JUDGMENT OF THE COURT
9 October 1990 *

In Case C-366/88,

French Republic, represented by Edwige Belliard, Sous-Directeur du droit économique, Ministry of Foreign Affairs, and Claude Chavance, Attaché principale d'administration centrale, Ministry of Foreign Affairs, acting as Agents, with an address for service in Luxembourg at the French Embassy, 9 boulevard Prince-Henri,

applicant,

v

Commission of the European Communities, represented by Peter Oliver, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Guido Berardis, also a member of the Commission's Legal Department, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the Internal instructions 88/C 264/03 concerning certain administrative and technical procedures to be followed by officials given powers by the Commission concerning sampling and analysis of products for the purposes of the management and control of the European Agricultural Guidance and Guarantee Fund (Official Journal 1988 C 264, p. 3),

* Language of the case: French.

THE COURT

composed of: O. Due, President, G. F. Mancini, T. F. O'Higgins, J. C. Moitinho de Almeida and M. Díez de Velasco (Presidents of Chambers), F. A. Schockweiler, F. Grévisse, M. Zuleeg and P. J. G. Kapteyn, Judges,

Advocate General: G. Tesauro
Registrar: D. Louterman, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument presented by the parties' representatives at the hearing on 14 June 1990,

after hearing the Opinion of the Advocate General delivered at the sitting on 12 July 1990,

gives the following

Judgment

1 By application lodged at the Court Registry on 16 December 1988, the French Republic brought an action under the first paragraph of Article 173 of the EEC Treaty for the annulment of a measure adopted by the Commission entitled: 'Internal instructions (88/C 264/03) concerning certain administrative and technical procedures to be followed by officials given powers by the Commission concerning sampling and analysis of products for the purposes of the management and control of the European Agricultural Guidance and Guarantee Fund' (Official Journal 1988 C 264, p. 3).

2 Pursuant to the first subparagraph of Article 9(1) of Regulation (EEC) No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy (Official Journal, English Special Edition 1970 (I), p. 218), 'Member States shall make available to the Commission all information required for the proper working of the Fund and shall 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'.

3 Article 9(2) provides that:

'. . . officials appointed by the Commission to carry out inspections on the spot shall have access to the books and all other documents relating to expenditure financed by the Fund. They may in particular check:

(a) whether administrative practices are in accordance with Community rules;

(b) whether the requisite supporting documents exist and tally with the transactions financed by the Fund;

(c) the conditions under which transactions financed by the Fund are carried out and checked.

The Commission shall give due notice before the inspection is carried out to the Member State concerned or to the Member State on whose territory it is to take place. Officials of the Member State concerned may take part in the inspection.

At the request of the Commission and with the agreement of the Member State, inspections or inquiries concerning the transactions referred to in this regulation shall be carried out by the competent authorities of that Member State. Officials of the Commission may also participate.'

4 Pursuant to Article 9(3), the Council, acting by a qualified majority on a proposal from the Commission, is, as far as necessary, to lay down general rules for the application of Article 9.

5 The Commission adopted the contested measure on the basis of Regulation No 729/70, in particular Article 9 thereof. According to the fourth recital in the preamble to the contested measure, it is appropriate, in order to facilitate the

taking and analysis of samples, for certain administrative and technical procedures to be laid down to be followed by Commission officials when carrying out the supervision in question.

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

The admissibility of the application

7 The Commission has objected that the application is inadmissible on the ground that the Internal instructions at issue are not an act which can be the subject of proceedings under Article 173 of the EEC Treaty. It contends that the Internal instructions have no legal or financial repercussions whatsoever for economic agents and the Member States and are therefore, as their name indicates, purely internal.

8 It must be pointed out in the first place that, as the Court has consistently held, an action for annulment is available in the case of any measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects (judgment in Case 22/70 *Commission* v *Council* [1971] ECR 263).

9 It must also be observed that in principle internal instructions have effects only within the administration itself and give rise to no rights or obligations on the part of third parties. They do not therefore constitute acts adversely affecting any person, against which, as such, an action for annulment can be brought under Article 173 of the Treaty (see judgment in Case 190/84 *'Les Verts'* v *European Parliament* [1988] ECR 1017, paragraph 8).

10 However, the contested measure is distinguished from an ordinary service instruction both by the circumstances in which it was adopted and by the conditions under which it was prepared, drawn up and published. It is apparent from the documents before the Court that in this case the measure represents a position taken by the Commission as to the extent of the supervisory powers of its officials in relation to the taking of samples under Article 9 of Regulation No

729/70. That position is based on an interpretation of that provision which had previously been contested by certain Member States.

11 In order to decide whether the contested measure is intended to have legal effects additional to those arising from Article 9 of Regulation No 729/70, it is necessary to examine its content.

12 It follows that the decision on the objection of inadmissibility depends on the decision to be given on the complaints made by the French Republic against the contested measure and that that objection must therefore be examined at the same time as the substantive matters at issue in these proceedings.

The substance

13 In support of its application, the French Republic alleges lack of powers and misuse of powers on the part of the Commission.

14 With respect to the Commission's lack of powers, the French Republic claims that the contested measure adds to Article 9 of Regulation No 729/70 in so far as it lays down general rules concerning direct sampling of products at the premises of undertakings, whereas such rules are, by virtue of Article 9(3), a matter reserved exclusively to the Council.

15 The Commission for its part contends that as a result of the Member States' obligation to make available to it all information necessary for the proper working of the Fund and to take all suitable measures to facilitate supervision by it, including inspections on the spot provided for in Article 9(1), the checks carried out under Article 9(2) by the officials appointed by it involve the taking and analysis of samples.

16 It is appropriate in the first place to review the main terms of the contested measure which are relevant to this case.

17 Reference is made to the Opinion of the Advocate General for a more detailed analysis of this aspect; here, it suffices to note that, in the context of cooperation with the Member States for the purposes of the inspections carried out under Article 9 of Regulation No 729/70, the Commission officials are to be 'given access' to the establishments and installations of which a non-exhaustive list is given for the purpose of taking samples or having samples taken (point 1 of the Internal instructions); the Commission staff is to 'inform' the Member State concerned of their intention to take samples for analysis at least 48 hours before they are actually taken, without, however, being 'obliged' to provide a list of the establishments to be checked (point 3); and the officials may 'request' from the operators concerned such information as they consider necessary for assessment of the products concerned (point 8).

18 As regards the financial consequences of the Internal instructions, it must be observed that, whilst the costs of taking samples, of packaging them, of dispatching them to laboratories and of analysis are to be borne by the Commission (second paragraph of point 2), the transport and handling of goods on the premises where samples are taken and unpacking and repacking operations are nevertheless carried out under the responsibility of the owner of the goods or his representative (third paragraph of point 2) and that no compensation is payable for loss of all or part of the value of samples because of the analyses carried out (second paragraph of point 7).

19 It must then be pointed out that, pursuant to Article 8(1) of Regulation No 729/70, it is the responsibility of the Member States, in accordance with national provisions laid down by law, regulation or administrative action, to take the measures necessary *inter alia* to satisfy themselves that the transactions financed by the Fund are actually carried out and are executed correctly.

20 Under the system of supervision provided for by Regulation No 729/70, the Commission exercises only a supplementary function. That fact is clearly expressed in the eighth recital in the preamble to Regulation No 729/70, according to which, in addition to supervision carried out by the Member States on their own initiative, which remains essential, provision should be made for verification by officials of the Commission and for the Commission to have the right to enlist the help of the Member States.

21 To that end, Article 9(1) of Regulation No 729/70 imposes on the Member States the obligation to make available to the Commission all necessary information and to facilitate the supervision undertaken by it, including inspections on the spot.

22 It is apparent from Article 9(2) of Regulation No 729/70 that the inspections on the spot are designed to verify the correctness of the checks carried out by the Member States, as indicated in the eighth recital in the preamble to that regulation.

Under the system of supervision provided for by that article, if the taking and analysis of samples prove necessary, those operations must be carried out by the Member State, either on its own initiative by virtue of the responsibility attributed to it by Article 8(1), or at the request of the Commission pursuant to the third subparagraph of Article 9(2).

23 It must therefore be stated that the contested measure does not confine itself to making more explicit the rules laid down in Article 9 of Regulation No 729/70 but adds to the text of that provision by empowering the Commission to take samples, independently of the Member States, and by laying down detailed arrangements for its action in that regard.

24 As regards the power of the Commission to adopt provisions adding to the text of Article 9 of Regulation No 729/70, it must be stressed that no such power is provided for by that regulation and that, in any event, only the Council is empowered, under Article 9(3), to adopt general rules for the application of that article.

25 It follows that the contested measure constitutes a decision adopted by an authority which had no power to do so. Accordingly, without there being any need to give a decision on the other submission made by the French Republic, the application for the annulment of that measure must be declared both admissible and well founded.

Costs

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

On those grounds,

THE COURT

hereby:

(1) Annuls the Internal instructions 88/C 264/03 concerning certain administrative and technical procedures to be followed by officials given powers by the Commission concerning sampling and analysis of products for the purposes of the management and control of the European Agricultural Guidance and Guarantee Fund;

(2) Orders the Commission to pay the costs.

Due Mancini O'Higgins Moitinho de Almeida

Díez de Velasco Schockweiler Grévisse Zuleeg Kapteyn

Delivered in open court in Luxembourg on 9 October 1990.

J.-G. Giraud
Registrar

O. Due
President