JUDGMENT OF THE COURT (Fifth Chamber)

9 January 2003 *

In Case C-177/00,

Italian Republic, represented by U. Leanza, acting as Agent, assisted by D. Del Gaizo, avvocato dello Stato, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by E. de March and L. Visaggio, acting as Agents, assisted by A. Dal Ferro, avvocato, with an address for service in Luxembourg,

defendant,

* Language of the case: Italian.

APPLICATION for partial annulment of Commission Decision 2000/216/EC of 1 March 2000 excluding from Community financing certain expenditure incurred by the Member States under the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) (OJ 2000 L 67, p. 37), in so far as it imposes financial adjustments in respect of expenditure declared by the applicant Member State,

THE COURT (Fifth Chamber),

composed of: M. Wathelet, President of the Chamber, D.A.O. Edward, A. La Pergola, P. Jann (Rapporteur) and S. von Bahr, Judges,

Advocate General: P. Léger,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 26 September 2002,

gives the following

Judgment

1 By application lodged at the Court Registry on 11 May 2000, the Italian Republic brought an action, pursuant to the first paragraph of Article 230 EC, for partial annulment of Commission Decision 2000/216/EC of 1 March 2000 excluding from Community financing certain expenditure incurred by the Member States under the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) (OJ 2000 L 67, p. 37, 'the contested decision'), in so far as it imposed three financial adjustments in respect of expenditure declared by the applicant Member State.

2 The application for partial annulment concerns the following adjustments, the description of which and reasons for which are given in the Commission's summary report of 27 October 1999 on the results of the inspections in the clearance of the accounts of the Guarantee Section of the EAGGF as regards export refunds, fruit and vegetables, animal premiums, agri-environmental measures, financial audit, arable crops, flax and hemp (Document VI/10529/99) ('the summary report'):

— a negative adjustment of ITL 61 665 065 968 applied to expenditure declared in respect of export refunds (paragraph 2.8.1 of the summary report);

— a negative adjustment of ITL 2 957 721 060 applied to expenditure declared in respect of export refunds for olive oil (paragraph 2.8.2 of the summary report);

— a negative adjustment of ITL 7 760 156 831 corresponding to the amount of a security which should have been forfeited in connection with the sale of alcohol from intervention stocks (paragraph 7.2 of the summary report).

The negative adjustment of ITL 61 665 065 968 in respect of export refunds

3 By its action, the Italian Republic challenges first of all a negative adjustment of ITL 61 665 065 968 which the Commission applied to export refunds on the ground that inadequate physical checks had been carried out by the national authorities.

General legal background

4 Articles 2 and 3 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) provide that the European Community will finance from the Guarantee Section of the Fund refunds on exports to third countries and intervention

intended to stabilise the agricultural markets, granted in accordance with the Community rules within the framework of the common organisation of agricultural markets.

5 Article 8(1) of the same regulation provides that Member States are to take the measures necessary to satisfy themselves that transactions financed by the Fund are actually carried out and are executed correctly, to prevent and deal with irregularities, and to recover sums lost as a result of irregularities or negligence.

6 Article 8(2) of that regulation provides that in the absence of total recovery, the financial consequences of irregularities or negligence are to be borne by the Community, with the exception of the consequences of irregularities or negligence attributable to administrative authorities or other bodies of the Member States.

7 Article 9(1) of Regulation No 729/70 provides that Member States are to make available to the Commission all information required for the proper working of the Fund and take all suitable measures to facilitate the supervision which the Commission may consider it necessary to undertake within the framework of the management of Community financing, including inspections on the spot.

8 Article 9(2) of that regulation provides that officials appointed by the Commission to carry out inspections on the spot are to have access to the books and all other documents relating to expenditure financed by the Fund. At the request of the Commission and with the agreement of the Member State, inspections or

inquiries concerning the transactions referred to in Regulation No 729/70 are to be carried out by the competent authorities of that Member State. Officials of the Commission may also participate.

9 Article 1(1) of Council Regulation (EEC) No 4045/89 of 21 December 1989 on scrutiny by Member States of transactions forming part of the system of financing by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund, and repealing Directive 77/435/EEC (OJ 1989 L 388, p. 18) concerns scrutiny of the commercial documents of recipient undertakings in order to ascertain whether transactions forming part of the system of financing by the Guarantee Section of the EAGGF have actually been carried out and have been executed correctly. Article 2(1) of that regulation provides that Member States are to carry out systematic scrutiny of the commercial documents of recipients, taking account of the nature of the transactions to be scrutinised. The detailed procedure for such scrutiny is laid down in Article 2(2) et seq.

10 As regards the financial consequences in the event of the absence of scrutiny by the Member States, criteria were adopted by the Commission in Document No VI/216/93 of 3 June 1993, known as 'the Belle Report'. Those criteria provide for three categories of flat-rate adjustment:

— 2% of expenditure where the absence is limited to certain aspects of the system of scrutiny of minor importance or the performance of checks which are not essential in order to ensure that expenditure has been incurred lawfully, so that it may reasonably be concluded that the risk of loss for the Fund was minor.

— 5% of expenditure where the absence concerns significant aspects of the system of scrutiny or the performance of checks which play a major role in

determining whether expenditure was lawful, so that it may reasonably be concluded that the risk of loss for the Fund was significant.

— 10% of expenditure where the absence concerns all or fundamental aspects of the system of scrutiny or the performance of essential checks which are designed to ensure that expenditure was lawful, so that it may reasonably be concluded that there was a high risk of comprehensive loss for the Fund.

11 As regards the final decisions adopted by the Commission, Article 8 of Commission Regulation (EC) No 1663/95 of 7 July 1995 laying down detailed rules for the application of Regulation No 729/70 regarding the procedure for the clearance of the accounts of the EAGGF Guarantee Section (OJ 1995 L 158, p. 6) provides:

'1. When, as a result of any enquiry, the Commission considers that expenditure was not effected according to Community rules, it shall communicate to the Member State concerned its findings, the corrective measures to be taken to ensure future compliance, and an evaluation of any expenditure which it may propose to exclude pursuant to Article 5(2)(c) of Regulation (EEC) No 729/70. The communication shall make reference to this regulation. The Member State shall reply within two months, and the Commission may modify its position in consequence. In justified cases the Commission may agree to extend this period for reply.

After expiry of the period allowed for reply, the Commission shall initiate a bilateral discussion, and both parties shall endeavour to come to an agreement as to the measures to be taken. The Commission shall then formally communicate its conclusions to the Member State...

2. The decisions referred to in Article 5(2)(c) of Regulation (EEC) No 729/70 shall be taken after an examination of any report drawn up by the Conciliation Body...'.

Legal framework with regard to the contested adjustment

12 Council Regulation (EEC) No 386/90 of 12 February 1990 on the monitoring carried out at the time of export of agricultural products receiving refunds or other amounts (OJ 1990 L 42, p. 6) introduced a system of Community monitoring of agricultural products in respect of which refunds or other amounts are granted on export. Article 3(1) of that regulation provides:

'1. Without prejudice to any specific provisions which require more extensive checks, the physical checks referred to in Article 2(a) must:

(a) take the form of spot checks conducted frequently and without prior warning;

(b) in any event, relate to not less than 5% of the export declarations in respect of which applications are submitted for the amounts specified in Article 1(1).'

13 The provisions for applying Regulation No 386/90 were adopted in Commission Regulation (EC) No 2030/90 of 17 July 1990 laying down detailed rules for the application of Council Regulation (EEC) No 386/90 as regards physical checks carried out at the time of export of agricultural products attracting refunds or other amounts (OJ 1990 L 186, p. 6), which was replaced from 1 January 1996 by Commission Regulation (EC) No 2221/95 of 20 September 1995 laying down detailed rules for the application of Council Regulation (EEC) No 386/90 as regards physical checks carried out at the time of export of agricultural products qualifying for refunds (OJ 1995 L 224, p. 13). The annex to that regulation describes the specific methods and practical details of how those checks are to be conducted.

The contested adjustment

14 It may be seen from the documents before the Court that in order to counter the growing risk of fraud and irregularities in the area of export refunds, which are adversely affecting the EAGGF budget, the Commission has since 1996 stepped up its inspections in the Member States as regards the checks made by customs authorities. According to the Commission, the inspections conducted in Italy have uncovered the existence of systematic errors in the procedures followed by the Italian customs authorities.

15 On the basis of the results of documentary checks carried out between 1996 and 1998 and of the results of on-the-spot checks, in particular those made during two inspections, one conducted between 15 and 19 April 1996 at the customs posts at Treviso, Trieste, Fernetti and Como, the other conducted between 2 and 6 December 1996 at the customs posts at Terni, Pisa, Livorno and Viareggio, the Commission considered that the Italian authorities were failing to comply adequately with the provisions of Regulations Nos 386/90 and 2221/95 relating to physical checks on the occasion of exportation of agricultural products. The details of the results of those checks are given in paragraph 2.8.1 of the summary report.

16 First, the Commission criticised the partial nature of the physical checks during the direct export procedures, that is to say, procedures whereby the products are directly checked on the vehicles at the customs posts. The physical checks were inadequate since they were not made until the goods were loaded on to the trucks. In two cases observed on the spot at Treviso and Pisa Commission inspectors recorded that the checks were conducted without any serious attempt being made to check the full load, either by unloading the goods or by creating a passage inside the containers being examined. In addition, the representative sample of 5% of export declarations required under Article 3(1)(b) of Regulation No 386/90 was not achieved at several customs offices. Lastly, the reports on the physical checks were general and imprecise.

17 Second, Commission staff found that no checks were being carried without prior warning during the so-called 'off-site' procedures, that is to say, those whereby the operator brings the export declaration to the customs office whilst the goods remain on the undertaking's premises. In such cases the Commission found that the procedures for the physical checks did not allow for the surprise effect. In some cases even, where the customs service did not have a vehicle available, operators were requested to provide transport themselves in order to take customs officers to the place where the check was to be carried out. The obvious risk of cheating and substitution resulting from this was aggravated by the fact that once the export declarations had been approved the operators themselves were required to send them to the paying body.

18 The Commission informed the Italian authorities of its findings by letters of 23 January and 18 September 1997, to which the authorities replied by letters of 13 March and 10 November 1997. By letter of 23 November 1998 the Commission invited the Italian authorities to a bilateral meeting. Since that meeting was inconclusive the Commission formally notified the Italian authorities of its conclusions by letter of 9 July 1999. In them it proposed an adjustment of 5% of the expenditure incurred for all the products in respect of which export refunds had been granted between 1 October 1995 and

31 December 1998, thus applying the Belle Report, which provides for a flat-rate adjustment of 5% where the failings concern significant aspects of the system of scrutiny or the performance of checks which play a major role in determining whether the expenditure was lawful, so that it may reasonably be concluded that the risk of loss for the EAGGF is significant.

19 In its final report of 11 January 2000, the EAGGF Conciliation Body, to which the Italian authorities had referred the matter on 6 August 1999, considered that, despite some uncertainties, the Commission's arguments appeared to be justified.

20 The Commission therefore imposed in the contested decision the proposed adjustment, amounting to ITL 61 665 065 968.

The first plea: infringement of the audi alteram partem *rule and the rights of defence*

Arguments of the parties

21 Under its first plea the Italian Republic contends that the contested adjustment is unlawful on the grounds that the inspections carried out by the Commission officials were in breach of the *audi alteram partem* rule and the rights of defence. The Commission did not inform the Italian Government of the results of the inspections until a very long time after they took place, the criticisms made of the Italian customs officers were not specific and the officers concerned were not given the opportunity to put their points of view. No report was drawn up in conjunction with the customs officers.

22 The Commission rejects those criticisms. It observes that the inspections in question were all conducted in the presence of Italian officials and its own officials, and that the Italian administration was always informed in advance and in detail of the inspections. Moreover, it is common practice for Community officials to arrange a final meeting with national officers in order to discuss criticisms, and such meetings also took place at the time of the inspections in question, as is established by a report by the Italian Ministry of Finance, which the Commission submits to the Court. In the Commission's view discussions always take place in such cases and national officials may put forward their opinions. Furthermore, minutes are taken on every occasion in such cases by at least two officials from the competent Commission services, which then constitute the basis for letters of observations sent to the national authorities. All these stages were gone through in this case.

Findings of the Court

23 It is appropriate to refer to Article 8 of Regulation No 1663/95, which sets out the various stages which must be gone through during the procedure for the clearance of EAGGF accounts. It is clear from the case-law of the Court of Justice (see in particular Case C-61/95 *Greece* v *Commission* [1998] ECR I-207, paragraph 39) that the procedure introduced by that regulation constitutes a 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.

24 In the present case, it is clear from the history of the correspondence exchanged (see paragraphs 15 to 19 of this judgment) that the Commission meticulously followed the various stages of the procedure laid down in Regulation No 1663/95 and that at each of those stages the Italian authorities had the opportunity to put their point of view. As the Advocate General stated in points 44 to 49 of his Opinion, on the one hand, the time which elapsed between the inspections and communication of the results to the Italian authorities, seven months, cannot be regarded as excessive and, on the other hand, the Commission's accusations were specific. As regards the drafting of a report in conjunction with the customs officers, there is no provision to that effect in the legislation in question.

25 The complaint alleging infringement of the *audi alteram partem* rule and the principle of observance of the rights of defence cannot be upheld and the first plea relied on by the Italian Government must therefore be rejected.

The second plea: the unrepresentative nature of the customs offices inspected

Arguments of the parties

26 Under its second plea the Italian Government claims, although it does not set out its complaint in detail, that the customs posts and operators inspected by the Commission in 1996 were not sufficiently representative as regards either quantity or quality. In its submission, it cannot be inferred from findings made at certain customs posts that the same monitoring procedures as those highlighted by the Commission were generally followed during the 80 000 or so export operations conducted each year in Italy in respect of which a refund application is made.

27 The Commission contests those assertions. It maintains, and is not contradicted on that point by the Italian Government, that the customs offices selected for the on-the-spot inspections, Terni, Pisa, Livorno, Viareggio, Treviso, Trieste, Fernetti and Como, are the main customs offices as regards payment of export refunds and accounted for 27% of the total number of export declarations recorded in Italy in 1995. They are therefore totally representative. The Commission inspectors took care in particular to divide their inspections between the various customs clearance procedures carried out by Italian customs officers. Inspections were also carried out on the premises of undertakings involved in simplified customs clearance procedures and failings were discovered during those inspections too.

Findings of the Court

28 The Commission's statements shows that the customs offices selected by its inspectors for their inspections were indeed representative of the overall situation. Since the Italian Government has put forward no concrete evidence to dispute those statements, the plea alleging that the customs posts inspected were not representative must be rejected.

Third plea: the equivocal nature of the results of some inspections

Arguments of the parties

29 In its third plea the Italian Government disputes the Commission's findings that the checks carried out by the customs posts at Terni, Pisa, Viareggio and Livorno were neither 'complete' nor 'made without warning'.

30 As regards the Commission's complaint against the Italian authorities that the checks were only partial, the Italian Government states that following the Commission's inspections its own staff were asked to look into the facts at issue. At a meeting with the customs officers concerned in March 1999 the officers denied that the checks in question took place in the manner which the Commission staff stated. Since there is no record of the meeting the statements of the Commission staff can only be regarded as inaccurate, or at least unreliable.

31 As regards whether the checks were made without prior notice, the Commission has provided an incorrect interpretation of that concept. Although the checks involved the exporter going to the customs offices, this does not mean that prior warning was given of the checks. In reality, the way the checks were carried out and the various methods used by the Italian authorities were irreproachable.

32 Furthermore, the failings found by the Commission ended following a letter from the Italian Ministry of Finance of 13 March 1997 in which Italian customs offices received appropriate instructions designed to avoid a repeat of such failings.

33 The Commission disputes those claims. It contends that the version of the facts given by the Italian customs officers concerned in the present case as regards whether the checks were carried out in full is wrong. The meetings which the Italian Government states it had with those officers apparently did not take place until 1999, which was three years after the inspections carried out in 1996. Furthermore, the fact that those customs officers were aware of the purpose of the talks, namely to investigate the claim that the checks they had made were of a very poor quality, should be taken into account. Their evidence is therefore highly questionable.

34 As for whether the checks were made without prior notice, the Commission points out that the Italian Government did not dispute the complaint made against the Italian customs officers that they always asked the operators concerned to come to the customs offices in their own vehicles in order to collect the customs officials who were to carry out the physical checks. Under that procedure operators were clearly warned in advance that they would be subjected to checks so that there could be no question of the checks being made without prior warning. The Court has already held in Case C-242/97 *Belgium* v *Commission* [2000] ECR I-3421, paragraph 41, that if there is no official car it is very difficult to show that the physical checks were made without prior notice as required by Article 3 of Regulation No 386/90.

35 Moreover, as it is stated in detail in paragraph 2.8.1 of the summary report, consideration of the inspection reports submitted by the Italian Republic for 1997 and 1998 show the same irregularities and negligence as those found in 1996.

Findings of the Court

36 It is clear from the case-law of the Court, in particular from *Belgium* v *Commission*, cited above (paragraphs 33 and 34) and from Case C-243/97 *Greece* v *Commission* [2000] ECR I-5813 (paragraph 53), that as regards the inspections carried out by Commission staff in connection with the clearance of EAGGF accounts, the Member State concerned cannot disprove the Commission's findings without substantiating its own claims by providing evidence of a reliable and operational supervisory system. If it is not able to show that they are inaccurate, the Commission's findings are likely to raise serious doubts as to the existence of an appropriate and effective body of supervisory measures and inspection procedures.

37 In the present case the Italian Government has not succeeded in casting doubt on the Commission's findings concerning the inadequacy of the checks, which are set out in detail at point 66 of the Advocate General's Opinion, by adducing evidence establishing the existence of reliable and effective monitoring from which it may be concluded that the irregularities complained of did not occur. The Italian Government has not, moreover, challenged in any detail the Commission's findings as contained in the summary report, but has merely stated that it was clear from the evidence given by the Italian customs officers concerned that the conduct of their checks was generally irreproachable.

38 That evidence given by the Italian customs officers concerned, which moreover was not taken until three years after the inspections were carried out by the

Commission staff, cannot affect the veracity of the findings made on the spot by the Commission officials, which were subsequently set out in the summary report.

39 As regards the irregularities found during consideration of the inspection reports submitted by the Italian Republic for 1997 and 1998, the Italian Government has not provided any specific argument establishing the existence of a reliable and operational system of checks, thus casting doubt on the Commission's findings.

40 The third plea relied on by the Italian Government must therefore be rejected in its entirety.

The fourth plea: the excessive amount of the adjustment

Arguments of the parties

41 Under its last plea, put forward in the alternative, the Italian Government contends that the amount of the adjustment imposed by the Commission is excessive.

42 First, the checks carried out at the customs posts related to conduct which only lasted for a year at most, whilst the adjustment covered four consecutive years, namely 1995 to 1998.

43 Second, the Commission imposed the adjustment on all the export refunds granted during those four financial years, although the physical checks related to only a 5% sample of the transactions. In the submission of the Italian Government the adjustment should have applied only to a maximum of 5% of the refunds granted during those years.

44 The Commission maintains that the adjustment concerned was adopted in strict accordance with the Belle Report. As regards the years in respect of which it applies, it is clear from the documents before the Court, as the Commission explained in connection with the third plea, that the irregularities regarding the checks persisted into 1997 and 1998.

Findings of the Court

45 As regards the first part of the fourth plea, it is common ground that the failings complained of by the Commission were established, as regards 1995 and 1996, by the on-the-spot checks referred to in paragraph 15 above. As regards 1997 and 1998, the Commission arrived at the same result after considering the inspection reports submitted by the Italian Republic for 1997 and 1998. As the Italian Government had not put forward any arguments capable of casting doubt on those findings, as was pointed out in paragraph 39 above, it follows that the Commission did not commit any error of law by extending the adjustment to cover four consecutive years.

46 As regards the second part of the fourth plea, although Member States are required by Article 3(1)(b) of Regulation No 386/90 to carry out checks on a representative sample of not less than 5% of export declarations, that does not mean that only the 5% of declarations that are checked must comply with the

requirements laid down. It is inherent in the concept of checks by sampling that such checks are designed to ensure that all the declarations are made correctly, and not only those declarations that have actually been checked.

47 It follows that the Commission, having found failings in the checks made by the Italian authorities, did not commit any error of law in imposing the adjustment in question, in accordance with the Belle Report, on all the export refunds on the agricultural products to which the export declarations related and not only on those corresponding to the products to which the 5% of declarations which were actually checked by those authorities related.

48 Since all the pleas relied upon by the Italian Government with a view to contesting the adjustment of ITL 61 665 065 968 are therefore unfounded the Italian Republic's application must be dismissed in so far as that adjustment is concerned.

The negative adjustment of ITL 2 957 721 060 relating to export refunds for olive oil

49 Secondly, the Italian Republic challenges an adjustment of ITL 2 957 721 060 concerning export refunds for olive oil paid by the Italian authorities in 1995. According to the Commission, the goods in question, namely olive oil of Community origin blended with olive oil coming from third countries, in particular Tunisia, and covered by inward processing arrangements, were not eligible for export refunds, so the payments made by the Italian authorities had no legal basis (paragraph 2.8.2 of the summary report).

Legal framework

50 Export refunds on Community-produced olive oil are provided for in Regulation No 136/66/EEC of the Council of 22 September 1966 on the establishment of a common organisation of the market in oils and fats (OJ, English Special Edition 1965-1966, p. 221). The rules for implementing that regulation are laid down in Commission Regulation (EEC) No 3665/87 of 27 November 1987 laying down common detailed rules for the application of the system of export refunds on agricultural products (OJ 1987 L 351, p. 1).

51 Article 8 of Regulation No 3665/87 provides:

'1. A refund shall be granted only in respect of products which come within the terms of Article 9(2) of the Treaty, even if the packaging does not come within those terms.

...

2. When compound products qualifying for a refund fixed on the basis of one or more of their ingredients are exported, that refund shall be paid in so far as the ingredient or ingredients in respect of which the refund is claimed come within the terms of Article 9(2) of the Treaty.

The refund shall also be paid where the ingredient or ingredients in respect of which the refund is claimed came originally within the terms of the said Article 9(2) and no longer do so by reason solely of their incorporation in other products.

3. For the purposes of paragraph 2, the following refunds are considered as refunds fixed on the basis of an ingredient:

— refunds applicable to products of the cereals, eggs, rice, sugar,... and milk and milk products sectors,

...'

52 Article 9(2) of the EC Treaty (now, after amendment, Article 23(2) EC), to which Article 8 of Regulation No 3665/87 refers, provides:

'The provisions of Chapter 1, Section 1, and of Chapter 2 of this Title [on the free movement of goods] shall apply to products originating in Member States and to products coming from third countries which are in free circulation in Member States'.

Arguments of the parties

53 The Italian Government argues, although it does not dispute the amount of the adjustment, that the Commission was wrong to refuse the financing of export refunds for volumes of olive oil of Community origin blended with olive oil coming from third countries, in particular Tunisia, which was covered by inward processing arrangements within the Community.

54 The Italian Government contends that Article 8(1) of Regulation No 3665/87 applies to such volumes of olive oil of Community origin. The fact of having been blended with other oils is irrelevant. In particular, Article 8(2) and (3) of Regulation No 3665/87, relating to certain cases of compound products, does not apply because the product in question is not a compound but rather a finished product. Olive oil is a basic product which can take the form of either a finished product or an ingredient and blending does not alter either the chemical composition or the nutritional characteristics of the product. In this case the volumes of olive oil of Community origin in question should have qualified for export refunds since they are finished products, despite the fact that they had been blended with oils from third countries.

55 The Commission argues that Article 8(1) of Regulation No 3665/87, in conjunction with Article 9(2) of the Treaty, excludes any export refund on products coming from third countries which are not in free circulation within the Community but are subject to other arrangements such as, in this case, inward processing arrangements. The product in question in this case is a compound product which is not eligible for refunds unless the conditions laid down in Article 8(2) and (3) of Regulation No 3665/87 are met. Article 8(3) contains an exhaustive list of compound products which qualify for export refunds, a list which does not include olive oil.

Findings of the Court

56 Article 8 of Regulation No 3665/87 provides for the granting of export refunds either, under paragraph 1, for finished products or, under paragraphs 2 and 3, by way of exception, for certain compound products. It is common ground that olive oil does not appear on the list of products qualifying for the exceptions provided for in Article 8(2) and (3). Moreover, the Italian Republic does not rely on those provisions but rather on Article 8(1), arguing that the product in question is a finished product which was exported as such.

57 It is clear from the wording of Article 8(1) of Regulation No 3665/87 and from that of Article 9(2) of the Treaty, to which Article 8 of the regulation refers, that in order to qualify for export refunds products must either originate in the Member States or, where they come from third countries, they must be in free circulation within the Member States.

58 It is common ground that oils coming from third countries, with which the volumes of olive oil of Community origin in question had been blended, were covered by inward processing arrangements, as provided in Article 114 et seq. of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1). It is clear from Article 4(16) of that regulation that inward processing is a different procedure from release for free circulation. The oils coming from third countries which made up part of the product in question did not therefore meet the requirements of Article 8(1) of Regulation No 3665/87.

59 In order for Article 8(1) of Regulation No 3665/87 to justify the payment of export refunds by the Italian authorities it would therefore have been necessary either for the olive oil of Community origin to have been exported as a separate product before being blended with oils coming from third countries, which was clearly not so in the present case, or for the product resulting from the blending itself to be regarded as a product originating in the Community, although some of the oils comprising it would not meet that condition.

60 To interpret Article 8(1) of Regulation No 3665/87 as meaning that it also authorises export refunds for compound products, only some ingredients of which meet the requirements it specifies, must be excluded by reason of the mere fact that Article 8(2) and (3) provides, by way of exception, for export refunds to be granted for compound products and that those products do not, as a result, fall within the scope of Article 8(1).

61 It follows that the olive oil in question was not eligible for export refunds under Article 8(1) of Regulation No 3665/87 or under Article 8(2) and (3) of that regulation. The Commission was therefore right to make the contested adjustment, with the result that the Italian Republic's application must be dismissed as unfounded in so far as that adjustment is concerned.

The negative adjustment of ITL 7 760 156 831 corresponding to the amount of a security which should have been forfeited in connection with the sale of alcohol from intervention stocks

62 Thirdly, the Italian Republic challenges an adjustment of ITL 7 760 156 831 imposed by the Commission in order to penalise the failure on the part of the competent Italian authorities to recover a security lodged in connection with the sale of alcohol from intervention stocks (paragraph 7.2 of the summary report).

General legal framework

63 Article 37(1) of Council Regulation (EEC) No 822/87 of 16 March 1987 on the common organisation of the market in wine (OJ 1987 L 84, p. 1) provides:

'Disposal of the products of distillation held by intervention agencies must not cause any disturbance of the market in alcohol and spirituous beverages produced in the Community.

To this end, they shall be disposed of in other sectors, and in particular in the fuel sector, each time disposal is likely to bring about such disturbance.'

64 The disposal of alcohol in sectors other than the alcohol and spirituous beverages sector must, under Commission Regulation (EEC) No 1780/89 of 21 June 1989 laying down detailed rules for the disposal of alcohol obtained from the distillation operations referred to in Articles 35, 36 and 39 of Regulation No 822/87 and held by intervention agencies (OJ 1989 L 178, p. 1), take place by tender. Article 24(2) of that regulation provides that successful tenderers must, within a certain period, provide proof that a performance guarantee has been lodged to ensure that the alcohol is used for the purposes specified in the notice of invitation to tender.

65 Article 33(2) of Regulation No 1780/89 provides that 'in the case of the performance guarantee, the primary requirement within the meaning of Article 20 of Regulation (EEC) No 2220/85 shall be that the alcohol must in fact be used for the purposes specified in the relevant invitation to tender'.

66 As regards the way in which such security is given, Commission Regulation (EEC) No 2220/85 of 22 July 1985 laying down common detailed rules for the application of the system of securities for agricultural products (OJ 1985 L 205, p. 5) provides that a security may be given either by making a cash deposit [Article 8(1)(a)] or by providing a guarantor as defined in Article 16(1) of that regulation [Article 8(1)(b)].

67 Article 16(2)(c) of Regulation No 2220/85 reads:

'The written guarantee shall state at least:

...

(c) that the guarantor undertakes jointly and severally with the party responsible for meeting the obligation to pay, within 30 days of demand by the competent authority, any sum, within the limit of the guarantee, due once a security is declared forfeit.'

68 Lastly, Article 29 of Regulation No 2220/85 provides:

'Once the competent authority is aware of circumstances giving rise to forfeiture of the security, in whole or in part, it shall without delay demand that the party required to meet the obligation to pay the sum forfeited, allowing up to 30 days from the day of issue of demand for payment.

Where payment has not been made at the end of this period, the competent authority shall:

...

(b) without delay require the guarantor described in Article 8(1)(b) to pay, allowing up to 30 days from the day of issue of demand for payment,

...'

The contested tendering procedure

69 By Regulation (EEC) No 3390/90 of 26 November 1990 opening a special sale by tender of vinous alcohol held by intervention agencies, for use as motor fuel within the Community (OJ 1990 L 327, p. 21), the Commission opened tendering procedure No 8/90 EC for the sale of 1 600 000 hectolitres of alcohol obtained from the distillation operations referred to in Articles 35, 36 and 39 of Regulation No 822/87. The total quantity was made up of five lots of 320 000 hectolitres each.

70 The tender was awarded to Palma SpA, established in Naples ('Palma'). The terms of the award provided *inter alia* that a performance guarantee was to be lodged, due on demand, even if the successful tenderer objected, and was releasable upon receipt of a written declaration by the intervention agency. The guarantee would be released when the successful tenderer had provided evidence that the alcohol had actually been used for the purposes specified within a period of one year from the removal of each lot from storage. The guarantee was lodged by Palma in accordance with those requirements with an Italian bank acting as guarantor.

71 Subsequently, after serious difficulties had arisen with regard to disposing of a large volume of alcohol on the motor fuel market, the Commission, by Regulation (EEC) No 2710/93 of 30 September 1993 concerning certain special sales by tender of vinous alcohol held by intervention agencies, for use as motor fuel within the Community (OJ 1993 L 245, p. 131), on the one hand, cancelled tendering procedure No 8/90 EC with regard to the lots of alcohol that had not yet been removed from storage (three lots). On the other hand, with regard to the two lots which had already been removed from storage the Commission extended the time-limit for the use of the products until 1 October 1995. Article 3 of Regulation No 2710/93 stated that the performance guarantee concerning the lots already removed would be released by the intervention agency when all the alcohol had been used as motor fuel within the Community.

72 By Commission Regulation (EC) No 416/96 of 7 March 1996 amending Regulation No 2710/93 (OJ 1996 L 59, p. 5) the time-limit for using the lots already removed was extended again, but on that occasion this was done progressively. To that end, Article 3(1) of Regulation No 2710/93, as amended by Regulation No 416/96, provided:

'Notwithstanding Article 23 of Regulation (EEC) No 2220/85 and save in cases of *force majeure*, where the deadline referred to in Article 2 is not met, the performance guarantee of ECU 90 per hectolitre of alcohol at 100% volume shall be forfeited in the following proportions:

(a) 15% in all cases [that is to say on 1 October 1995, as initially provided];

(b) 50% of the amount remaining after the deduction of 15%, where the use referred to in that Article has not taken place before 30 June 1996.

The entire guarantee shall be forfeited in the case of failure to complete use of the lots by 31 December 1996.'

73 It is clear from the documents before the Court that even after the time-limit was extended Palma was unable to provide evidence that the two lots of alcohol already removed had actually been used, and that Commission officials requested the competent national authority, the Azienda di Stato per gli Interventi nel Mercato Agricolo (State authority for intervention in the agricultural market, 'AIMA') to undertake the recovery of the various tranches of the security on the dates laid down in Regulation No 2710/93, as amended by Regulation No 416/96.

74 It is also clear from those documents that AIMA, despite the Commission's repeated requests,

— as regards the first tranche of the security (15%), which was due on 1 October 1995, did not send a demand for payment to Palma until 23 April 1996 and did not call upon the guarantor institution to pay the secured amount until 16 January 1997;

— as regards the second tranche of the security (50%), which was due on 30 June 1996, did not seek payment from Palma until 3 December 1996 and only called on the guarantor institution to make payment on 16 January 1997;

— as regards the balance (35%), which was due on 31 December 1996, did not ask Palma for payment until 29 January 1997 and only called on the guarantor institution on 7 March 1997.

75 Notwithstanding those requests, AIMA has so far not managed to obtain payment of the security. According to the information provided by the Italian Government, Palma brought a number of actions in order to gain time and finally brought an action before the Italian courts which is pending.

76 The Commission, by letter of 15 April 1997, imposed a final deadline on the Italian authorities for payment of the amounts concerned. As no action was taken in response to that letter the Commission, by letter of 14 July 1997, formally made known its intention to deduct an amount corresponding to the security that should have been forfeited, namely ITL 7 760 156 831, from the payment advances under the EAGGF for August 1997.

77 The Italian Republic subsequently instituted a conciliation procedure. On 26 October 1999 the Conciliation Body rejected the application for conciliation as inadmissible on the grounds that 'the Government concerned had not attended the bilateral meeting organised by the Conciliation Body'. The Commission therefore confirmed the adjustment for the amount proposed in the contested decision.

Arguments of the parties

78 The Italian Government does not dispute the amount of the adjustment, the details concerning the conduct of the contested tendering procedure or the fact that the obligation to recover the security was not met. It claims, however, that the delay in the recovery of the security is exclusively attributable to the conduct of Palma and not that of the national authorities, which acted with due promptness. Palma, in addition to bringing further actions to gain time, even tried to negotiate the terms of the award directly with the Commission. The delays

which resulted from this could not in any way be attributed to the Italian authorities.

79 The Commission points out, however, that it is common ground that, irrespective of any actions brought by Palma in order to gain time, AIMA did not comply with its own obligation to recover the various tranches of the security as soon as possible each time they fell due. It is clear from the timetable of events that both the demands for payment sent to Palma and the orders for payment made against the guarantor institution were made much too long after the due dates in all three cases. The Italian authorities were thus in breach of Article 29 of Regulation No 2220/85, which requires recovery of the amounts due 'without delay', and so the contested adjustment is justified.

Findings of the Court

80 It is common ground that the first paragraph of Article 29 of Regulation No 2220/85 provides that a national authority, once it is aware of circumstances giving rise to forfeiture of a security falling within the scope of that provision, is to demand payment from the party 'without delay'. In the event of failure to pay the security within a maximum period of 30 days from the date of issue of the demand for payment, the national authority must, under Article 29, second paragraph, subparagraph (b), of that regulation, 'without delay' require the guarantor to pay, which must also be done within a maximum of 30 days. Moreover, under Article 16(2)(c) of that regulation, the guarantor must act upon any demand for payment. In addition, in the present case, under the special terms of the invitation to tender which are referred to in paragraph 70 above, the security was due on demand even if the successful tenderer objected.

81 AIMA's action in respect of the recovery of the various tranches of the security did not meet the specified requirements with regard to diligence. As is clear from the timetable of events mentioned in paragraph 74 above, in the case of the first tranche of the security AIMA sent the demand for payment to Palma almost seven months after the due date and did not call upon the guarantor institution to pay the secured amount until almost nine months after the demand for payment was sent. As regards the second tranche, those periods were more than five months and one and a half months, respectively. As for the balance, AIMA sent the demand for payment within a slightly shorter period, approximately one month after the due date, and called upon the guarantor institution one month and one week later.

82 As regards the first two tranches of the security, it is clear, given the length of the delays, that AIMA did not act 'without delay'. As regards the balance, it is common ground that the demand was sent, and the guarantor called upon to pay, more quickly than in the first two cases. However, in the context of this case, in which the debtor had persistently avoided its earlier obligations to pay, AIMA should not have waited one month, and one month and one week, respectively, before demanding payment of the outstanding balance, so that it did not act 'without delay' either.

83 It must therefore be found that the national authorities have not in every case complied with their obligation to recover the amounts of the security in question without delay.

84 The actions allegedly brought by the successful tenderer in order to gain time are not such as to affect the responsibility of the national authorities in the situation at issue in the present case, in which there were considerable delays on the part of those authorities in demanding payment from the successful tenderer. The security, as stated in paragraph 70 above, was to be due on demand even if the successful tenderer objected, and releasable upon receipt of a declaration by the

intervention agency. There was therefore no justification for AIMA not being able to obtain payment of the security from the guarantor institution, and that is so whatever actions may have been brought by the successful tenderer to gain time.

85 It follows from all the foregoing considerations that the Commission was entitled to impose the contested adjustment on the Italian Republic, and that the argument that the Commission's conduct was unlawful is unfounded. The Italian Republic's application must therefore be dismissed in so far as it concerns the adjustment of ITL 7 760 156 831.

86 As all the pleas submitted by the Italian Government have proved to be unfounded, the Italian Republic's application must be dismissed in its entirety.

Costs

87 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission applied for costs and the Italian Republic has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT(Fifth Chamber)

hereby:

1. **Dismisses the application;**

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

Wathelet Edward La Pergola

Jann von Bahr

Delivered in open court in Luxembourg on 9 January 2003.

R. Grass M. Wathelet

Registrar President of the Fifth Chamber