# JUDGMENT OF THE COURT (Sixth Chamber)

13 November 2001 *

In Case C-277/98,

**French Republic**, represented by K. Rispal-Bellanger and C. Vasak, acting as Agents, with an address for service in Luxembourg,

applicant,

supported by

**Kingdom of Spain**, represented by S. Ortiz Vaamonde, acting as Agent, with an address for service in Luxembourg,

intervener,

* Language of the case: French.

V

**Commission of the European Communities,** represented by G. Berscheid, acting as Agent, with an address for service in Luxembourg,

defendant,

APPLICATION for partial annulment of Commission Decision 98/358/EC of 6 May 1998 on the clearance of the accounts presented by the Member States in respect of the expenditure for 1994 of the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (OJ 1998 L 163, p. 28), in so far as it applies to the French Republic 'negative corrections' for sums in respect of supplementary levies the recovery of which was being disputed in proceedings pending before national courts at the date of that decision,

THE COURT (Sixth Chamber),

composed of: N. Colneric (Rapporteur), President of the Second Chamber, acting for the President of the Sixth Chamber, C. Gulmann, R. Schintgen, V. Skouris and J.N. Cunha Rodrigues, Judges,

Advocate General: S. Alber,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 29 March 2001,

gives the following

## Judgment

1 By application lodged at the Court Registry on 21 July 1998, the French Republic brought an action under Article 173 of the EC Treaty (now, after amendment, Article 230 EC) for partial annulment of Commission Decision 98/358/EC of 6 May 1998 on the clearance of the accounts presented by the Member States in respect of the expenditure for 1994 of the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (OJ 1998 L 163, p. 28, hereinafter 'the contested decision') in so far as it applies to the French Republic 'negative corrections' for sums in respect of supplementary levies the recovery of which was being disputed in proceedings pending before national courts at the date of that decision.

2 By order of the President of the Court of 17 December 1998 the Kingdom of Spain was granted leave to intervene in support of the French Republic.

## Legal background

3 Under Article 3(1) of Regulation (EEC) No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy (OJ, English Special

Edition 1970 (I), p. 218), intervention intended to stabilise the agricultural markets, undertaken according to Community rules within the framework of the common organisation of agricultural markets, is to be financed by the European Agricultural Guidance and Guarantee Fund ('EAGGF').

4 Under the first subparagraph of Article 4(2) of Regulation No 729/70, the Commission is to make available to Member States the necessary credits so that the designated authorities and bodies may make the intervention payments in accordance with Community rules and national legislation.

5 Article 5(2)(b) of Regulation No 729/70, as amended by Council Regulation (EC) No 1287/95 of 22 May 1995 (OJ 1995 L 125, p. 1), provides that the Commission is, before 30 April of the following year, to grant clearance for the year in question on the basis of the annual accounts, accompanied in particular by the information needed for that purpose. Article 5(2)(c) of Regulation No 729/70, as amended by Regulation No 1287/95, provides that the Commission is to decide on the expenditure to be excluded from Community financing where it finds that expenditure has not been effected in compliance with Community rules.

6 Pursuant to the first subparagraph of Article 8(1) of Regulation No 729/70, the Member States are required to take, in accordance with national provisions laid down by law, regulation or administrative action, the measures necessary to satisfy themselves that transactions financed by the EAGGF are actually carried out and are executed correctly, to prevent and deal with irregularities and to recover sums lost as a result of irregularities or negligence.

7 Under the second subparagraph of Article 8(1) of Regulation No 729/70, the Member States are to inform the Commission of the measures taken for those purposes and in particular of the state of the administrative and judicial procedures.

8 Under Article 8(2) of Regulation No 729/70, in the absence of total recovery, the financial consequences of irregularities or negligence are to be borne by the Community, with the exception of the consequences of irregularities or negligence attributable to administrative authorities or other bodies of the Member States. The sums recovered are to be paid to the paying authorities or bodies and deducted by them from the expenditure financed by the EAGGF.

9 Council Regulation (EEC) No 856/84 of 31 March 1984 amending Regulation (EEC) No 804/68 on the common organisation of the market in milk and milk products (OJ 1984 L 90, p. 10) introduced a 'supplementary levy' on any quantities of milk delivered in excess of a reference quantity to be determined, in order to control the increase in production of milk and milk products in the Community (hereinafter 'the supplementary levy').

10 The second subparagraph of Article 5c(1) and Article 5c(3) and (5) of Regulation (EEC) No 804/68 of the Council on the common organization of the market in milk and milk products (OJ, English Special Edition 1968(I), p. 176), inserted by Regulation No 856/84, provides:

'1....

The levy system shall be implemented in each region of the territory of the Member States in accordance with one of the following formulas:

Formula A

— A levy shall be payable by every milk producer on the quantities of milk and/or milk equivalent which he has delivered to a purchaser and which for the 12 months concerned exceed a reference quantity to be determined.

Formula B

— A levy shall be payable by every purchaser of milk or other milk products on the quantities of milk or milk equivalent which have been delivered to him by a producer and which, during the 12 months concerned, exceed a reference quantity to be determined.

— The purchaser liable to the levy shall pass on the burden in the price paid to those producers who have increased their deliveries, in proportion to their contribution to the purchaser's reference quantity being exceeded.

...

3. Subject to paragraph 4, the sum of the reference quantities referred to in paragraph 1 may not exceed a guaranteed total quantity equal to the sum of quantities of milk delivered to undertakings treating or processing milk or other milk products in each Member State during the 1981 calendar year, plus 1%.

...

5. The levies referred to in this Article shall be regarded as intervention measures designed to regulate agricultural markets and shall be allocated to the financing of expenditure in the milk and milk products sector.'

11 Council Regulation (EEC) No 857/84 of 31 March 1984 adopting general rules for the application of the levy referred to in Article 5c of Regulation No 804/68 in the milk and milk products sector (OJ 1984 L 90, p. 13), which remained in force until 31 March 1993, determines in particular the reference quantity — defined as the quantity of milk or milk equivalent delivered by the producer during the 1981 calendar year (Formula A), or purchased by a purchaser during the 1981 calendar year (Formula B), plus 1% — beyond which a supplementary levy is payable by that producer (Formula A) or that purchaser (Formula B).

12 Under the second subparagraph of Article 9(4) of Regulation No 857/84, as amended by Council Regulation (EEC) No 1305/85 of 23 May 1985 (OJ 1985 L 137, p. 12), 'the amount of the levy collected corresponding to the amount of the excess recorded shall be paid over to the Community'.

13 The first subparagraph of Article 15(4) of Commission Regulation (EEC) No 1546/88 of 3 June 1988 laying down detailed rules for the application of the additional levy referred to in Article 5c of Regulation No 804/68 (OJ 1988 L 139, p. 12) provides:

'The purchasers... shall pay any levy amount due to the competent agency within three months following the end of each 12-month period.'

14 Pursuant to Article 19(1)(a) of Regulation No 1546/88,

'Member States shall adopt whatever additional measures are required:

(a) to ensure collection of the levy, in particular inspection measures and measures ensuring that interested parties are aware of the penal or administrative sanctions to which they will be subject if they fail to comply with the provisions of this Regulation.'

## Facts

15 In applying the supplementary levy rules, the French authorities opted for Formula B (levy collected from purchasers). For the milk years 1985/86, 1988/89,

1989/90 and 1991/92, supplementary levies totalling FRF 114 387 058 were not recovered. That sum comprises the following amounts for the milk years indicated:

FRF 642 358 for 1985/86,
FRF 14 466 984 for 1988/89,
FRF 38 756 717 for 1989/90,
FRF 60 520 999 for 1991/92.

16 Those amounts were the subject of 11 actions before the national courts concerning the recovery of the supplementary levies, involving the French authorities and purchasers of milk.

17 In letter No VI/16332 of 16 April 1997 sent to the French Republic concerning clearance of accounts for 1993, the Commission observed that the amounts outstanding were continuing to accumulate and had reached substantial levels. According to the Commission, four years after the end of the last milk year covered by the old milk quota scheme, those proceedings should have been brought to a satisfactory conclusion.

18 In letter No VI/30301 of 29 July 1997, also concerning clearance of accounts for 1993, the Commission gave formal notice to the French authorities of a proposed financial correction for failure to account to the EAGGF for the supplementary levies due in respect of 1985/86, 1988/89, 1989/90 and 1991/92 and still the subject of proceedings brought by purchasers before the national courts.

19 Following a request for conciliation made on 7 October 1997 by the French Government under Commission Decision 94/442/EC of 1 July 1994 setting up a conciliation procedure in the context of the clearance of the accounts of the European Agricultural Guidance and Guarantee Fund (EAGGF) Guarantee Section (OJ 1997 L 182, p. 45), the conciliation body indicated, in its final report dated 29 January 1988, that it had been unable to achieve reconciliation of the parties' positions.

20 By the contested decision, based on Regulation No 729/70 and in particular Article 5(2) thereof, as amended by Regulation No 1287/95, the Commission determined the amount of the expenditure recognised as chargeable to the EAGGF in respect of the 1994 financial year.

21 The ninth recital in the preamble to that decision reads as follows:

'Whereas corrections are necessary in respect of supplementary levies for milk for the milk years 1985/86 to 1992/93 which are still outstanding because of legal disputes between buyers/producers and the competent authorities of certain Member States; whereas these negative corrections for France... amount to FRF 114 387 058...; whereas the Commission nevertheless reserves the possibility to re-examine the corrections made under this clearance of accounts if, following the outcome of the legal proceedings, amounts are considered not to be due or to be non-recoverable'.

22 As at the date of the contested decision, none of the 11 actions had been disposed of by final judgment.

## Substance

*Arguments of the parties*

23 The French Government maintains that there is no proper legal basis for making a Member State responsible for payment of sums of which recovery, pursued in accordance with the Community and national provisions, has not yet been secured because proceedings remain pending before the national courts.

24 It asserts, first, that the supplementary levies, although paid by the Member States are, nevertheless, subject to supervision by the Commission in the context of the powers vested in it by Regulation No 729/70, so that they constitute negative expenditure of the EAGGF. Accordingly, the Commission is entitled to charge to a Member State a supplementary levy that has not yet been recovered only if it does so under the same conditions as those laid down for the exclusion of expenditure from Community financing.

25 Under Article 8(2) of Regulation No 729/70, it is only where irregularities or negligence are attributable to administrative authorities or other bodies of the Member States that the latter must bear the financial consequences thereof. Under Article 8(1) of Regulation No 729/70, it is incumbent on the Member States only to take the measures necessary to recover the sums due in accordance with national provisions laid down by law, regulation or administrative action.

26 The French Government maintains that the amounts covered by the contested decision derive neither from irregularities nor from negligence within the meaning

of Regulation No 729/70. The proceedings before the national courts are running their course for the purpose of obtaining payment of the supplementary levies due from the purchasers.

27 Next, the Community rules on supplementary levies do not require the Member States to pay over to the Community amounts which have not yet been recovered.

28 Under the second subparagraph of Article 9(4) of Regulation No 857/84, as amended by Regulation No 1305/85, and Article 19 of Regulation No 1546/88, the Member States are required only to ensure collection of the supplementary levies from producers or purchasers and to make the amounts collected available to the Community. As regards the procedure to be followed to ensure the recovery of supplementary levies, the national authorities are required only to follow a procedure identical to that applicable to the recovery of debts of national origin. That obligation has been fulfilled in this case.

29 Finally, according to the French Government, the imposition by the Commission of a time-limit for the recovery of the amounts payable (four years after the last milk year covered by the old milk quota rules) exceeds the management powers conferred on the EAGGF by Regulation No 729/70, which contains no provisions to the effect that a binding time-limit can be imposed on Member States. Furthermore, by departing from the practice it followed before 1997, the Commission infringed the principle of sound administration.

30 The Spanish Government also maintains that the obligation of a Member State towards the Community consists in diligently demanding payment of the supplementary levies from the persons from whom they are due, in accordance with its domestic law, and to pay them over to the Commission. The Commission

is merging those two obligations to make a third one, namely that of paying the supplementary levies as if they constituted a debt owed by the Member State itself. However, according to the Spanish Government, the Member State is required to pay to the Community only those sums it has actually obtained from producers or purchasers of milk from whom the supplementary levies are due, except in cases where non-recovery is attributable to its negligence.

31 The Commission points out that, under Article 15(4) of Regulation No 1546/88, purchasers are required to pay any supplementary levy due within the three months following the end of the relevant 12-month period and that, under Article 19(1) of the same regulation, the Member States are to take the measures necessary to ensure collection of the supplementary levy.

32 The obligation to create a rapid and efficient recovery mechanism derives both from the milk quota regime, of which payment of the supplementary levy is the central feature, and from the general obligations of cooperation and fairness laid down in Article 5 of the EC Treaty (now Article 10 EC). A levy system devoid of any rapid and efficient recovery mechanism would lack the deterrent aim (combating overproduction of milk) which is essential to it. Given that particular feature of the supplementary levy, the Member States should not confine themselves to applying to recovery of the supplementary levy the same rules as they apply to the recovery of sums payable to the national budget. According to the Commission, the Member States themselves are required to pay the supplementary levy. Accordingly, the fact that a purchaser challenges, in proceedings before a national court, his obligation to pay the sums claimed from him in respect of the supplementary levy has no impact on the obligation attaching to the Member State itself to pay into the Community account the entire supplementary levy due.

33 In the alternative, the Commission states that there is sufficient evidence to conclude that the French Government has not taken all the measures needed to ensure collection of the levy due. The fact that such large sums have not yet been

collected more than six, or even twelve, years after the date on which they fell due, depending on the milk year concerned, in itself constitutes proof of that fact and shows that, in any event, the conditions laid down in Article 8(2) of Regulation No 729/70 are also satisfied.

*Findings of the Court*

34 It must be pointed out that no obligation specifically attaching to the Member States to pay supplementary levies to the Community can be inferred from Articles 15(4) and 19 of Regulation No 1546/88.

35 Article 15(4) of that regulation imposes only on purchasers, and not on Member States, the obligation to pay to the competent body, within the three months following the end of each 12-month period, the amount of any supplementary levy due. The obligations of the Member States, for their part, are described in Article 19 of Regulation No 1546/88, according to which they are required to take all the measures necessary to ensure collection of the supplementary levy.

36 The very wording of Article 19 of Regulation No 1546/88 shows that it creates an obligation to use best endeavours and not an obligation to achieve a specific result.

37 It is also clear from the mechanism introduced by Regulation No 1546/88 that, whilst the Member State is required to pay over the amounts collected by it to the Commission, it is not itself liable to pay the supplementary levy. The Community rules on the supplementary levy do not provide for the Member State to be substituted for the purchaser as the person liable where that purchaser has

recourse to remedies under the applicable national procedures in order to resist payment of the amounts claimed from him in respect of the supplementary levy. Such substitution of the Member State for the purchaser as the person liable to pay, even for a period co-terminous with the proceedings before courts, presupposes the existence of a legal basis laying down the conditions for such substitution (see, to that effect, Case C-352/92 *Milchwerke Köln* v *Wuppertal* [1994] ECR I-3385, paragraph 22). In this case, there is no such legal basis.

38 Accordingly, the Member States are only required, under Regulation No 1546/88, to pay over the supplementary levies collected, and the amount of the supplementary levies does not constitute a debt owed by the Member State itself.

39 Next, it must be pointed out that no obligation on the Member State to make payment to the Community arises from the second subparagraph of Article 9(4) of Regulation No 857/84 either. It must be observed that, in the French version and in most of the language versions of that regulation, provision is made only for payment to the Community of the amount of the levies 'collected'. Although the German version mentions only the amount of the levy, without specifying whether it has been collected, it must be emphasised that, as the Advocate General rightly observes in points 70 to 73 of his Opinion, the existence of a guaranteed overall quantity for each Member State does not necessarily imply that a payment obligation attaches specifically to the Member State in the event of that overall quantity being exceeded.

40 As regards the argument put forward by the Commission in the alternative, based on Article 8 of Regulation no 729/70, it must be borne in mind that, according to the case-law of the Court, the Member States must, in the first place, respect the obligation of general diligence in Article 5 of the Treaty, as specifically embodied in Article 8(1) and (2) of Regulation No 729/70 with regard to the financing of the common agricultural policy. That obligation implies that the Member States must take steps to rectify irregularities promptly (Case C-54/95 *Germany* v *Commission* [1999] ECR I-35, paragraph 177).

41 However, the Commission is obliged to give reasons for each decision finding that negligence is attributable to the Member State concerned (see, to the effect, Case C-8/88 *Germany* v *Commission* [1990] ECR I-2321, paragraph 23).

42 It is true that, in order to satisfy that obligation, the Commission need merely give reasons for which it entertains serious and reasonable doubt. However, in this case, the statement by the Commission that the length of time elapsed is in itself sufficient for negligence on the part of the Member State to be assumed is unacceptable. The Commission has not shown, on the basis of specific examples, how the protraction of the proceedings might be imputable to the French authorities. On the contrary, it is clear from the file that, in its letter No VI/48419 of 21 December 1995 concerning clearance of the accounts for 1992 and 1993, by which it brought to the attention of the French authorities its observations following inspections carried out by its staff at French dairy undertakings in 1994 and 1995, the Commission recognised that 'the French authorities have commenced, in respect of all the files submitted, the necessary proceedings for recovery'. Even though, in that letter, the Commission criticised the applicant, in general and abstract terms, for slowness or delays, it did not give details thereof before the Court. Moreover, the Commission has given no indications of the extent to which the alleged irregularities or negligence which it attributes to the French authorities justify the general application of 'negative corrections'.

43 Finally, the imposition of a time-limit cannot compensate for the lack of a legal basis for the corrections. The Member States are required only to pursue the collection of supplementary levies diligently and to pay them over to the Community.

44 In those circumstances, the French Republic's application must be upheld and, consequently, the contested decision must be annulled in so far as it applies to the French Republic 'negative corrections' for sums in respect of supplementary levies the recovery of which was being disputed in proceedings pending before national courts at the date of that decision.

## Costs

45 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. The French Republic has not applied for costs to be awarded against the Commission. It follows that, although the Commission has been unsuccessful, the parties must be ordered to bear their own costs.

46 Pursuant to the first subparagraph of Article 69(4) of the Rules of Procedure, the Kingdom of Spain must bear its own costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Annuls Commission Decision 98/358/EC of 6 May 1998 on the clearance of the accounts presented by the Member States in respect of the expenditure for

1994 of the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) in so far as it applies to the French Republic 'negative corrections' for sums in respect of supplementary levies the recovery of which was being disputed in proceedings pending before national courts at the date of that decision;

2. Orders the French Republic and the Commission of the European Communities to bear their own costs;

3. Orders the Kingdom of Spain to bear its own costs.

Colneric Gulmann Schintgen

Skouris Cunha Rodrigues

Delivered in open court in Luxembourg on 13 November 2001.

R. Grass

Registrar

F. Macken

President of the Sixth Chamber