JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

11 December 2003 *

In Case T-306/00,

Conserve Italia Soc. coop. rl, established in San Lazzaro di Savena (Italy), represented by M. Averani, A. Pisaneschi and S. Zunarelli, lawyers, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by L. Visaggio, acting as Agent, assisted by M. Moretto, lawyer, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment of Commission Decision C (2000) 1752 of 11 July 2000 reducing aid from the Guidance Section of the EAGGF for Project No 88.41.IT.0020.0 entitled 'Technical modernisation of an establishment processing in the fruit and vegetable sector at Alseno (Piacenza)',

* Language of the case: Italian.

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of: R. García-Valdecasas, President, P. Lindh and J.D. Cooke, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 3 June 2003,

gives the following

Judgment

Legal background

Council Regulation (EEC) No 355/77

1 Article 1(3) and Article 2 of Council Regulation (EEC) No 355/77 of 15 February 1977 on common measures to improve the conditions under which agricultural products are processed and marketed (OJ 1977 L 51, p. 1) provide that the Commission may grant aid for common measures by financing through the Guidance Section of the European Agricultural Guidance and Guarantee Fund

(EAGGF) projects which are included in the specific programmes drawn up in advance by the Member States and approved by the Commission, which are designed to develop or rationalise the treatment, processing or marketing of agricultural products.

2 Regulation No 355/77 was repealed on 1 January 1990 by Council Regulation (EEC) No 4256/88 of 19 December 1988 (OJ 1988 L 374, p. 25), and by Council Regulation (EEC) No 866/90 of 29 March 1990 (OJ 1990 L 91, p. 1), apart from certain provisions which remained applicable temporarily until 3 August 1993 to projects introduced before 1 January 1990.

The 1983 Information Document produced by the Commission on the criteria for the choice of projects to be financed under Regulation No 355/77

3 On 10 June 1983 the Commission published information on the criteria for the choice of projects to be financed under Regulation No 355/77 (OJ 1983 C 152, p. 2, 'the 1983 Information Document'), in which it set out the selection and eligibility criteria that projects had to fulfil in order to qualify for aid from the EAGGF.

4 Title I, point 10, of the 1983 Information Document provides that 'execution of the project must not have begun before the submission of the request to the Commission'.

Commission Regulation (EEC) No 2515/85

5 Commission Regulation (EEC) No 2515/85 of 23 July 1985 on applications for aid from the EAGGF for projects to improve the conditions under which agricultural and fish products are processed and marketed (OJ 1985 L 243, p. 1) lays down in the annexes thereto what data and documents applications for aid must contain. In particular, those annexes contain explanatory notes to assist applicants in submitting their applications ('the explanatory notes').

6 Point 5.3 of the 'explanatory notes', the first part of Annex A to Regulation No 2515/85, states that 'projects begun before the application reaches the Commission cannot qualify for aid'. Point 5.3 of the explanatory notes refers to an undertaking which the applicant must make under point 5.3 of the aid application form, where he must put a cross in the box next to the following statement to indicate his agreement:

'We undertake not to start work on the project before receipt of the application for aid by the EAGGF Guidance Section'.

The 1986 working document

7 In 1986 the staff of the Directorate-General for Agriculture of the Commission, which is in charge of the EAGGF, drew up working document VI/1216/86-IT fixing the maximum amount of aid which may be granted from the EAGGF under Regulation No 355/77 ('the working document'). Point B.1 lists those

operations which are completely ineligible for aid. Under paragraph 5, operations or work which are started before the application is submitted are ineligible for aid, with the exception of:

'...

(b) the purchase of machines, equipment and building materials, including metal skeletons and prefabricated components (order and supply), provided that assembly, installation, incorporation and work on site, in so far as building materials are concerned, have not taken place before the application for aid was submitted...'.

8 Point B.1, paragraph 5, of the working document also states that the operations referred to under (b) are eligible for aid from the EAGGF.

Council Regulation (EEC) No 4253/88

9 On 19 December 1988 the Council adopted Regulation (EEC) No 4253/88 laying down provisions for implementing Regulation No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 374, p. 1). That regulation entered into force on 1 January 1989 and was amended on several occasions.

10 Article 24 of Regulation No 4253/88, entitled 'Reduction, suspension and cancellation of assistance', as amended by Council Regulation (EEC) No 2082/93 of 20 July 1993 (OJ 1993 L 193, p. 20), applicable at the time the Commission decided to reduce the aid, provides:

'1. If an operation or measure appears to justify neither part nor the whole of the assistance allocated, the Commission shall conduct a suitable examination of the case in the framework of the partnership, in particular requesting that the Member State or authorities designated by it to implement the operation submit their comments within a specified period of time.

2. Following this examination, the Commission may reduce or suspend assistance in respect of the operation or measure concerned if the examination reveals an irregularity or a significant change affecting the nature or conditions for the implementation of the operation or measure for which the Commission's approval has not been sought.

3. Any sum received unduly and to be recovered shall be repaid to the Commission. Interest on account of late payment shall be charged on sums not repaid in compliance with the provisions of the Financial Regulation and in accordance with the arrangements to be drawn up by the Commission pursuant to the procedures referred to in Title VIII'.

Facts

11 On 17 July 1987 the Commission received an application for aid from the EAGGF, dated 22 May 1987, from Colombani Lusuco SpA ('Colombani'), a

company controlled by the Federazione italiana dei consorzi agrari (Federconsorzi), a major grouping of Italian agricultural cooperatives. That application was lodged by the Italian Government under Regulation No 355/77.

12 The aid was intended to support project No 88.41.IT.002.0 for the 'technical modernisation and rationalisation of production facilities at the establishment processing fruit and vegetables at Alseno (Piacenza)'. The aim of the project was in particular to modernise and replace certain equipment which had become technologically obsolete in the department packaging fresh vegetables, in order to increase its productivity.

13 In point 5.3 of the aid application form, signed by the beneficiary, the latter undertook 'not to start the work before the application for aid had been received by the Guidance Section of the EAGGF'.

14 On 24 September 1987 the Commission's Directorate-General for Agriculture informed the beneficiary that it had received the application for aid dated 17 July 1987.

15 The Commission approved project No 88.41.IT.002.0 by Decision C (88) 1950/369 of 21 December 1988 ('the decision to grant aid') and granted Colombani aid amounting to 819 321 930 Italian lire (ITL) towards a total investment of ITL 3 280 387 000, fixing the period within which the project was to be carried out as 17 July 1987 to 30 June 1990. The Commission informed the beneficiary of this by a letter sent on the same date, the sixth paragraph of which expressly stated:

'If any amendments are made to the project as described in the Commission decision granting aid from the Fund, please note that such amendments must be submitted to the Commission... before the new work proposed is carried out. The Commission will inform you as soon as possible of the outcome as regards the amendment proposal(s) and, if accepted, the relevant conditions. Failure to comply with the above-mentioned procedure... or the Commission's rejection of the amendments may result in discontinuation or reduction of the aid.'

16 In December 1989 Colombani acquired an establishment at Massa Lombarda, giving rise to the new company Massalombarda Colombani SpA, which thereby became the beneficiary of the aid ('the beneficiary' or 'Massalombarda').

17 By Decree No 5905 of 15 January 1990 the Ministero delle Risorse agricole, alimentari e forestali (Ministry of Agricultural, Food and Forestry Resources, the 'Italian Ministry of Agriculture') granted the beneficiary ITL 951 947 500 by way of national aid for the project.

18 On 8 and 9 February 1990 the Italian Ministry of Agriculture made an initial check on the way the work was being carried out. On 9 February 1991, following the application for a final check on the beneficiary and after an on-the-spot inspection, the Italian Ministry of Agriculture approved the certificate of inspection of the final state of the work.

19 In March 1993 the Italian authorities and the Commission conducted a joint inspection of the Alseno establishment in connection with the grant of other aid from the Fund. In view of the irregularities found during that inspection the Commission decided in 1994 to check the other projects for which the beneficiary had obtained Community aid, including project No 88.41.IT.002.0, which also concerned the Alseno establishment. On 12 September 1994 the Commission requested, by fax addressed to the Italian Ministry of Agriculture and the

beneficiary, that certain supporting documents and other documents be prepared in order to enable it to check during the forthcoming on-the-spot inspection whether the investment that had been made was in accordance with the project as approved and whether the conditions laid down when the project was approved had been met.

20 The Commission carried out the inspection on 26 September 1994, in the course of which several irregularities were found. The irregularities to which the present case refers were recorded in the inspection report of 30 September 1994 ('the report') signed by all the parties, including representatives of the beneficiary, as follows:

'...

(6) On 26 September 1994 Mr Mario Padoin compiled a list of invoices (Annex 4) concerning investment in the Alseno establishment prior to the date on which the application for aid was received by the Commission (17 July 1987). The work and purchases concerned the prefabrication of components for the line.

...

(8) The invoices indicated on the attached list (Annex 6) contain several irregularities, both as regards tax (delivery notes bear dates earlier than those of the corresponding invoices) and as regards compliance with Regulations No 355/77 and No 2515/85 (notes with dates earlier than those on which the application for the Commission's contribution was received, missing notes, etc).

....'

21 A later examination of the invoices made after the inspection revealed the acquisition of machinery for harvesting raw materials which was not provided for in the project approved by the Commission.

22 In October 1994 Massalombarda was acquired, and ultimately in 1997 taken over, by Frabi SpA (which subsequently became Finconserve SpA), the finance company of the group Conserve Italia Soc. coop. rl., which is the applicant in this case and which constitutes the main network of agricultural cooperatives in Italy and one of the largest in Europe.

23 By letter of 22 May 1995 the Commission informed the beneficiary and the Italian authorities of the infringements that had been found and of its intention to initiate the procedure to discontinue the aid in order to recover the incorrect payments. It requested them to submit their observations in that regard. The letter alleged that the beneficiary was responsible for the following irregularities, inter alia:

'Whereas in the course of that investigation [the on-the-spot investigation of 26 September 1994] it was established that some investment had been carried out before the Commission received the project;

whereas it was established that some invoices charged to the Alseno establishment did not relate to that establishment;

whereas machinery for harvesting basic products of the soil which was not originally provided for was purchased and those purchases were not covered by the derogation referred to in Articles 5 and 6 of Regulation No 355/77'.

24 On 3 August 1995, 22 September 1995 and 27 February 1996 the beneficiary submitted its observations to the Commission. The Italian Ministry of Agriculture sent its observations to the Commission by letters dated 20 July 1995 and 20 September 1995.

25 By letter of 28 October 1996, following a meeting which took place on 22 October 1996 between the beneficiary and the Commission, the latter decided that the circumstances of the case called for a reduction in the aid rather than discontinuance of it and sent the beneficiary a draft decision concerning reduction in the aid. In that letter the Commission stated: 'As agreed..., we attach... a copy of the invoices relating to the premature start of work in connection with the Alseno establishment.

Commission officials have concluded that three invoices for purchases and construction work show that components were installed prematurely on the new line in the "fresh vegetables department". This is corroborated by the statement signed on 26 September 1994 by the person in charge of the Alseno establishment (Mr Padoin).

The invoices are as follows:

— No 30 of 24 July 1987 from Berletti,

— No 260 of 30 July 1987 from Casearmeccanica

— No 136 of 23 July 1987 from Izoteca.

Consequently, the draft decision to reduce aid will be amended to take into account the new calculation set out in the table annexed hereto (Annex 1)...'. Annex 1 to that letter shows the amount of the reduction in the aid and the method of calculation used by the Commission.

26 On 11 November 1996 the beneficiary submitted another statement of observations accompanied by an expert report relating to the three invoices which the Commission considered in its letter of 28 October 1996 as providing evidence of the premature start of the work (invoice No 30 of 24 July 1987 from Berletti, invoice No 260 of 30 July 1987 from Casearmeccanica and invoice No 136 of 23 July 1987 from Izoteca).

27 On 11 July 2000 the Commission adopted Decision C (2000) 1752, based on Article 24(2) of Regulation No 4253/88, reducing the aid granted and requiring the beneficiary to repay the sum of ITL 623 193 529 ('the contested decision'). The main grounds of the contested decision are as follows:

'Whereas:

...

(6-7) ... it has been found that some invoices provide evidence of installations and of construction work carried out on a new production line as part of the project; whereas that investment was made before the date on which the Commission received the application for aid from the beneficiary, that is to say, before 17.7.87.

(8) This fact is confirmed by a statement, signed on 26.9.94, and submitted voluntarily by the person in charge of the Alseno establishment to Commission officials and the [Italian Ministry of Agriculture] representatives conducting the inspection.

(9) This fact infringes the undertaking made by [the] beneficiary, in accordance with the provision appearing on page 5 of Annex A1 to Commission Regulation No 2515/85, in that application for aid; whereas it also infringes point I.10 of the [1983 Information Document] under Regulation (EEC) No 355/77.

(10) It has also been found that certain invoices, although charged to the Alseno establishment, did not in fact concern that establishment.

(11) Machinery was bought for harvesting basic products of the soil which was not provided for in the project approved by the Commission decision.

...

(21) On 28.10.96 Commission staff... sent [the] beneficiary a letter explaining how the proposed reduction in the amount of aid had been calculated together with a copy of the three invoices that provided evidence of the premature start.

...

(26) In the light of the information given above, the irregularities found affect the conditions for implementing the project in question.

...

(29) In the light of the information given above, it is necessary to reduce the aid granted.

(30) The beneficiary is required to repay the amount of [ITL] 623 193 529, payment of which has become devoid of purpose.'

Procedure and forms of order sought

28 By application lodged at the Court Registry on 21 September 2000 the applicant brought the present action.

29 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber) decided to open the oral procedure. The parties presented oral argument and their replies to the questions from the Court at the hearing on 3 June 2003.

30 The applicant claims that the Court should:

— annul Commission Decision C (2000) 1752 of 11 July 2000;

— order the Commission to pay the costs.

31 The Commission contends that the Court should:

— dismiss the application in its entirety;

— order the applicant to pay the costs.

Law

32 The applicant puts forward four pleas in law in support of its application for annulment of the contested decision. The first plea alleges that the contested decision contains an inadequate statement of reasons; the second plea alleges

infringement and misinterpretation of point 5.3 of the explanatory notes, of point I.10 of the 1983 Information Document and of point B.1, paragraph 5(b), of the working document, as regards recitals 7 to 9 of the contested decision; the third plea alleges incorrect assessment of the facts referred to in recitals 10 and 11 in the contested decision; the fourth plea alleges infringement of the principle of proportionality.

The first plea: the contested decision contains an inadequate statement of reasons

1. Preliminary observations

Arguments of the parties

33 The applicant contends that the circumstances set out in the contested decision by no means provide an adequate statement of reasons as required by the settled case-law of the Court of Justice and the Court of First Instance. It claims that it was not possible for it to determine from an examination of the contested decision which invoices the Commission considered as not being in order in the context of the complaint referred to in recitals 7 and 9 or in the context of the complaint referred to in recital 10, nor the machinery subject to criticism in recital 11 in the contested decision. According to the applicant, the very vague nature of that evidence did not enable it to discern the real reasons forming the basis for the contested decision and therefore made it very difficult for it to exercise its right of defence.

34 The applicant states that the statement of reasons for the contested decision is inadequate, even when reference is made to its context.

35 The Commission considers that that plea is unfounded since the applicant was in a position to identify quite clearly the invoices and machinery at issue and to understand the reasons why the Commission concluded that they were not in order. It points out in particular that, according to *Delacre and Others* v *Commission* (Case C-350/88 [1990] ECR I-395, paragraph 16), the statement of the grounds for a decision must be assessed with regard not only to its wording but also to its context.

36 In the present case, with regard to the context within which the contested decision was adopted, the Commission points out that the applicant signed the report, which sets out clearly in the annexes the list of invoices sent by the beneficiary providing evidence of the premature start of the work, and the list of invoices relating to other establishments. Moreover, the applicant received detailed information from the Commission in the letter of 22 May 1995 regarding the complaints the latter was making against it. The applicant also took an active part in the administrative procedure, disputing those complaints in detail on several occasions, which showed that it was fully aware of the facts and points of law concerned and that it was in possession of the evidence required to defend its rights.

Findings of the Court

37 It is clear from settled case-law, first, that under Article 253 EC the reasons stated for a measure must disclose clearly and unequivocally the reasoning of the Community authority which adopted it, so as to make the persons concerned aware of the reasons for the measure and thus enable them to defend their rights, and so as to enable the Community Courts to exercise their supervisory jurisdiction, and, second, that the extent of the obligation to state reasons must be assessed in the light of its context (Joined Cases T-551/93 and T-231/94 to

T-234/94 *Industrias Pesqueras Campos and Others* v *Commission* [1996] ECR II-247, paragraph 140; Case T-216/96 *Conserve Italia* v *Commission* [1999] ECR II-3139, '*Conserve Italia I*', paragraph 117, and Case T-186/00 *Conserve Italia* v *Commission* [2003] ECR II-719, '*Conserve Italia II*', paragraph 95).

38 Moreover, according to case-law, the statement of reasons required by Article 253 EC must be appropriate to the nature of the measure in question (Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others* v *Commission* [1988] ECR 219, paragraph 71). In that regard, the grounds for a decision entailing serious consequences for the recipient of Community aid must clearly show the grounds justifying the measure adopted against it by the administration (Case T-450/93 *Lisrestal and Others* v *Commission* [1994] ECR II-1177, paragraph 52, and Case T-126/97 *Sonasa* v *Commission* [1999] ECR II-2793, paragraph 65).

39 It is in the light of those principles that the statement of reasons for the contested decision should be considered.

2. Recitals 7 to 9 of the contested decision concerning the invoices providing evidence that the work started prematurely

Arguments of the parties

40 The applicant contends with regard to recitals 7 to 9 in the contested decision, which state that some invoices provide evidence of installation and construction work carried out before the date on which the Commission received the

application for aid, that the letter of 22 May 1995 initiating the infringement proceedings only gives vague references to the list of invoices contained in Annex 6, point 1, to the report, mentioning nine invoices. In the letter of 28 October 1996 concerning the calculation of the reduction in the amount of aid the Commission appeared however to focus the complaint on only three of the invoices.

41 The applicant also contends that that letter of 28 October 1996 does not meet the requirement to state adequate reasons either. First, it goes back four years before the contested decision was adopted and, second, it failed to establish definitively what irregularities had been found and, what is more, it is set in the broader context of the comments made by the Commission in the report, in which the Commission identified over 77 invoices that were not in order. Those circumstances do not therefore permit the conclusion to be drawn that it is only those three invoices that form the basis for the contested decision. Furthermore, the principle of stating reasons by reference to another document, accepted in Community case-law (Case T-504/93 *Tiercé Ladbroke* v *Commission* [1997] ECR II-923, paragraph 54, and Case T-65/96 *Kish Glass* v *Commission* [2000] ECR II-1885, paragraph 51), cannot be relied upon in the present case because the contested decision does not contain any reference to the letter in question.

42 The Commission states that the letter of 28 October 1996 clearly identified the three invoices that provided evidence of the premature start of the work (namely invoice No 30 of 24 July 1987 from Berletti, invoice No 260 of 30 July 1987 from Casearmeccanica and invoice No 136 of 23 July 1987 from Izoteca), as is stated in recital 21 in the contested decision.

Findings of the Court

43 The complaint referred to in recitals 7 to 9 of the contested decision does not list the invoices specifically disputed in that complaint. However, recital 21 in the

contested decision states that on 28 October 1996 the Commission sent a copy of the three invoices that provided evidence of the premature start.

44 The letter of 28 October 1996 concerning the calculation of the reduction in the amount of aid expressly states that the Commission only considered that invoice No 30 of 24 July 1987 from Berletti, invoice No 260 of 30 July 1987 from Casearmeccanica and invoice No 136 of 23 July 1987 from Izoteca relating to purchases and construction work provided evidence of premature installation work. That detail is repeated in Annex 1, point 1, to that letter, which contains details of how the reduction is calculated. Therefore, since recital 21 in the contested decision refers exclusively to 'the three invoices that provided evidence of the premature start', the applicant had sufficient information to identify which three invoices recitals 7 to 9 were based on and to dispute the alleged irregularity in full knowledge of the facts.

45 That assessment cannot be invalidated by the applicant's argument that the letter in question was written four years before the contested decision was adopted and did not definitively establish what irregularities had been found. Since that letter contains the calculation of the reduction in the amount of Community aid, which the Commission in fact used in the contested decision, there was no reason for the applicant to assume that the disputed invoices identified in that calculation were subsequently altered in any way. It should also be pointed out that in its additional observations of 11 November 1996 the applicant produced an expert report relating exclusively to the three invoices referred to in the letter of 28 October 1996 and that in its application the applicant merely disputed the irregularity of the three invoices, specifically on the basis of the wording of that letter. Therefore, contrary to what the applicant maintains, it cannot be denied that it had sufficient information to dispute the alleged irregularity in full knowledge of the facts.

46 The argument that there was an inadequate statement of reasons in respect of the complaint referred to in recitals 7 to 9 of the contested decision must be rejected.

3. Recital 10 in the contested decision, concerning invoices which, although charged to the Alseno establishment, did not in fact concern that establishment

Arguments of the parties

47 The applicant contends with regard to recital 10 in the contested decision, which states that certain invoices, although charged to the Alseno establishment, did not in fact concern that establishment, that the references to the report which the Commission made in its defence are insufficient to identify the invoices concerned. That document only records a presumed irregularity which should have subsequently been formally alleged against the beneficiary.

48 The Commission claims in its defence and its rejoinder that the complaint referred to in that recital can logically only refer to the nine invoices specifically listed in Annex 6, point 1, of the report, and that there was no reason for the applicant to assume that that complaint had subsequently undergone any amendment as compared with the complaint alleged against the beneficiary during the inspection and in the letter of 22 May 1995 concerning the initiation of the discontinuance procedure.

49 However, the Commission maintained at the hearing in response to the questions from the Court that recital 10 referred exclusively to invoice No 3012 from Comar and invoice No 1466 from Line Switch, cited in full in Annex 1, point 3, to the letter of 28 October 1996 relating to the calculation of the reduction in the amount of aid.

Findings of the Court

50 It should be noted at the outset that recital 10 in the contested decision, which states that certain invoices, although charged to the Alseno establishment, did not in fact concern that establishment, does not identify the invoices concerned.

51 As regards the context within which the contested decision was adopted, it is clear from the file that Annex 6, point 1, to the report identified nine invoices relating to the Alseno establishment that were considered not to be in order, namely:

— Invoice No 1938 of 31 May 1988 from FMI;

— Invoice No 2917 of 30 July 1988 from FMI;

— Invoice No 74 of 30 January 1988 from FMI;

— Invoice No 2043 of 30 August 1989 from Zaninox;

— Invoice No 3045 of 31 August 1988 from FMI;

— Invoice No 234 of 29 July 1988 from Tecnotubi;

— Invoice No 3541 of 30 September 1987 from FMI;

— Invoice No 1813 of 4 September 1987 from Cimme;

— Invoice No 1466 of 16 December 1987 from Line Switch.

52 In addition, the letter of 22 May 1995 initiating the discontinuance procedure set out that complaint with a reference to the inspection conducted on 26 September 1994 and, hence, the invoices contained in the said list. The applicant claimed during the administrative procedure, moreover, that those nine invoices were in order.

53 However, in its letter of 28 October 1996 concerning the calculation of the reduction in the amount of aid the Commission expressly referred to two invoices wrongly charged to the Alseno establishment (invoice No 3012 of 28 July 1988 from Comar and invoice No 1466 of 16 December 1987 from Line Switch), stating in that regard that they were 'not the same invoices as those under the sub-heading "fresh vegetables department"'. In addition to the fact that it is not clear from that letter that the nine invoices initially disputed during the inspection are still referred to in the complaint — except for invoice No 1466 from Line Switch —, it should be pointed out that the Commission includes in the calculation of the amount of the reduction, without giving any explanation, invoice No 3012 from Comar, which does not appear on the list in Annex 6, point 1, to the report and which, according to the file, was not adduced as evidence against the applicant during the administrative procedure.

54 At the hearing the Commission stated in response to questions from the Court that the invoices attributed in the context of the complaint changed during the administrative procedure, and confirmed that recital 10 only referred to the two

invoices expressly indicated in Annex 1, point 3, to the letter of 28 October 1996, and that all other invoices were excluded. However, those statements are not supported by any evidence on the file and are directly contradicted by the Commission's assertions in its defence (paragraph 42) and its rejoinder (point 14), in which it clearly stated that the invoices referred to in that recital were the nine invoices listed in Annex 6, point 1, to the report and that there was no evidence from which the applicant might assume that the complaint had subsequently been amended.

55 It is not therefore possible to determine on the basis of the file, or from the context in which the contested decision was adopted, which the invoices disputed in recital 10 in the contested decision were, since the Commission was not even able to state clearly before the Court which invoices were referred to in that recital. The applicant is therefore right to state that it was not in a position to identify the invoices concerned and to challenge properly the alleged irregularity.

56 Recital 10 in the contested decision is therefore vitiated by an inadequate statement of reasons.

4. Recital 11 in the contested decision, concerning the purchase of machinery not provided for in the approved project

Arguments of the parties

57 The applicant claims with regard to recital 11, which states that machinery was bought for harvesting basic products of the soil which was not provided for in the project approved by the Commission decision, that the references made by the Commission to the observations it submitted during the administrative procedure constitute an inadequate statement of reasons.

58 The Commission contends that the circumstances described in recital 11 enabled the applicant to determine precisely the contested machinery, as is clear from the observations submitted by the applicant during the administrative procedure and its application; it referred consistently to the acquisition of two pea-shelling machines.

Findings of the Court

59 The recital in question does not identify the machines whose purchase is disputed. It is clear from the context of the contested decision, however, that the applicant, as it acknowledged at the hearing, was in a position to determine which machinery was at issue and to understand the reasoning on which the Commission's complaint was based.

60 First, in the letter initiating the discontinuance procedure adopted on 22 May 1995 the Commission alleged that the beneficiary had acquired machinery for harvesting basic products of the soil which had not originally been provided for. In the observations submitted on 3 August 1995 the applicant expressly stated that the complaint made in that letter of 22 May 1995 concerned the purchase of two pea-shelling machines which had not been included in the original project submitted to the Commission. Moreover, the detailed list of the documents supporting the project expenditure signed by the applicant and annexed to the certificate attesting completion of the work issued by the Italian authorities on 9 February 1991, annexed to the applicant's observations, shows, as the first actual expenditure, the purchase of two pea-shelling machines corresponding to invoice No 159 of 23 February 1989 from FMC for ITL 641 341 800.

61 Second, Annex 1, point 2, to the letter of 28 October 1996 concerning the calculation of the reduction in the amount of aid expressly mentions invoice No 159 of 23 February 1989 from FMC for ITL 641 341 800, as corresponding to the purchase of machines for harvesting products of the soil which were not provided for in the project. That invoice coincides exactly with the one indicated by the applicant in the detailed list appearing in the annexes to its observations of 3 August 1995.

62 The applicant therefore has sufficient evidence from which to identify the machinery on which that recital was based and to dispute the alleged irregularity in full knowledge of the facts. Moreover, the applicant referred expressly in its application (paragraph 50) to the two shelling machines disputed and identified during the administrative procedure, which means that the theory of an inadequate statement of reasons put forward by the applicant in respect of that complaint is totally unfounded.

63 The plea alleging an inadequate statement of reasons put forward by the applicant with regard to the complaint referred to in recital 11 in the contested decision must therefore be rejected.

5. Conclusion

64 In the light of the above it must be concluded that the contested decision meets the requirements with regard to the statement of reasons in respect of recitals 7 to 9 and 11. However, the complaint referred to in recital 10 in the contested decision is vitiated by an inadequate statement of reasons.

65 The plea alleging an inadequate statement of reasons is therefore partially founded, as regards recital 10 in the contested decision, and must be rejected as being unfounded as regards the other recitals.

The second plea: infringement and misinterpretation of point 5.3 of the explanatory notes, of point I.10 of the 1983 Information Document and of point B.1, paragraph 5(b), of the working document, as regards recitals 7 to 9 of the contested decision

66 The applicant contends that the Commission was wrong to consider that the invoices referred to in recitals 7 to 9 of the contested decision showed that some of the investment under the project being financed contravened point 5.3 of the explanatory notes and point I.10 of the 1983 Information Document because it was started prematurely.

67 This plea is divided into two limbs. The first limb alleges misinterpretation of point 5.3 of the explanatory notes and of point I.10 of the 1983 Information Document as regards the date to be taken into consideration in order to determine whether the work started prematurely. The second limb is based on incorrect assessment of point B.1, paragraph 5(b), of the working document concerning the possibility of making acquisitions and of carrying out work before applying for aid.

1. First limb of the second plea

Arguments of the parties

68 The applicant claims that the Commission misinterpreted the rules governing the subject at issue, since it stated that the beneficiary carried out premature investment on the basis, under point 5.3 of the explanatory notes, of the date on which the Commission received the application, 17 July 1987, instead of taking into consideration the date on which the application was submitted, namely 22 May 1987.

69 In that regard, the applicant points out that point I.10 of the 1983 Information Document and point B.1, paragraph 5(b), of the working document make clear that the date to be taken into consideration is the date of the 'submission' of the application and not the date of the 'receipt' of the application. Those two provisions constitute the only rules for applying Regulation No 355/77, unlike point 5.3 of the aid application form, which is not an actual rule but rather a particular contained in a facsimile formula for the submission of applications.

70 The applicant also contends that *Conserve Italia II* did not contain an express ruling on the question of the relevant date as regards the start of the work. In [that] case the Court favoured the wording of Regulation No 2515/85 (Articles 1 and 2) and of Regulation No 355/77 (Article 13), which consistently refer to the 'presentation' or the 'submission' of the application and not to its receipt.

71 The applicant contends that this comment has a decisive effect in the present case. The three invoices complained of, which were submitted immediately after completion of the work, were dated 24 July 1987 (Berletti No 30), 30 July 1987 (Casearmeccanica No 260) and 23 July 1987 (Izoteca No 135), which shows that the work was carried out after 22 May 1987, the date on which the beneficiary submitted the application for funding, and even after 17 July 1987, the date it was received by the Commission. Moreover, the reference to the date of receipt made in the statement contained in Annex 4 to the report is of no significance since it is a reference made in good faith by the applicant to the date given by the Commission.

72 The Commission considers that the applicant's theory is unfounded. First, there is no conflict between the rules at issue, since point I.10 of the 1983 Information Document does indeed refer to 'submission', but to the submission of applications for aid by the authorities of the Member States — which act as the applicants' intermediaries — to the Commission. Therefore the undertaking

referred to in point 5.3 of the explanatory notes is the same as that in point I.10 of the 1983 Information Document. Second, the applicant acknowledged during the administrative procedure that the relevant date was not that on which the application for aid was submitted, but that on which the Commission received it.

Findings of the Court

73 The requirement that the project must not be started before the application for aid is received by the Commission is contained in point 5.3 of the explanatory notes, which states that 'projects begun before the application reaches the Commission cannot qualify for aid'. That point is corroborated by point 5.3 of the aid application form (the form in the first part of Annex A to Regulation No 2515/85), which contains an undertaking by the applicant for aid not to start work on the project before receipt of the application for aid by the EAGGF. Thus, by signing the aid application form the applicant undertook not to start work before 'receipt' of the application for aid by the Commission.

74 In that regard, it is appropriate to point out first of all that the Court has already ruled that the instructions contained in the aid application form have binding force identical to that of the regulation to which they are annexed, namely Regulation No 2515/85 (*Conserve Italia I*, paragraph 61, and *Conserve Italia II*, paragraph 58). Therefore, the applicant's argument that the undertaking referred to in point 5.3 of the application for aid has no regulatory effect cannot be accepted.

75 In *Conserve Italia II* (paragraph 62) the Court held that there was no conflict between the provisions governing the issue in question with regard to the relevant date for assessing whether the work had been started prematurely.

76 Thus, the reference made in point I.10 of the 1983 Information Document to the 'submission of the request to the Commission' and that contained in point B.1, paragraph 5(b), of the working document to the date on which 'the application for aid was submitted' do not, as has been ruled, conflict with the reference made in point 5.3 of the explanatory notes to the date on which 'the application reaches the Commission'. Nor is there any conflict between those provisions and the reference made in point 5.3 of the aid application form to the date of the 'receipt of the application for aid by the EAGGF'. All those references must necessarily be understood as referring to the date on which the Commission receives the application for aid which is forwarded to it by the competent national authorities.

77 The argument put forward by the applicant that Articles 1 and 2 of Regulation No 2515/85 and Article 13 of Regulation No 355/77 refer to the submission of the aid application and not to receipt of that application does not affect that assessment. Article 1 of Regulation No 2515/85 refers to applications for aid 'to be submitted on or after 1 May 1985' and Article 2 refers to applications 'submitted to the competent national authorities... for presentation to the EAGGF'. Moreover, Article 13 of Regulation No 355/77 provides that applications for aid from the Fund must be submitted through the Member State concerned before 1 May. Apart from the fact that these are regulatory provisions which have no connection with the undertaking in question, they do not alter the fact that it is the competent national authorities which submit the aid applications to the Commission and, therefore, that the date for the submission of applications must also be understood to be the date on which they are received by the Commission.

78 Moreover, as the Commission rightly points out, the beneficiary referred expressly to the date of 'receipt' of the aid application in the unsolicited statement it made during the inspection concerning the work that was carried out prematurely, which was attached to Annex 4 to the report. Thus, the fact that the disputed invoices are dated 23 to 30 July 1987 and that they were submitted immediately the work was completed is irrelevant, since the applicant expressly acknowledged in that statement that the work corresponding to those invoices took place before 17 July 1987.

79 The Commission therefore interpreted the explanatory notes and the 1983 Information Document correctly in considering that the date to be taken into consideration for the start of the work was that on which the Commission received the application for aid and that therefore the work carried out by the applicant was premature.

80 The first limb of the second plea must therefore be rejected.

2. Second limb of the second plea

Arguments of the parties

81 The applicant contends that at any event the Commission wrongly interpreted point B.1, paragraph 5(b), of the working document, since the preparatory and ancillary work referred to in the contested invoices does not constitute work started before the application was submitted in terms of the Community regulations.

82 According to the applicant, that provision permits the prior acquisition of machines and building materials provided they are not assembled or installed before the aid application is submitted to the Commission. Hence, that rule authorises the purchase of equipment on condition that it is not rendered operational; this includes installations and machinery which although they have been assembled need further components to be fitted in order for them to operate.

83 In the present case, the three invoices referred to in recitals 7 to 9 related to preparatory and ancillary work and additional equipment to be installed on the filling and vacuum-sealing line for the processing of beans and peas, delivered on 31 July 1987, according to delivery note No 482 from Zacmi. Given that that equipment would not have been able to operate independently until the production line in question had been delivered and fitted to it, the preparatory work should be regarded as authorised under the terms of point B.1, paragraph 5(b), of the working document.

84 Mr Padoin's statement of 26 September 1994 attached to the report confirms that assessment, since it refers to the 'delivery' of machinery and equipment before the Commission received the application on 17 July 1987, and not to the assembly, fitting or incorporation of that equipment. Thus, it is clear from the statement that the equipment acquired was used solely for ancillary work in order to prepare the area intended for the new filling and vacuum-sealing line. The statement on which in particular the Commission based the contested decision made it absolutely clear that the fitting, installation and putting into service of the purchases took place after 31 July 1987, when the Zacmi Group had delivered the production line.

85 The Commission contends that the applicant's interpretation of the working document is unfounded. First, that interpretation blatantly conflicts with the wording of point B.1, paragraph 5(b), of the working document, which provides

exceptions that apply only if the applicant complies with certain conditions, such as the requirement not to carry out any 'assembly'. The applicant has acknowledged in the present case that the machinery had already been assembled. Second, that provision constitutes an exception and hence it should be interpreted restrictively.

Findings of the Court

86 The applicant contends that the Commission incorrectly interpreted point B.1, paragraph (5), of the working document since the work referred to in the three invoices disputed in the letter of 28 October 1996 is not work carried out before the submission of the aid application under the exception provided for in the working document.

87 It is necessary to check first of all the nature and extent of the work carried out prematurely by the beneficiary.

88 With regard to invoice No 30 of 24 July 1987 from Berletti, it can be seen from its subject-matter that it relates to 'preparation work for the installation of the new pea filling line'. Moreover, the sworn expert's report prepared on 5 November 1996 states that that work consisted of repairing tiling and drainage pipework that had deteriorated as a result of wear and tear, 'carried out for the existing processing line but also suitable for implementing the proposed improvement project'.

89 Invoice No 260 of 30 July 1987 from Casearmeccanica relates to 'setting up the new pea filling line', the 'construction and assembly of conveyor belts to carry empty cans from the pallet unloader to the filling machine' and 'installation of the

line delivering full cans to the steriliser'. The expert report of 5 November 1996 also states that the work involved rebuilding in stainless steel damaged belt-type or cable conveyors during the annual shut-down of the line, and that 'the belts modified in this way for the existing line were then installed on the new line, with which they were compatible since its layout had not been modified'.

90 Lastly, invoice No 136 of 23 July 1987 from Izoteca relates to 'the construction and assembly of raised protective casings for machinery on the pea filling line' and the 'assembly of the Archimedes screw for extracting peas'. In that regard, the expert report of 5 November 1996 points out that the work involved renewing the safety casings on damaged machinery and gantries and reconstructing them in stainless steel, and that those casings, 'which were used on the existing line, were subsequently used in the installation of the new line'.

91 It is clear from the description of the invoices and the expert report set out above that the work did indeed include, as the applicant acknowledged, actual installation and *in situ* assembly work.

92 That assessment is moreover confirmed by the statement of 26 September 1994 attached to the report, which states expressly that 'a whole range of ancillary work was carried out', that 'additional equipment was purchased and installed' and that 'some of it was constructed beforehand at the establishment... in order to reduce the installation time after the delivery from the Zacmi Group (for example: sections of cable conveyors, sections of piping, protective casings and sections of belt-type conveyors, etc)'. The work and equipment referred to in the statement coincide with those referred to in the invoices and the expert report in question. Therefore, the applicant's argument that the wording of that statement shows that those invoices referred solely to the 'delivery' of machinery and equipment before 17 July 1987 and not to the assembly or incorporation of that machinery and equipment cannot be accepted.

93 It is also clear from the information provided in the expert's report and reproduced above that the equipment and work referred to in invoices No 260 from Casearmeccanica and No 136 from Izoteca did have an operational function on the existing line and that the work referred to in invoice No 30 from Berletti was also of benefit to the existing line before the delivery from the Zacmi Group. Therefore, contrary to what the applicant contends, it is apparent that ancillary equipment became operational before it was delivered and fitted to the Zacmi filling line on 31 July 1987.

94 The applicant's argument therefore has no factual basis.

95 At any event, it should be remembered that the exception provided for in point B.1, paragraph 5(b), of the working document permits the purchase of building materials, provided that assembly, installation, incorporation and work on site, in so far as building materials are concerned, have not taken place before the application for aid was submitted. That provision therefore permits the purchase of equipment provided it has not been the subject of any work on site or assembly, without drawing any distinction as to the possible secondary nature of the equipment purchased and the work carried out, or whether or not that equipment needed to be fitted to other equipment in order to operate.

96 Therefore, since all exceptions are to be strictly interpreted, the interpretation put forward by the applicant cannot in any case be accepted.

97 The Commission therefore correctly interpreted point B.1, paragraph 5, of the working document in considering that the work carried out by the beneficiary did not meet the conditions laid down in that provision. The second limb of the second plea must therefore be rejected.

98 In the light of the foregoing, the second plea relied upon by the applicant must be rejected in its entirety.

The third plea: incorrect assessment of the facts referred to in recitals 10 and 11 in the contested decision

99 The applicant pleads incorrect assessment of the facts referred to, on the one hand, in recital 10 in the contested decision, which states that certain invoices, although charged to the Alseno establishment, did not in fact concern that establishment and, on the other hand, in recital 11 in the contested decision, which states that machinery was bought for harvesting basic products of the soil which was not provided for in the project approved by the Commission decision.

1. The first limb of the third plea: irregularities in recital 10 in the contested decision

100 The applicant claims that the Commission's complaint in recital 10 in the contested decision does not correspond to reality, since the nine contested invoices charged to Alseno did not relate 'solely' to other establishments, as the defendant wrongly contends, but also related to the Alseno establishment.

101 As was held in points 50 to 56 above, recital 10 in the contested decision is vitiated by an inadequate statement of reasons. The Court is not therefore required to rule on whether the Commission made an incorrect assessment of the facts referred to in that recital.

2. The second limb of the third plea: irregularities in recital 11 in the contested decision

Arguments of the parties

102 The applicant contends that the Commission's complaint in recital 11 in the contested decision that the applicant purchased machinery for harvesting basic products of the soil which was not provided for in the project approved by the decision to grant aid cannot be made against it because that complaint was not contained in the report. The Commission raised it solely in the letter of 22 May 1995 initiating the administrative procedure.

103 The applicant contends that, at any event, the complaint is based on an incorrect assessment of the facts, since the purchase of the two shelling machines to which the Commission supposedly refers was inserted into the project sent to the Italian Government in order to obtain the share of the national subsidy, and was not in the project sent to the Commission. The Commission did not therefore provide any aid for the acquisition of those machines and so it cannot legitimately seek repayment through a reduction in the aid granted.

104 The applicant also claims that, in any event, the aid granted represented 24.9% of the total expenditure incurred by the beneficiary under the project approved by the Commission (ITL 3 280 387 000). Thus, the percentage of 25% laid down by Regulation No 355/77 was fully complied with.

105 The Commission points out that the applicant's argument that the complaint referred to in recital 11 cannot be made against it is irrelevant for the purposes of considering the legality of the contested decision, since the irregularity in question was correctly pointed out in the letter of 22 May 1995 initiating the administrative procedure.

106 The Commission also claims that the substantive arguments put forward by the applicant are unfounded. According to the Commission, the subsequent inclusion of those two machines in the project, even if they did not form part of the project originally approved by the Commission, misled it, causing it to pay the beneficiary a sum in excess of the 25% ceiling of eligible costs that could be granted by the Fund, namely funding equivalent to approximately 26% of the investment. If the beneficiary had drawn the Commission's attention to this fact the defendant would have been able to reassess the aid and reduce it to within the limits provided for in the decision to grant aid.

Findings of the Court

107 As regards the question whether the Commission could make the complaint referred to in recital 11 in the contested decision, it should be noted that observance of the rights of the defence is, in any procedure initiated against a person which is liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the procedure. That principle requires that the addressees of decisions which significantly affect their interests should be placed in a position in which they may effectively make known their views (Case C-32/95 P *Commission* v *Lisrestal and Others* [1996] ECR I-5373, paragraph 21).

108 In the present case, it is clear from the file that the applicant had a proper hearing before the contested decision was adopted as regards the complaint referred to in

recital 11 in the contested decision. In its letter of 22 May 1995 initiating the discontinuance procedure the Commission informed the applicant of, and complained about, the fact that 'machinery for harvesting basic products of the soil which was not originally provided for was purchased and those purchases were not covered by the derogation referred to in Articles 5 and 6 of Regulation No 355/77'; moreover it informed it that it was requested to submit its observations under Article 6 of Commission Regulation (EEC) No 1685/78 of 11 July 1978 laying down detailed rules for the implementation of the decision by the Guidance Section of the EAGGF to grant aid for projects designed to improve conditions under which agricultural products are processed and marketed (OJ 1978 L 197, p. 1). It is also clear from the file that the applicant subsequently submitted written observations dated 3 August 1995, 22 September 1995, 27 February 1996 and 11 November 1996, and oral observations on 19 January 1996 and 22 October 1996, on the complaints made by the Commission in that letter.

109 Therefore, since that letter of 22 May 1995 set out the complaints made by the Commission against the applicant and the latter submitted its observations on several occasions, from the time of the administrative procedure the applicant was fully in a position to make known its point of view effectively as to whether the facts asserted by the Commission in connection with this complaint were genuine and relevant. Hence, the letter initiating the procedure correctly set out the complaint referred to in recital 11 in the contested decision.

110 Second, as regards the factual circumstances referred to in that recital, it is clear from the file that that complaint concerns the acquisition of two shelling machines which were not provided for in the original project approved by the Commission and which were inserted into the project subsequently. In that regard, the applicant contends that the Commission incorrectly considered that owing to the failure to notify that inclusion the amount of the Community aid paid had been wrongly calculated, exceeding the 25% ceiling to be granted by the Fund, and that therefore there was an irregularity giving rise to a reduction in the aid.

111 Article 17(2)(c) of Regulation No 355/77 provides that 'for each project, in relation to the investment made... the aid granted by the fund shall be equal to not more than 25%'.

112 It is clear from Annex B to the applicant's aid application that the original project submitted, approved by the Commission and totalling ITL 3 280 387 000, for which aid was granted, did not provide for the purchase of any pea shelling machinery. It is also clear from Article 1 of the decision to grant aid that the Commission granted the beneficiary Community aid amounting to a maximum of ITL 819 321 930 (25%), towards a total investment of ITL 3 280 387 000, and that it expressly stated in point A.3 of the annex to the decision to grant aid that 'if, during the implementation of the project, there are reductions in the costs originally approved, the amount of aid will be reduced accordingly'.

113 Lastly, it is clear from the 'Model 4' form giving details of the expenses actually incurred under the project, signed by the beneficiary and attached to the certificate attesting completion of the work, dated 9 February 1991 and annexed to the applicant's observations of 3 August 1995, that in February 1989 the applicant purchased two pea shelling machines for a total of ITL 641 341 800. The form gives the total cost of the project expenditure as ITL 3 880 600 443.

114 It is clear from those documents that the cost of the two pea shelling machines was not included in the project submitted, approved by the Commission in December 1988. Therefore, irrespective of the fact that the amount of those purchases was later included in the project allegedly approved by the Italian authorities for national aid, that cost was not 'originally approved' in the project approved by the Commission.

115 Therefore, as the Commission rightly states, the total amount of the investment actually made by the applicant, from the point of view of the amount of Community aid, was not ITL 3 880 600 443 (total amount of expenditure incurred), but ITL 3 167 258 643, when the cost of those two machines that were not approved (namely ITL 641 341 800) is deducted from the total amount. Therefore, since the aid paid (ITL 819 321 930) was calculated on the amount of ITL 3 280 387 000 and not on the lower amount of ITL 3 167 258 643, the Community funding was 26% of the project expenditure approved and so the applicant received aid in excess of the ceiling of 25% of eligible expenditure which can be granted from the Fund.

116 The applicant's argument that the Commission did not pay any aid for the purchase of those machines and that therefore it cannot legitimately make that complaint against it cannot alter that assessment.

117 There is no indication in the file that the beneficiary notified the Commission that the machinery concerned had been purchased and included in the project, in breach of the obligation to give prior notification of amendments to the project that was imposed on the applicant by the letter granting aid. Therefore, since the failure to notify that amendment misled the Commission with regard to the amount of Community aid to be paid and resulted in the 25% ceiling laid down in the Community rules being exceeded, the applicant cannot legitimately contend that the Commission is not concerned by that irregularity.

118 The Commission did not therefore err in considering that the inclusion of that cost in the approved project constituted a fact that could give rise to a reduction in the aid proportionate to that amount.

119 The second limb of the third plea, alleging incorrect assessment of the facts referred to in recital 11 in the contested decision, must therefore be rejected.

The fourth plea: infringement of the principle of proportionality

Arguments of the parties

120 The applicant claims that the contested decision manifestly infringes the principle of proportionality in two respects.

121 First, the contested decision is disproportionate in relation to the degree of seriousness and the small amount of the alleged irregularities. Since the complaints made by the Commission concern at any event the three invoices referred to in recital 7 and the invoices referred to in recital 10 in the contested decision, the total amount of those invoices is only ITL 31 043 085, which represents 0.9% of the approved investment. The Commission has reduced the aid by ITL 623 193 529, that is to say, by more than two thirds of the amount granted and more than 20 times the total amount of the alleged irregularities, and so the principle of proportionality has clearly been infringed.

122 Second, the applicant claims that the Commission took no account of the fact that the irregularities were committed by an undertaking other than the one to which the contested decision is addressed, so that the measure affects a person unconnected with the facts in question. For that reason, the Commission ought to have considered the fact that the contested decision itself is neither effective nor dissuasive within the terms of the case-law of the Court of Justice and the Court of First Instance, as it is clearly disproportionate from the point of view of the company to which the decision is addressed.

123 The Commission challenges the plea as being unfounded.

124 First, the applicant's statement that the reduction in aid is disproportionate in relation to the alleged irregularities is unfounded since the Commission took account precisely of the fact that the irregularities were less serious when it decided to reduce the aid rather than discontinue it, thereby demonstrating its wish not to penalise the applicant excessively.

125 In particular, with regard to the invoices referred to in recitals 7 to 9 in the contested decision, the Commission contends that, as is clear from its letter of 28 October 1996, it adopted as its method for calculating the reduction in the amount of aid the solution that was most favourable to the applicant. Thus, instead of reducing, as it would normally do, the amount in respect of all the investments included under the heading of the aid application form which contained the irregularity established — in the present case, heading B.6.4.1 — it merely reduced the amount in respect of the equipment mentioned under sub-heading 'fresh vegetables department' of heading B.6.4.1, which was more advantageous for the applicant. Moreover, that method properly takes into account the relationship between the seriousness of the infringement and the reduction made. The difference between the amount of the alleged irregularities and the total amount of investment arises simply from the impossibility of separating the disputed work that was not in order from the category of investment to which it was attributed.

126 Second, the Commission points out that the Court has already established that the applicant assumed the beneficiary's rights and obligations following Massalombarda's acquisition and subsequent take-over by the Conserve Group (*Conserve Italia I*, paragraph 107). The contested decision is therefore not disproportionate as regards the applicant.

Findings of the Court

127 It is settled case-law that the principle of proportionality laid down in the third paragraph of Article 5 EC requires that the measures adopted by Community

institutions must not exceed what is appropriate and necessary for attaining the objective pursued (Case 15/83 *Denkavit Nederland* [1984] ECR 2171, paragraph 25, Case T-260/94 *Air Inter* v *Commission* [1997] ECR II-997, paragraph 144, *Conserve Italia I*, paragraph 101, and *Conserve Italia II*, paragraph 83).

128 The applicant claims that the contested decision is disproportionate in relation to the seriousness and small number of the alleged irregularities, since the irregularities concerned constituted 0.9% of the approved investment and the Commission reduced the aid by ITL 623 193 529, that is to say, by more than two thirds of the amount of the Community aid granted.

129 It should be noted first of all that Article 24 of Regulation No 4253/88, as amended by Council Regulation (EEC) No 2082/93, authorises the Commission to reduce the Community aid allocated to a beneficiary where an operation or measure appears to justify only part of the aid allocated, if the appropriate investigation reveals an irregularity or a significant change affecting the nature or conditions of the operation.

130 It is therefore appropriate to consider the way in which the Commission calculated the reduction in order to ascertain whether it did not in the present case exceed what was appropriate and necessary for attaining the objective of Article 24 of Regulation No 4253/88.

131 Annex 1 to the letter of 28 October 1996 concerning calculation of the amount of the reduction in aid indicates that the Commission first calculated the amounts of the irregularities established, that it then deducted them from the total expenditure actually incurred by the beneficiary, and thus obtained the total amount of expenditure eligible under the project, and that, on the basis of those

figures, it finally determined the amount of aid appropriate for the applicant and the amount of aid already granted that needed to be recovered. Thus, in the part entitled 'amount of eligible expenditure', the Commission stated that from the amount of ITL 3 880 600 443 (corresponding to the beneficiary's total expenditure) were subtracted the amounts of the irregularities established (ITL 2 443 105 039 with regard to the complaint referred to in recitals 7 to 9, ITL 11 640 000 with regard to the complaint referred to in recital 10 and ITL 641 341 800 in respect of the complaint referred to in recital 11), and that the resulting total was ITL 784 513 604 of eligible expenditure. Community aid was therefore 25% of that eligible expenditure, corresponding to ITL 196 128 401, and the amount to be recovered was ITL 623 193 529 (ITL 819 321 930 — ITL 196 128 401).

132 With regard to the complaint referred to in recital 10 in the contested decision concerning the invoices wrongly charged to the Alseno establishment, the Commission reduced those parts of the amounts of the invoices which it considered were not in order. As it was held in points 50 to 56 above that the complaint in question is vitiated by an inadequate statement of reasons, it cannot therefore justify any reduction in aid. The reduction made in that regard must therefore be annulled.

133 As regards the complaint referred to in recital 11 in the contested decision, the Commission took the amount of ITL 641 341 800, corresponding to invoice No 159 from FMC for the purchase of two pea-shelling machines and deducted it from the total eligible expenditure. As was held above, that cost cannot be taken into account in the calculation of the expenditure incurred or in the calculation of Community aid. Therefore, under point A.3 of the annex to the decision to grant aid, that cost was correctly deducted to the value of its amount.

134 The reduction of the aid by the amount of ITL 641 341 800 is therefore justified.

135 As regards the complaint referred to in recitals 7 to 9 relating to the three invoices that provided evidence of the premature start of the work, the Commission adopted a method for calculating the reduction that was totally different from the one used in respect of the other complaints: instead of reducing the amounts of the preparatory work started before 17 July 1987 it reduced the total amount of all the installation work started after that date, including the preparatory work. Thus, in Annex 1 to the letter of 28 October 1996 the Commission stated first of all that three invoices, amounting to ITL 26 725 000, provided evidence that components were installed prematurely on the new line in the 'fresh vegetables department'. The Commission went on to state that the reduction was to be calculated on the basis of all the tangible investments which in its view constituted a 'homogeneous group'. Taking as its basis the classification set out in the application for aid and in the request for payment submitted by the beneficiary, the Commission considered that the premature work concerned all the work listed under the sub-section 'fresh vegetables department' and, consequently, it considered that the total investment made under that sub-section should be regarded as premature work. The Commission therefore deducted the total amount of that investment, ITL 2 443 105 039, instead of deducting the amounts of the invoices relating to the work started before 17 July 1987, which was only ITL 26 725 000.

136 The Court considers that that method manifestly infringes the principle of proportionality. It must be said that, contrary to what the Commission maintains, that method of calculating the reduction does not take due account of the relationship between the seriousness of the infringement committed by the applicant and the amount involved, on the one hand, and the reduction made, on the other.

137 First, as regards the seriousness of the alleged conduct, the complaint relates only to three invoices, each dated after the date on which the Commission received the aid application, which concerned preparatory work carried out only a few days before that date. Furthermore, the applicant did not in the present case engage in conduct that could be termed fraudulent. In that regard, it should be remembered

that during the on-the-spot inspection conducted in September 1994 the applicant submitted an unsolicited, voluntary statement identifying the list of invoices that were not in order and provided evidence of the premature start of the work, and the Commission took precisely this as the basis for that complaint.

138 Second, as regards the amount of that irregularity, the three invoices referred to in recitals 7 to 9 amount to a total of ITL 26 725 000. As the total investment made by the applicant in the 'fresh vegetables department' was ITL 2 443 105 039, the amount of the invoices disputed in recitals 7 to 9 in the contested decision is only 1.09% of that total. Therefore, the difference between the amount of the disputed invoices and the amount of the reduction made is so considerable as to show that the reduction is manifestly disproportionate.

139 None of the arguments submitted by the Commission justifies the reduction it has made.

140 First, the Commission's statement that it used that method owing to the impossibility of separating the disputed work that was not in order from the category of investment to which it was attributed is not supported by any evidence.

141 It is clear from the expert report of 5 November 1996 and the applicant's statement attached to the inspection report, quoted in paragraphs 88 to 93 above, that the work referred to in the three invoices related exclusively to preparatory and ancillary work on pipework and drainage for that area, renewal of cable conveyors and safety casings and piping, which was carried out on the existing line before the delivery of the equipment in question, and the new line was also able to benefit from it. It cannot therefore be properly argued that it constituted part of the new line that was so integral and essential that it could not be separated from that category of installation work and identified. Furthermore,

since the Commission based that complaint on the content of that unsolicited statement by the applicant, which it even included in the contested decision (recital 8), it cannot subsequently dismiss the parts of that statement concerning the purely secondary and ancillary nature of that work and use only the parts concerning the premature start of the work and the invoices mentioned.

142 Second, at the hearing the Commission stated in response to questions from the Court that the method concerned was adopted due to the nature of the irregularity in question, namely the premature start of the work. Point 5.3 of the explanatory notes and point B.1, paragraph 5, of the working document stipulate that any project begun before the Commission receives the application cannot qualify for aid. In the present case, the Commission isolated the homogeneous category to which the disputed invoices belonged in order not to penalise the applicant excessively by discontinuing the aid in its entirety.

143 That argument cannot be accepted either.

144 It must be noted at the outset that the system according to which work for which aid is granted should not start before the date on which the Commission receives the application is fundamental and its logical purpose is to enable the competent national authority to check that the application in question is indeed compatible with the purpose of the system established, as regards in particular whether the work for which financing is sought has not already been carried out by the applicant (*Conserve Italia II*, paragraph 87).

145 However, it is desirable that such a system should include an appropriate mechanism requiring the Commission or the Member State concerned to notify the applicant, within a reasonable period, of the date on which the Commission received the application. It is the national authorities which submit the aid project to the Commission and therefore the Commission receives the application on a

date unknown to the applicant, and an unspecified period may elapse between the date the application is received by the Commission and the time the Commission notifies the applicant that it has received it. This situation is likely to place the applicant in a difficult position. On the one hand, if the applicant decides to start work before the notification it incurs the risk of having its aid discontinued due to the premature start of the work, if the date of receipt notified to it is after work has started. On the other hand, if the applicant decides to wait for the notification and suspends the proposed work and too long a period elapses between the date the application is received and the date on which the applicant is notified, the applicant may face difficulties with regard to its commitments to suppliers and the implementation of the project.

146 Therefore, since the system established by the EAGGF permits the applicant to start work after the date on which the Commission receives the aid [application] and before the aid is granted, but does not guarantee notification within a reasonable date of receipt, the view should be taken that the fact of embarking upon work a few days before the date of receipt by the Commission, where there is no fraudulent intent on the part of the applicant and once the national authorities have checked that the application is compatible with the purpose of the system, should not automatically result in discontinuance or reduction of the aid, and that exercise of that option should involve a conscientious assessment of those circumstances by the Commission.

147 In the present case, therefore, since the applicant had no fraudulent intent and the Italian authorities had carried out the relevant checks, the Commission should not have exercised the discontinuance option in respect of the applicant solely on grounds of the premature start of preparatory work on the project.

148 On the other hand, it should be observed that in any event, since the Commission chose in the contested decision, in the exercise of its discretion, to reduce the aid and not to discontinue it, it cannot now rely on the possibility of discontinuing the aid contained in point 5.3 of the explanatory notes and in point B.1,

paragraph 5, of the working document, in order to justify the contested decision. Indeed, the fact that Regulation No 4253/88 allows the Commission to discontinue aid in certain circumstances does not authorise it, when it decides to impose a reduction, to make that reduction without taking into account the requirements of the principle of proportionality.

149 Therefore, in view of the nature of the infringement, the small degree of seriousness and the low amount involved, the Court considers that a reduction of ITL 2 443 105 039 is disproportionate in relation to the irregularity concerned.

150 The plea alleging infringement of the principle of proportionality is therefore held to be well founded and there is no need to rule on the applicant's argument concerning infringement of that principle from the point of view of the company to which the contested decision is addressed.

151 In the light of all the foregoing, the contested decision must be annulled.

Costs

152 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Moreover, Article 87(3) of those Rules provides that the Court may order that costs be shared or that the parties bear their own costs if each party succeeds on some and fails on other heads. In this case the Commission must bear its own costs and pay four fifths of those incurred by the applicant. The applicant must bear one fifth of its costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Annuls Commission Decision C (2000) 1752 of 11 July 2000 reducing aid from the Guidance Section of the EAGGF for Project No 88.41.IT.002.0, entitled 'Technical modernisation of an establishment processing products in the fruit and vegetable sector at Alseno (Piacenza)';

2. Orders the Commission to bear its own costs and to pay four fifths of those incurred by the applicant;

3. Orders the applicant to bear one fifth of its own costs.

García-Valdecasas Lindh Cooke

Delivered in open court in Luxembourg on 11 December 2003.

H. Jung P. Lindh

Registrar President