JUDGMENT OF THE COURT (Third Chamber)

23 November 1995 *

In Case C-476/93 P,

Nutral SpA, established at Casalbuttano, Cremona (Italy), represented by Emilio Cappelli and Paolo de Caterini, of the Rome Bar, and Mario de Bellis, of the Mantua Bar, with an address for service in Luxembourg at the Chambers of Charles Turk, 13b Avenue Guillaume,

appellant,

APPEAL against the order of the Court of First Instance of the European Communities of 21 October 1993 in Cases T-492/93 and T-492/93 R *Nutral* v *Commission* [1993] ECR II-1023, seeking to have that order set aside,

the other party to the proceedings being:

Commission of the European Communities, represented by Eugenio de March, Legal Adviser, acting as Agent, assisted by Alberto Dal Ferro, of the Vicenza Bar, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

* Language of the case: Italian.

THE COURT (Third Chamber),

composed of: J.-P. Puissochet (Rapporteur), President of the Chamber, J. C. Moitinho de Almeida and C. Gulmann, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 12 October 1995,

gives the following

Judgment

1 By application lodged at the Registry of the Court of Justice on 22 December 1993, Nutral SpA ('Nutral') brought an appeal pursuant to Article 49 of the Statute of the Court of Justice of the EC against the order of 21 October 1993 in Cases T-492/93 and T-492/93 R *Nutral* v *Commission* [1993] ECR II-1023 ('the contested order'), in which the Court of First Instance, first, upheld the objection of inadmissibility raised by the Commission and dismissed Nutral's application for the annulment of Commission decision No SG(93) D/140.082 of 3 March 1993 and of any other prior, linked or associated measure, relating in particular to inquiry report No SG(92) D/140.028 of the Unit on the Coordination of Fraud Prevention of 19 January 1993 and, second, dismissed the appellant's application for interim relief.

2 The following findings were made by the Court of First Instance in its order:

'1 The applicant is a company specializing in the production, processing, importing and exporting of feedingstuffs for animals. The Commission considered that irregularities had been committed with regard to certain imports carried out by the applicant and therefore requested the Italian authorities by letter of 6 August 1992, pursuant to Article 6 of Council Regulation (EEC) No 595/91 of 4 March 1991 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organization of an information system in this field and repealing Regulation (EEC) No 283/72 (OJ 1991 L 67, p. 11), to take part in an inquiry concerning imports from Austria of a preparation with a basis of skimmed-milk powder called "edible preparation with a basis of liquid skimmed milk, emulsified with refined edible beef fat".

2 Pursuant to Regulation (EEC) No 986/68 of the Council of 15 July 1968 laying down general rules for granting aid for skimmed milk and skimmed-milk powder for use as feed (OJ, English Special Edition 1968(I), p. 260) and Commission Regulation (EEC) No 1725/79 of 26 July 1979 on the rules for granting aid for skimmed milk processed into compound feedingstuffs and skimmed-milk powder intended for feed for calves (OJ 1979 L 199, p. 1, hereinafter "Regulation No 1725/79"), the applicant received from 1988 to 1991, through the intermediary of the Italian intervention agency, the Azienda di Stato per gli Interventi sul Mercato Agricola ("AIMA"), Community aid for skimmed-milk powder which has been denatured or used in the production of compound feedingstuffs.

3 Moreover, in so far as, first, the declared content of that preparation was less than 1.5% as regards milkfat and less than 2.5% as regards milk proteins and, second, the preparation originated in a country belonging to the European Free Trade

Association, the consignments successively imported were subject neither to an *ad valorem* duty nor to the levying of a "variable component" charge, to which goods imported from third countries are normally subject pursuant to Article 5(1) of Council Regulation (EEC) No 3033/80 of 11 November 1980 laying down the trade arrangements applicable to certain goods resulting from the processing of agricultural products (OJ 1980 L 323, p. 1).

4 By letter of 19 January 1993 the Head of the Unit on the Coordination of Fraud Prevention ("UCLAF") sent to the Italian authorities the report drawn up by the agents appointed by the Commission to participate in the inquiry referred to above. He requested them to take the necessary administrative measures to ensure the recovery of the sums in issue and to inform the Commission of the judicial steps taken in the matter.

5 According to the inquiry report, and contrary to the declaration previously given, the milk-protein content of the preparation imported by the applicant was in excess of 2.5% and should thus have been subject to the "variable component" normally applicable to imports from third countries. The inquiry had also revealed that part of the product in question (500 tonnes) originated from the German intervention agency and had already been the subject of an export refund, with the result that it did not qualify for aid for skimmed-milk powder in accordance with Article 1(2)(b) of Regulation No 1725/79.

6 On 26 February 1993 the Comando Nucleo Polizia Tributaria di Cremona della Guardia di Finanza (hereinafter "Guardia di Finanza") drew up a report against the applicant "for the purposes of notification of the undue payment of Community aid in the agricultural sector in respect of 500 tonnes of milk powder, as referred to in paragraph (2) of the conclusions of the inquiry report sent by UCLAF in its letter SG(92) D/140.028 of 19 January 1993".

7 On 3 March 1993, by letter bearing the reference SG(93) D/140.082, the head of UCLAF informed the Italian authorities that:

...

"With a view to clarifying the points made in paragraph (2) of the conclusions of the inquiry report ... I would inform you that, although the aid for skimmed milk processed into feedingstuffs was properly awarded ... to Nutral by the competent agency, the payment of such aid ... must be regarded as unlawful.

In view of the foregoing, the competent national authorities must proceed not only to calculate the variable component in respect of all of the product imported and to recover the processing aid relating to the preparation manufactured from the 500 tonnes of powder originating in Ilyichevsk, but also to recover all of the processing aid awarded in respect of milk powder which was granted in relation to the preparation imported between January 1988 and 14 August 1991."

8 By letter of 23 March 1993 sent by Commissioner Schmidhuber to the Minister of Finance, the Minister of Agriculture and Forestry and the Minister of Community Policy and Regional Affairs, the Commission drew attention to its previous communications of 19 January and 3 March 1993 and requested the competent Italian authorities to proceed as rapidly as possible to take the necessary steps to recover the sums in issue, in accordance, first, with Council Regulation (EEC) No 1697/79 of 24 July 1979 on the post-clearance recovery of import duties or export duties which have not been required of the person liable for payment on goods entered for a customs procedure involving the obligation to pay such duties (OJ 1979 L 197, p. 1, hereinafter "Regulation No 1697/79") and, second, with Article 8 of Regulation (EEC) No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy (OJ, English Special Edition 1970(I), p. 218, hereinafter "Regulation No 729/70").

9 On 27 April 1993 the Guardia di Finanza drew up against the applicant a "record of findings" in respect of the aid for skimmed-milk powder unduly paid by AIMA between 1988 and 1991. A copy of the record of findings was sent to the Ministry of Agriculture and Forestry with a view to the issue by that ministry of the "decree-injunction" provided for by Article 3 of Italian Law No 898 of 23 December 1986.'

3 By application lodged at the Registry of the Court of Justice on 6 July 1993, Nutral brought an action under the second paragraph of Article 173 of the EEC Treaty for the annulment of the aforementioned decision of the Commission of 3 March 1993 and of any other prior, linked or associated measure, and requested the Court of Justice, by a separate document lodged at the Registry of the Court on 13 September 1993, to order suspension of the operation of the decision. By order of 27 September 1993 the two cases were transferred to the Court of First Instance pursuant to Article 4 of Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993, amending Decision 88/591/ECSC, EEC, Euratom establishing the Court of First Instance of the European Communities (OJ 1993 L 144, p. 21).

4 In the proceedings before the Court of First Instance, the Commission raised an objection of inadmissibility.

5 In the first limb of that objection, it argued that the measure the annulment of which was sought did not constitute an act against which proceedings could be brought within the meaning of Article 173 of the Treaty. According to the Commission, neither the letters of 3 and 23 March 1993 nor the inquiry report gave rise in themselves to any obligation on the part of the State or, *a fortiori*, Nutral. The obligation on Member States to recover sums not collected arises directly from Regulation No 729/70 and Regulation No 1697/79.

6 In the second limb of the objection of inadmissibility, the Commission maintained that the contested measure was not of direct concern to Nutral. Only a measure

adopted under national law, such as the record which the Italian authorities drew up and against which the applicant could seek the legal remedies available under Italian law, was capable of causing it damage. The Commission pointed out that the Community rules drew their inspiration from a strict requirement for the separation of the Commission's powers from those of the Member States.

7 It contended in the third limb that, in so far as it was directed against the inquiry report annexed to the record of 26 February 1993, Nutral's action had been brought after the expiry of the time-limit laid down by Article 173 of the Treaty.

8 Nutral contested that objection, arguing before the Court of First Instance that it was the definitive finding of infringement, set out unequivocally and peremptorily in the contested letter, which had damaged its interests. The Italian authorities had subsequently merely recorded the results of the inquiry in the record notified to the applicant on 27 April 1993, which already indicated the sums to be repaid, and formally demanded payment of the amounts in issue. None of the competent authorities had issued any 'decree-injunction' establishing the infringement, as provided for under Italian law. The applicant was deprived of legal protection within the national legal order.

9 Furthermore, according to Nutral, the Commission's argument that, because of a lack of Community competence, no decision capable of being contested could be said to exist, was without merit. It would mean that any measure taken by an incompetent authority must escape judicial review.

10 Lastly, in response to the third limb of the objection of inadmissibility raised by the Commission, Nutral maintained that it was only in the light of the letter of 3 March 1993 that the inquiry report, which had hitherto possessed the import and

meaning of a preparatory act only, had acquired a different significance and scope as regards the finding that an infringement had been committed.

11 Nutral relies on two pleas in support of its appeal against the order of the Court of First Instance, the first of which alleges misinterpretation of the Community rules and the second violation of the legal concept of an act capable of being contested.

The first plea advanced in the appeal

12 Nutral maintains, first, that in paragraph 26 et seq. of its order the Court of First Instance misinterpreted Regulation No 729/70 and Regulation No 1697/79 in relation to Regulation No 595/91, cited above. According to the appellant, the competence of the Commission has been progressively extended in the sphere under consideration: the Commission now possesses decision-making powers, at least as regards the determination of facts relating to irregular Community expenditure in the agricultural sector, the evidence establishing them and their legal characterization.

13 The Commission contests that first plea. It maintains that the Court of First Instance correctly interpreted Regulations Nos 729/70, 1697/79 and 595/91 and that its interpretation was consistent with the system for monitoring Community agricultural expenditure and in conformity with the case-law of the Court of Justice.

14 It should be noted in that regard that, in referring to the relevant case-law of the Court of Justice (judgment in Joined Cases 89/86 and 91/86 *Étoile Commerciale and CNTA* v *Commission* [1987] ECR 3005, paragraph 11) and to the actual wording of Article 8(1) of Regulation No 729/70, the Court of First Instance pointed out, in paragraph 26 of the contested order, that, according to the institutional system of the Community and the rules governing relations between the Community and the Member States, it is for the latter, in the absence of any contrary provision

of Community law, to ensure that Community regulations, particularly those concerning the common agricultural policy, are implemented within their territory.

15 Indeed, the Court further stated in the abovementioned judgment (paragraph 11, final sentence) that, as regards more particularly financing measures adopted under that policy, it is incumbent on the Member States, by virtue of Article 8 of Regulation No 729/70, to take the measures necessary to recover sums lost as a result of irregularities or negligence. That provision is seen, as regards the financing of the common agricultural policy, as expressing the obligation of general diligence laid down by Article 5 of the Treaty (judgment in Case C-55/91 *Italy* v *Commission* [1993] ECR I-4813, paragraph 56).

16 The Court of First Instance went on to point out, in paragraph 27 of the contested order, that, under Article 2(1) of Regulation No 1697/79, where the competent authorities find that 'all or part of the amount of import duties ... has not been required of the person liable for payment, they shall take action to recover the duties not collected'. Moreover, by Article 4 of that regulation, 'the action for recovery shall be taken by the competent authorities, subject to the relevant provisions in force, against the natural or legal persons responsible ... for the payment of the import duties ...'.

17 In paragraph 28 of the contested order, the Court of First Instance inferred from that article that it is for the Member States to implement the Community rules in that sphere and to take the necessary individual decisions regarding the traders concerned, in accordance with the rules and procedures laid down in national legislation and subject to the limits imposed by Community law, for the recovery of sums unduly paid, as the Court held in paragraph 12 of the judgment in *Étoile Commerciale and CNTA* v *Commission*, cited above.

18 The interpretation applied to the abovementioned regulations by the Court of First Instance is thus the same as that of the Court of Justice.

19 It should additionally be noted that, within the framework of the system of supervision provided for by Regulation No 729/70, the Commission exercises only a supplementary function. This is clearly expressed in the eighth recital in the preamble to that regulation, according to which, in addition to supervision carried out by Member States on their own initiative, which remains essential, provision should be made for verification by officials of the Commission and for it to have the right to enlist the help of the Member States (judgments in Case C-366/88 *France* v *Commission* [1990] ECR I-3571, paragraph 20, and C-55/91 *Italy* v *Commission*, cited above, paragraphs 31 and 32).

20 Whilst it is true that the procedures for cooperation between the Commission's staff and national bodies with a view to intensifying the campaign against irregularities were specified, in the light of the experience acquired, by Regulation No 595/91, that regulation did not modify the system established by Regulation No 729/70. Contrary to Nutral's contention, Regulation No 595/91 has not conferred on the Commission any power whatever to adopt binding measures against traders in order to prevent and take action against irregularities or negligence in the financing of the common agricultural policy. It has merely strengthened the Commission's powers to initiate action and the information-gathering and supervisory resources at its disposal in that field.

21 Lastly, it is quite clear from Article 209a, inserted into the EC Treaty by the Treaty on European Union, that it is for the Member States to combat fraud which is prejudicial to the financial interests of the Community.

22 There is no basis, therefore, for Nutral's contention that the Court of First Instance should have acknowledged that the Commission had the power to take measures against traders in the sphere under consideration. Moreover, the appellant accepts that Article 6 of Regulation No 595/91 does not authorize the Commission to replace the Member States in the conduct of inquiries in cases of putative irregularity.

23 In its reply, however, Nutral maintains in support of its first plea that, in the present case, the Commission, and more particularly UCLAF, failed to comply with the procedure laid down by Article 6 of Regulation No 595/91: in breach of that provision, the findings established following the inquiry were formulated by the Commission itself and not by the Italian authorities, which merely put them into effect.

24 In that regard, the appellant is not putting forward a new limb of its first plea but is in fact contesting the legality of the decision of the Italian authorities which adversely affected it. The Court is thus not competent to rule on that point in this appeal. It is, by contrast, for the appellant to make use of the national system of legal remedies available to it under domestic law in order to contest that decision before the national courts.

25 It follows from all of the foregoing that the first plea advanced by Nutral in support of its appeal must be rejected.

The second plea advanced in the appeal

26 Nutral maintains, second, that, in ruling, in paragraph 28 of the contested order, that only the measures taken by the national authorities produced binding legal effects capable of damaging its interests, the Court of First Instance erred in law by refusing to categorize the measure in issue as an actionable measure. It was not open to the Court of First Instance to declare the application inadmissible solely on the ground that the Commission lacked the competence, in the sphere under consideration, to take measures against the applicant which produced binding legal effects. It should have examined the actual scope of the contested measure.

27 The Commission contends, on the other hand, that the Court of First Instance did not disregard the concept of an actionable measure within the meaning of Article 173 of the Treaty. It in fact analysed the Commission's letters of 3 and 23 March 1993 and concluded — without, moreover, denying that the Commission was competent to address those measures to the Italian authorities — that they did not have any binding effect capable of affecting the appellant's interests.

28 As the Court of First Instance pointed out in paragraph 24 of the contested order, in order to decide whether the objection of inadmissibility raised by the Commission is well founded, it should be recalled, as a preliminary point, that the Court has consistently held that only a measure whose legal effects are binding on the applicant and are capable of affecting his interests constitutes an act or decision which may be the subject of an action for annulment under Article 173 of the Treaty (order in Cases C-66/91 and C-66/91 R *Emerald Meats* v *Commission* [1991] ECR I-1143, paragraph 26).

29 The Court of First Instance then observed:

'In the present case, and as stated above, the Commission contacted the Italian authorities, following an inquiry in which it had participated at its request, and asked them to undertake the recovery, first, of certain aid granted to the applicant which the Commission considered illegal and, second, of certain import duties which the applicant was liable to pay. It was in response to the communications from the Commission to the Italian authorities that the latter took certain measures to recover the sums unduly received by the applicant' (paragraph 25).

30 Thus the Court of First Instance merely found — correctly — that the Commission's letters to the Italian authorities fell within the ambit of cooperation between

the Commission and the national bodies responsible for applying the Community rules, and that those letters simply constituted recommendations or opinions having no legal effect. It inferred from this, in the final sentence of paragraph 28 of the contested order, that it was only the measures taken by the national authorities which produced legal effects binding on the applicant, and, in paragraph 29 of that order, that the contested measures could not be regarded as decisions capable of directly affecting Nutral's legal position.

31 Consequently, the final sentence of paragraph 28 of the contested order cannot be read without having regard to all of the considerations on which it is based. Contrary to Nutral's contentions, the Court of First Instance was merely seeking to decide the specific case before it, and not to lay down any principle to the effect that measures taken by the Commission in the sphere in question are incapable of adversely affecting traders solely because the Community rules do not empower that institution to take decisions which are directly enforceable against interested parties.

32 It follows that the Court of First Instance defined the contested measure correctly and the appellant's second plea must be rejected.

33 The appeal must therefore be dismissed.

Costs

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

On those grounds,

THE COURT (Third Chamber)

hereby:

1. Dismisses the appeal;

2. Orders the appellant to pay the costs.

Puissochet Moitinho de Almeida Gulmann

Delivered in open court in Luxembourg on 23 November 1995.

R. Grass J.-P. Puissochet

Registrar President of the Third Chamber