JUDGMENT OF THE COURT (Fifth Chamber)

6 June 1996 *

In Case C-198/94,

Italian Republic, represented by Umberto Leanza, Head of the Diplomatic Legal Affairs Department of the Ministry of Foreign Affairs, acting as Agent, assisted by Maurizio Fiorilli, Avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy, 5 Rue Marie-Adélaïde,

applicant,

v

Commission of the European Communities, represented by Eugenio de March, Legal Adviser, acting as Agent, and 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,

defendant,

* Language of the case: Italian.

APPLICATION for the annulment of Commission Decision C(94) 1011 final of 29 April 1994 on the clearance of accounts of Italy for certain expenditure financed by the European Agricultural Guidance and Guarantee Fund (EAGGF), Guarantee Section, for the financial year 1991,

THE COURT (Fifth Chamber),

composed of: D. A. O. Edward, President of the Chamber, J.-P. Puissochet, J. C. Moitinho de Almeida, C. Gulmann (Rapporteur) and M. Wathelet, Judges,

Advocate General: P. Léger,
Registrar: H. A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 18 January 1996,

after hearing the Opinion of the Advocate General at the sitting on 29 February 1996,

gives the following

Judgment

1 By application lodged at the Court Registry on 7 July 1994, the Italian Republic brought an action under Article 173 of the EC Treaty for the annulment of

Commission Decision C(94) 1011 final of 29 April 1994 on the clearance of accounts of Italy for certain expenditure financed by the European Agricultural Guidance and Guarantee Fund (EAGGF), Guarantee Section, for the financial year 1991, in so far as it excludes the sum of LIT 18 934 858 259 from financing by the Community. That decision was published as Decision 94/281/EC in the *Official Journal of the European Communities* 1994 L 120, p. 59.

The applicable legislation

2 Article 2 of Council Regulation (EEC) No 598/91 of 5 March 1991 on urgent action for the supply of agricultural products intended for the people of the Soviet Union (OJ 1991 L 67, p. 19) provides that for the purposes of that action the Community is to transfer agricultural products available as a result of intervention free of charge to the Soviet Union. Supply costs are to be met by the Community and suppliers chosen by tendering procedure. Transport costs are to be met by the Community unless the recipient country itself takes the products over in the Community.

3 Article 5 of that regulation provides that the Commission is to be responsible for implementing that action. In conformity with the procedure provided for in Article 5(2), the Commission adopted Regulation (EEC) No 1582/91 of 11 June 1991 laying down certain detailed rules for the application of Regulation (EEC) No 598/91 (OJ 1991 L 147, p. 20).

4 Article 1 of Regulation No 1582/91 initiated a tendering procedure for the delivery of canned intervention beef.

5 Article 2 of that regulation provides that delivery is to comprise the processing and packaging of that meat and the actual delivery of the canned meat to the organization designated by the Commission for the transport of the food aid to its destination.

6 Article 3(2) provides that tenderers are to submit their tenders in writing to the national intervention agencies.

7 Under Article 4, the intervention agencies are to forward the tenders to the Commission. On the basis of the tenders received, the Commission is to decide either to fix a maximum amount of costs or to make no award. Where the maximum amount of costs is fixed, tenders not exceeding that amount are to be accepted. Within three working days following the day on which the Member States are notified of the Commission's decision, the intervention agency concerned is to inform all tenderers of that decision. Where a tender is accepted, the contract is to be deemed to have been concluded on the date of notification by the intervention agency to the tenderer.

8 Pursuant to Article 8, the tenderer is to ensure that the canned meat produced is placed and kept in store in easily identifiable lots.

9 Article 9 provides that the intervention agencies are to be responsible for the supervision of all movements and operations related to the beef concerned until the canned beef is taken over by the carrier. Supervision must include, first, permanent physical control to verify that all the meat taken over is used for the manufacture of canned beef in accordance with the specifications laid down in

Annex I and, secondly, when actual delivery takes place, physical control to verify that the canned beef produced and stored fully corresponds with the canned beef to be delivered. In respect of each delivery contract a report is to be drawn up stating the findings of the supervision. If those findings are considered satisfactory by the official responsible he is to issue the appropriate certification to the successful tenderer.

10 Under Article 10(2) all the canned products are to be delivered to the carrier against receipt of a take-over certificate.

11 Article 11 provides that upon application for payment accompanied by the take-over certificates and the certificates of conformity the intervention agency is immediately to pay to the successful tenderer the amount indicated in his tender.

12 Pursuant to Article 12, the delivery security lodged with the intervention agency is to be released immediately after the successful tenderer has provided the intervention agency with both of the certificates referred to above.

13 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 only expenditure incurred in accordance with the Community rules within the framework of the common organization of the agricultural markets is to be borne by the EAGGF.

The dispute

14 Following a tendering procedure initiated under Regulation No 1582/91, certain member companies of the Italian BECA Group were awarded part of the contract for the supply of canned beef intended for the people of the Soviet Union. The meat, which came from the German intervention agency (BALM), was accordingly processed by certain companies in that group. A considerable portion of meat was processed and canned by Nuova Irpinia SpA in its factory at Avellino.

15 The Italian intervention agency (AIMA), responsible under Regulation No 1582/91 for checking the processing and canning, entrusted to the National Institute for Canned Food ('INCA') the task of supervising the transactions relating to the beef. INCA certified that the canned produce originating from Nuova Irpinia's factory was in conformity with the requirements laid down by Regulation No 1582/91, whereupon AIMA paid to the successful tenderer the amount for the processing of the beef and released the security relating thereto. Wesotra, a transport company, was responsible for the carriage of the canned products to the people of the former Soviet republics.

16 When the authorities in some of those republics claimed that the canned goods delivered were unfit for consumption, the Commission made investigations. In particular, it inspected Nuova Irpinia's factory and analysed several series of samples in order to check the quality of the suspect product.

17 The results of those investigations convinced the Commission that the complaints were well founded and that the unfitness for consumption of the canned meat delivered to the former Soviet republics was caused by insufficient sterilization of

the canned meat by Nuova Irpinia. Since the consignments of those canned goods were not identifiable, the Commission considered it necessary to arrange for the recall of the whole of Nuova Irpinia's production. Tests carried out on the canned goods after they had been recalled confirmed the Commission's appraisal of the facts.

The decision at issue

18 The Commission therefore decided to exclude from the expenditure chargeable to the EAGGF the sum of LIT 18 934 858 259, which corresponds to the expenditure incurred by the EAGGF in respect of the canned meat produced in Nuova Irpinia's factory on behalf of BECA. The documents before the Court show that the contested decision is based principally on the following grounds:

— a considerable part of the canned beef produced in Nuova Irpinia's factory and supplied to the former Soviet republics proved to be unfit for human consumption;

— the deterioration of part of the produce was found to be due to inadequate sterilization of the meat to be processed;

— all the suspect produce had to be withdrawn and will have to be destroyed, because, contrary to the Community requirements, the canned goods affected were not identifiable by lot;

— when an inspection was carried out by the Commission's officials at Nuova Irpinia's factory, it was clear many irregularities had been committed in the

course of the production cycle and that the Italian supervisory authorities had not discovered them;

— the permanent physical controls which should have been effected in accordance with Article 9 of Regulation No 1582/91 appear therefore to have been neither reliable nor exhaustive;

— consequently, the Italian intervention agency should not have paid the processing costs in question.

The heads of complaint

19 The Italian Republic claims that examination of the regulations in question shows that the supply of canned beef was the subject-matter of contracts between the Commission and the successful tenderers, following a tendering procedure for the canning of intervention meat. On the basis of that hypothesis it expounds two separate pleas. In the first, it claims essentially that, having regard to the contractual nature of the legal relationship between BECA and the Commission, the latter should have acted in accordance with the rules of contract law. In the second, it effectively contests the form and results of the Commission's investigations.

The first plea

20 The Italian Republic claims that the action taken against it by the Commission has no legal basis. The supply contract was concluded between the Commission and

BECA in the context of humanitarian action, which does not fall within the scope of the common agricultural policy, so that the provisions and principles peculiar to that policy do not apply to the legal relationships which arose in the course of that action. The Commission was obliged, following the rejection of the produce by the authorities of the countries of destination, to investigate the existence and cause of the alleged defects in consultation with the interested parties, namely the processor, the national intervention agency and the transporter. If proof of the product's unfitness for consumption had been given and the supplier had not shown that he was not responsible for it, the supplier would have had to repay the sums received. The Italian Government concludes that it is only where it has proved impossible to recover the sums paid for the supply of the goods that the Commission could, where appropriate, hold the Italian Republic liable.

21 The Commission contends that Regulation No 598/91 falls entirely within the ambit of the common agricultural policy. Since humanitarian action serves also to reduce intervention stocks, it is one of the instruments of the agricultural policy. As an example, it refers in particular to the free distribution of goods to the underprivileged.

22 It denies the existence of a contractual link between it and the successful tenderers, and BECA in particular, and observes that the question whether it has a contract with BECA is irrelevant in the present case, because the contested decision merely refused to charge to the EAGGF the irregular payments made by AIMA to the successful tenderer on account of the breach of its obligation to supervise the goods pursuant to Article 9 of Regulation No 1582/91.

23 The Court notes that Regulation No 598/91 is expressly based on Article 43 of the EEC Treaty, now the EC Treaty, relating to the common agricultural policy.

According to the first and second recitals in the preamble to that regulation, the action envisaged, while essentially humanitarian in aim — which is why the Community legislature also based the regulation on Article 235 of the EEC Treaty — was to be carried out giving priority to supplying agricultural products in storage as a result of intervention measures. That use of intervention products was also regarded as a means of regularizing the agricultural markets. Article 1(2)(b) of Regulation No 729/70 states that intervention intended to stabilize the agricultural markets is to be financed by the Guarantee Section of the EAGGF. Furthermore, Article 3 of Regulation No 598/91 refers to the procedure laid down in Article 13 of Regulation No 729/70 as regards the determination of the accounting value of the products transferred to the Soviet Union.

24 It follows that the urgent action for the supply of agricultural products intended for the people of the Soviet Union, which is the subject-matter of Regulation No 598/91, falls within the scope of Regulation No 729/70. Consequently, the relationships between the Commission and the Member States, and in particular the Italian Republic, are governed by the rules on the operation and financing of the EAGGF, Guarantee Section.

25 Articles 2, 3 and 5(2)(b) of Regulation No 729/70 and the case-law of the Court of Justice (Case 11/76 *Netherlands* v *Commission* [1979] ECR 245) indicate that expenditure undertaken by a Member State by way of intervention intended to regularize the agricultural markets, like other expenditure falling within the scope of the common agricultural policy, is to be the subject of a procedure for the clearance of accounts, during which a decision is taken to charge the expenditure either to the Community budget or to the Member State concerned, depending on whether or not it corresponds to expenditure undertaken 'according to Community rules'.

26 Consequently, the Italian Government's first plea must be rejected.

The second plea

27 The applicant claims that when the Commission gathered evidence relating to the defective quality of the goods, it infringed the rule that all parties should be heard, to the detriment of the Italian intervention agency responsible for supervising the processing of the product.

28 It observes that the Commission instructed the company which had transported the canned goods to the countries of the former Soviet Union and which was therefore involved in the action in question, and indeed even contractually liable to the Commission, to collect and ship to it the samples to be analysed, without even involving the Italian authorities in that exercise.

29 It claims, furthermore, that in any event none of the evidence on which the Commission relied when adopting the decision at issue proves that AIMA was responsible for the failure to achieve the purpose of the Community action; the recovery measure is therefore unlawful for abuse of power.

30 The Commission contests those claims.

31 As to the alleged procedural irregularities in establishing the evidence, it states that the samples to which the Italian Government refers were collected by the local authorities and not by the transporter.

32 As regards the alleged insufficiency of the evidence adduced in support of the decision at issue, the Commission claims that it has been sufficiently shown both that the meat's unfitness for consumption was due to poor sterilization during processing and that AIMA had not fulfilled its obligation of supervision in accordance with Article 9 of Regulation No 1582/91.

33 As to the alleged procedural defect in establishing the evidence, it should be noted that even if the Italian Republic's objections in that respect are well founded, the rejection of that evidence is not sufficient to justify the annulment of the decision at issue. It is clear from the documents before the Court that the Commission considered that the results of the tests performed on the meat returned to Italy, in respect of which the Italian Republic does not allege any procedural irregularity, were in themselves sufficient to provide the necessary evidence to justify its decision. Even in the absence of the evidence challenged by the Italian Government, therefore, the content of the decision would not have been different.

34 As regards the second objection relied on by the Italian Government in the context of this plea, namely the insufficiency of the evidence to support the contested measure, it must be held, first, that the documents before the Court show that it has been proved, in particular by the results of the tests performed by the Italian laboratories, that some of the canned meat sent to the former Soviet republics was spoiled, and secondly that those same tests, whose procedural irregularity has not been disputed by the Italian Government, indicated a lack of sterilization as the probable cause of the defects.

35 Secondly, the inspection by the Commission's staff of the factory where the meat was processed revealed irregularities in the production of the suspect canned meat

which the Italian authorities, who had a supervisory obligation pursuant to Article 9 of Regulation No 1582/91, had not discovered.

36 Where the Commission refuses to charge expenditure to the EAGGF on the ground that it was incurred as a result of breaches of Community rules imputable to a Member State, it is for the Member State to show that the conditions for obtaining the financing disallowed are satisfied (Case C-385/89 *Greece* v *Commission* [1992] ECR I-3225, paragraph 30). That case-law also applies in circumstances such as the present where on the basis of conclusive results of the testing of samples and an inspection of the production facilities the Commission decides that the Member State in question has not satisfied the obligation to check adequately the quality of the canned meat before releasing the delivery security and paying to the producer the amount indicated in his tender.

37 In the present case, the Italian Republic has not adduced any specific and significant evidence to cast doubt on the conclusions to which the Commission came or the consequences which it drew therefrom.

38 Consequently, the second plea must also be rejected.

39 It follows that the application must be dismissed in its entirety.

Costs

40 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 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.

Edward Puissochet Moitinho de Almeida

Gulmann Wathelet

Delivered in open court in Luxembourg on 6 June 1996.

R. Grass D. A. O. Edward

Registrar President of the Fifth Chamber