the contested formula, since there is a difference of opinion between the parties regarding the course and the significance of the negotiations which took place within the Council.

24 Similarly, the dispute cannot be decided on the basis of the aims of the basic regulation and the general principles governing the common agricultural policy. The calculation in question forms part of a mechanism for granting premiums, which is complicated by the distinction made between region 5 and the other regions of the Community, by the 'clawback' system which is designed to avoid disturbances which might be caused by that distinction and by the possibility of paying an advance on account of the annual premium per ewe to producers located in all regions. The parties are not in agreement as regards the economic effects of those different components of the system and the effects of the amendments to the method of calculation, other than the amendment at issue, which are provided for by Regulation No 871/84. Finally, no specific economic argument for excluding animals covered by the SEC arrangements from the divisor in the contested fraction has emerged from the explanations provided by the Commission.

25 In those circumstances, it must be held that the examination of the arguments advanced by the parties has not brought to light any sufficiently clear evidence to justify a departure from the principle that an average must be calculated on the basis of commensurate orders of magnitude.

26 It follows that Article 5 (6) of the basic regulation cannot constitute the necessary legal basis for the method of calculation which the Commission used in the two contested regulations and according to which the Commission included the premiums paid in respect of animals covered by the SEC arrangements but excluded production corresponding thereto.

27 Accordingly, those two regulations must be declared void in so far as they relate to the calculation of the amount of the annual premium payable per ewe for region 5 (Great Britain). It follows that the calculation of the balance to be paid to producers located in that region, who have received an advance on account of the premium, must also be declared void.

Costs

28 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. As the defendant has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

(1) Declares that Commission Regulation (EEC) No 1989/85 of 18 July 1985 determining for the Member States the loss of income and the level of the premium payable per ewe for the 1984/85 marketing year and Commission Regulation (EEC) No 728/86 of 11 March 1986 determining for the Member States the loss of income and the level of the premium payable per ewe for the

1985 marketing year are void, in so far as those regulations concern the calculation of both the amount of the annual premium payable per ewe for region 5 (Great Britain) and the balance which must be paid to producers located in that region who have received an advance on account of the premium;

(2) Orders the Commission to pay the costs.

Bosco Due Rodríguez Iglesias

Koopmans Bahlmann Joliet Schockweiler

Delivered in open court in Luxembourg on 2 February 1988.

P. Heim
Registrar

A. J. Mackenzie Stuart
President