JUDGMENT OF THE COURT (Fifth Chamber)

13 September 2001 *

In Case C-374/99,

Kingdom of Spain, represented by M. López-Monís Gallego, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by J. Guerra Fernández, acting as Agent, with an address for service in Luxembourg,

defendant,

APPLICATION for partial annulment of Commission Decision 1999/596/EC of 28 July 1999 amending Decision 1999/187/EC on the clearance of the accounts presented by the Member States in respect of the expenditure for 1995 of the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) (OJ 1999 L 226, p. 26) in so far as it relates to the Kingdom of Spain,

* Language of the case: Spanish.

THE COURT (Fifth Chamber),

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

Advocate General: L.A. Geelhoed,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 3 April 2001,

gives the following

Judgment

1 By application lodged at the Registry of the Court of Justice on 7 October 1999, the Kingdom of Spain sought the annulment, under the first paragraph of Article 230 EC, of the part concerning it of Commission Decision 1999/596/EC of 28 July 1999 amending Decision 1999/187/EC on the clearance of the accounts presented by the Member States in respect of the expenditure for the 1995 financial year of the Guarantee Section of the European Agricultural Guidance Guarantee Fund (EAGGF) (OJ 1999 L 226, p. 26) (hereinafter 'the contested decision').

2 The contested decision amends and supplements Commission Decision 1999/187/EC of 3 February 1999 on the clearance of the accounts presented by the Member States in respect of the expenditure for 1995 of the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (OJ 1999 L 61, p. 37). Decision 1999/187 had been adopted before the closure of the conciliation procedure to which some Member States, including the Kingdom of Spain, had had recourse, in accordance with Commission Decision 94/442/EC of 1 July 1994 setting up a conciliation procedure in the context of the clearance of the accounts of the European Agricultural Guidance and Guarantee Fund (EAGGF), Guarantee Section (OJ 1994 L 182, p. 45). The contested decision was adopted so as to clear the accounts of the expenditure for which the conciliation procedure had been completed.

3 So far as the Kingdom of Spain is concerned, the contested decision states the total allowed expenditure at ESP 868 161 191 634, and the total disallowed expenditure at ESP 30 727 280 399. Of the latter sum ESP 24 935 116 620 corresponds to expenditure already disallowed by Decision 1999/187. The correction made by the contested decision thus affects an additional sum of ESP 5 792 163 779.

4 The reasons for the corrections thus made to the expenditure are set out in the summary reports on the results of the checks for the clearance of the accounts of the EAGGF, Guarantee Section, in respect of the 1994 financial year (document No VI/7421/97, hereinafter 'the 1994 summary report') and the 1995 financial year (document No VI/6462/98, hereinafter 'the 1995 summary report') as well as a supplement dated 7 June 1999 to the 1995 summary report.

5 The corrections made in the sector of aid for the consumption of olive oil correspond to 10% of the expenditure incurred in Spain in that sector during the 1994 and 1995 financial years. The corrections made in the sector of premiums for sheep and goats correspond to 5% of the expenditure in four Spanish provinces and to 2% of the expenditure in a fifth Spanish province during the 1993 to 1995 financial years.

The aid for the consumption of olive oil

6 The corrections made in respect of aid for the consumption of olive oil are attributable, according to the 1994 and 1995 summary reports as well as the supplement to the 1995 summary report, to the defects in the systems put in place by the Spanish authorities for, respectively, the payment of the aid, controls and sanctions.

7 The Spanish Government disputes both the correction procedure as it was pursued by the Commission, and the findings set out in the contested decision.

The correction procedure followed by the Commission

Consideration of the report by the Conciliation Body

8 The Spanish Government criticises the Commission for not having taken account of the report by the Conciliation Body set up by Decision 94/442 (hereinafter 'the Conciliation Body'). It submits that, according to the express terms of Article 1(1)(b) of Decision 94/442, the Conciliation Body's function is to 'reconcile the divergent positions of the Commission and the Member State concerned'. That implies that the Commission must, before taking a decision, consider the report by that body and take it into account.

9 In this respect, it must be pointed out that under Article 1(2)(a) of Decision 94/442, 'the position of the Body shall be without prejudice to the Commission's final decision on the clearance of the accounts'. It follows that when the

Commission makes its decision it is not bound by the findings of the Conciliation Body (Case C-44/97 *Germany* v *Commission* [1999] ECR I-7177, paragraph 18).

10 In this case, it is clear from the evidence before the Court that the Commission read the report by the Conciliation Body and amended its initial proposal for financial correction on certain points, having regard to the remarks made by the Conciliation Body.

11 In those circumstances, the complaint of the Spanish Government is not supported by the facts and must therefore be rejected.

The representative nature of the checks carried out by the Commission

12 The Spanish Government submits that the 22 files on which the Commission based its conclusions related to undertakings in which the national control authority had found irregularities. According to it, that biased selection and the fact that there are more than 400 bottling undertakings in Spain indicate that those files cannot be considered representative. Furthermore, the results of an additional check, carried out at six large undertakings, cannot be relied on as against the Kingdom of Spain because they were not notified to it in due time, and, in any event, they supported its case.

13 The Commission replies that its conclusions are not based on the analysis of specific files, but on the analysis of the global system of management of the aid for the consumption of olive oil, such as was put in place by the Spanish authorities. The selection, to which the Spanish Government refers, of the 22 files only served to evaluate the efficacy of the penalties imposed.

14 It must be observed at the outset that only intervention undertaken in accordance with the Community rules in the framework of the common organisation of agricultural markets is to be financed by the EAGGF (see Case C-247/98 *Greece* v *Commission* [2001] ECR I-1, paragraph 7, and Case C-278/98 *Netherlands* v *Commission* [2001] ECR I-1501, paragraph 38).

15 It is worth pointing out that, although it is for the Commission to prove an infringement of the rules of the common organisation of agricultural markets, it is not obliged to demonstrate exhaustively the insufficiency of the checks carried out by national administrations or the irregularity of the figures transmitted by them, but must present evidence of a serious and reasonable doubt with regard to those checks or those figures (see the abovementioned judgments in *Greece* v *Commission*, paragraphs 7 and 8, and *Netherlands* v *Commission*, paragraphs 39 and 40).

16 Moreover, when the Commission criticises a Member State for not having established an effective monitoring and checking system, the discovery of individual cases in which it finds that the applicable agricultural legislation has been disregarded is only one element among others to justify its criticism in relation to the efficacy of the monitoring and checking system established by the Member State (Case C-8/88 *Germany* v *Commission* [1990] ECR I-2321, paragraph 42, and Case C-48/91 *Netherlands* v *Commission* [1993] ECR I-5611, paragraph 32).

17 In this case, in view of the criticisms made by the Commission about the inefficacy of the system established by the Spanish authorities, the individual cases which it has relied on constitute merely additional evidence which may corroborate its criticisms, the justification for which must be subjected to careful scrutiny.

18 It follows that the complaint made by the Spanish Government that the undertakings which were subject to audit were unrepresentative is not valid and must, therefore, be rejected.

The defects found

The system for payment of aid

19 The Spanish Government disputes the Commission's interpretation of the Community legislation, according to which a check on site should be made in respect of each application, before entitlement to the aid can be recognised.

20 It recognises that Commission Regulation (EEC) No 2677/85 of 24 September 1985 laying down implementing rules in respect of the system of consumption aid for olive oil (OJ 1985 L 254, p. 5), as amended by Commission Regulation (EEC) No 643/93 of 19 March 1993 (OJ 1993 L 69, p. 19) (hereinafter 'Regulation No 2677/85 as amended'), provides in Article 9(3) that '[the] Member State shall pay the aid within 150 days of the submission of the application for the quantities for which entitlement to aid has been recognised following on-the-spot checks'. It points out, however, that Article 12(1) of Regulation No 2677/85 as amended simply requires that, in the context of the checks envisaged by Council Regulation (EEC) No 3089/78 of 19 December 1978 laying down general rules in respect of aid for the consumption of olive oil (OJ 1978 L 369, p. 12), 'each undertaking [is to be] visited at least once every 12 months'.

21 According to the Spanish Government, because of the contradiction between those two provisions, the system put in place by the Spanish authorities of not

establishing a report on an application for aid if there has not been an on-site check at the undertaking, but establishing reports on applications submitted later in the course of the same marketing year, on the basis of the accounts submitted monthly by the undertaking, and making appropriate documentary checks, must be considered adequate.

22 In this respect it must be mentioned that the wording of Article 12 of Regulation No 2677/85 had already been amended by Commission Regulation (EEC) No 571/91 of 8 March 1991 (OJ 1991 L 63, p. 19), so as to require a check on each undertaking concerned 'at least once in each marketing year'. Regulation No 643/93, which, according to its second recital, aims to 'make verification of the quantities in respect of which aid is granted more effective', slightly amended that article in such a way that it provides that the check should take place 'at least once every 12 months'. Further, in order to strengthen the checks, Regulation No 643/93 amended the wording of Article 9 of Regulation No 2677/85 in such a way as to subject all aid to a prior on-site check.

23 Read in the general context of Regulation No 2677/85 as amended, Articles 9(3) and 12(1) of that Regulation do not therefore appear contradictory, but complementary. Article 12(1) must be interpreted as imposing a minimum requirement which is that, at the very least, a check should be undertaken once every 12 months. This minimum requirement is reinforced by Article 9(3), which makes each application for aid subject to a prior on-site check.

24 It follows that the argument of the Spanish Government does not rebut the Commission's complaint that the system of payment of aid for the consumption of olive oil put in place by the Spanish authorities does not satisfy the requirements of the Community legislation.

The system of checks

25 The Spanish Government submits that the Commission itself has recognised that the control procedures put into effect by the Spanish authorities had been improved compared to the 1992 and 1993 financial years. For those years the fixed adjustment applied was only 2%. It follows, according to that Government, that, in the absence of repeated defaults, there was no justification for increasing the rate of the fixed adjustment to 10%.

26 In this respect it must be recalled that the fact that the Commission did not take the appropriate action, on the financial level, on a finding of deficiencies pertaining to one financial year cannot deprive it of the right to do so in relation to subsequent financial years, particularly where those deficiencies have persisted; and that, moreover, subsequently ascertained deficiencies may also be taken into account in determining the level of the fixed adjustment (*Germany* v *Commission*, cited above, paragraph 14).

27 According to the Belle Report of the Commission (document No VI/216/93 of 1 June 1993), which lays down the guidelines to be followed when financial corrections must be applied against a Member State, a fixed adjustment of 10% of the expenditure is applicable in cases where 'the failure to act concerns the entirety or the fundamental elements of the control system, or the execution of essential checks intended to guarantee the correctness of the expenditure, of such a type as to justify the conclusion that there was a high risk of generalised losses to the EAGGF'.

28 In this case the 1994 summary report states that the application in respect of the 1993 financial year of a fixed adjustment of 2% was explained by the 'fact that the limited extent of the preparatory work for the 1993 financial year [had not enabled] more serious and probably more appropriate conclusions to be drawn'.

29 The application of a fixed adjustment of 10% in respect of the expenditure of the financial years covered by the contested decision was attributed in the 1995 summary report to the fact that the deficiencies found affected the entire system (payment, checks and penalties), which involved a sector particularly sensitive to the risk of fraud, and that the Spanish authorities were not disposed to take further corrective measures.

30 In those circumstances, the arguments put forward by the Kingdom of Spain are not sufficient to demonstrate that the application of a fixed adjustment of 10% in respect of aid for the consumption of olive oil was unjustified.

The system of penalties

31 The Spanish Government points out that, in accordance with Article 2(4) of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests (OJ 1995 L 312, p. 1), 'the procedures for the application of Community checks, measures and penalties shall be governed by the laws of the Member States'.

32 In respect of the cases in which the Spanish authorities confined themselves, after having established anomalies in the stocks of the inspected undertakings, to reducing the amount of aid applied for during the month of the inspection, the Spanish Government states that, according to Article 2(3) of Regulation No 2988/95, the sanction is to be applied 'having regard to the nature and seriousness of the irregularity'. In the absence of intent or serious negligence, the sanction applied by the Spanish authorities was both appropriate and a sufficient deterrent.

33 In this respect it must be noted that although Article 2(4) of Regulation No 2988/95 states that the procedures relating to the application of Community sanctions are governed by the law of the Member States, that must be '[s]ubject to the Community law applicable'. In particular, the rules and procedures provided for by the national law must not make it practically impossible to implement the Community legislation, or undermine its effectiveness (Joined Cases 205/82 to 215/82 *Deutsche Milchkontor and Others* [1983] ECR 2633, paragraph 19, and Case C-110/99 *Emsland-Stärke* [2000] ECR -11569, paragraph 54).

34 Article 1(2) of Regulation No 2988/95 defines an irregularity capable of attracting a penalty as being 'any infringement of a provision of Community law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the Communities'. As the Commission rightly points out, irregularities are thus defined by their results and not by the existence of intention or serious negligence. Therefore, the absence of such an element is no justification for refraining from imposing the penalty provided for by the Community legislation for an irregularity the existence of which has been established.

35 It follows that the argument of the Spanish Government does not rebut the Commission's complaint that the system of penalties put in place by the Spanish authorities does not satisfy the requirements of the Community legislation.

36 In those circumstances, all the arguments of the Spanish Government concerning the adjustments applied by the contested decision concerning aid for the consumption of olive oil must be rejected.

Premiums for sheep or goats

37 The Spanish Government contends that the sums taken into account to calculate the financial adjustment for the 1994 financial year do not match the expenditure incurred in the course of that financial year, as they include expenditure for the 1993 financial year. However, the latter had already been cleared by Commission Decision 97/333/EC of 23 April 1997 on the clearance of the accounts presented by the Member States in respect of the expenditure for 1993 of the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) (OJ 1997 L 139, p. 30), and Commission Decision 97/608/EC of 30 July 1997 amending Decision 97/333 (OJ 1997 L 245, p. 20).

38 The Spanish Government submits that the penultimate recital of Decision 97/333, according to which 'this Decision is without prejudice to any financial consequences drawn by the Commission, during a subsequent accounts clearance procedure, from investigations under way at the time of this Decision', refers exclusively to the enquiries which were in progress at the date of adoption of that decision and had caused the separation of the corresponding expenditure. In the case of Spain, the expenditure in question had not been the object of such a separation.

39 The Commission submits that the premiums for sheep and goats, governed by Council Regulation (EEC) No 3013/89 of 25 September 1989 on the common organisation of the market in sheepmeat and goatmeat (OJ 1989 L 289, p. 1), and Commission Regulation (EEC) No 2700/93 of 30 September 1993 on detailed rules for the application of the premium in favour of sheepmeat and goatmeat producers (OJ 1993 L 245, p. 99), are subject to an extremely complex payment procedure, the recipients receiving, for the same marketing year, funds over several financial years. Thus, for the 1993 marketing year, payments were spread over the 1993 to 1995 financial years. That is why the Community audit of the Spanish system was carried out jointly over the 1993 to 1995 financial years.

40 On this point, it must be held that the restrictive interpretation of the penultimate recital of Decision 97/333 advocated by the Spanish Government is contradicted by various papers in the court file. Thus, the summary report concerning the 1993 financial year states in its conclusions that 'the position in respect of the checks in Spain will be examined in the course of future audits'. Further, as the Advocate General pointed out at point 72 of his Opinion, it is clear from the documents prior to that report that the Spanish authorities should have known, first, that the system of checks put in place in Spain was considered inadequate, or even non-existent, and secondly that, for the clearance of the accounts concerning premiums for sheep and goats, the Commission in practice takes account of payments made in several different financial years.

41 Therefore, the arguments of the Spanish Government concerning the adjustments applied by the contested decision in respect of premiums for sheep and goats cannot be accepted.

42 Having regard to all the foregoing considerations, the Kingdom of Spain's action must be dismissed.

Costs

43 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 has applied for costs and the Kingdom of Spain has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the Kingdom of Spain to pay the costs.**

La Pergola Wathelet Edward

Jann Sevón

Delivered in open court in Luxembourg on 13 September 2001.

R. Grass A. La Pergola

Registrar President of the Fifth Chamber