JUDGMENT OF THE COURT (Fifth Chamber)
3 December 1992 *

In Case C-97/91,

Oleificio Borelli SpA, a company incorporated under Italian law, established at Pontedassio, Imperia, represented by Maria Luisa Sarni Florino, of the Genoa Bar, with an address for service in Luxembourg at the Chambers of Ernst Arendt, 8-10 Rue Matthias Hardt,

applicant,

v

Commission of the European Communities, represented by Eugenio De March, Legal Adviser, acting as Agent, assisted by Giuseppe Marchesini, a lawyer with rights of audience before the Corte di Cassazione (Court of Cassation), with an address for service in Luxembourg at the office of Roberto Hayder, of the Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION principally for the annulment of the Commission decision notified by memorandum No 69915 of 21 December 1990 in which it informed Oleificio Borelli SpA that it could not grant its application for aid from the European Agricultural Guidance and Guarantee Fund, Guidance Section, for the 1990 financial year under 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), and also for the annulment of all the procedural measures leading up to that decision or, in the alternative, for an order that the Commission and/or the region of Liguria make good the damage caused to the applicant,

* Language of the case: Italian.

THE COURT (Fifth Chamber),

composed of: G. C. Rodríguez Iglesias, President of the Chamber, M. Zuleeg, R. Joliet, J. C. Moitinho de Almeida and D. A. O. Edward, Judges,

Advocate General: M. Darmon,
Registrar: D. Triantafyllou, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 14 May 1992,

after hearing the Opinion of the Advocate General at the sitting on 9 June 1992,

gives the following

Judgment

1 By application lodged at the Court Registry on 18 March 1991, Oleificio Borelli SpA (hereinafter 'the applicant') brought an action under the second paragraph of Article 173, Article 178 and the second paragraph of Article 215 of the EEC Treaty principally for the annulment of the Commission decision notified by memorandum No 69915 of 21 December 1990 in which the Commission informed the applicant that it was unable to grant its application for aid from the European Agricultural Guidance and Guarantee Fund (hereinafter 'the Fund'), Guidance Section, for the 1990 financial year submitted under 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), and also for the annulment of all the procedural measures leading up to that decision or, in the alternative, for an order that the Commission and/or the region of Liguria make good the damage caused to the applicant.

2 It appears from the documents before the Court that on 16 December 1988 the applicant submitted to the Commission, through the Italian Government, an application under Regulation No 355/77 for aid from the Fund, Guidance Section, for the construction of an oil mill at Pontedassio (Imperia). That application, which had at that time been approved by the region of Liguria, did not qualify for aid from the Fund in 1989 because in that financial year the number of applications greatly exceeded the financial resources available and because, account having been taken of the applicable selection criteria, the application could not be held to be a priority one. In accordance with Article 21 of Regulation No 355/77, the applicant's application for aid was carried forward by the Italian administration to the 1990 financial year.

3 By letter dated 19 January 1990 the Italian authorities informed the Commission that the Regional Council of Liguria had issued an unfavourable opinion (No 109) on 18 January 1990 in respect of that application for aid submitted by the applicant.

4 By memorandum No 69915 of 21 December 1990 from the Directorate-General for Agriculture (hereinafter 'the contested decision') the Commission informed the applicant that its project could not be admitted to the procedure for the grant of aid on the ground that, in view of the above-mentioned unfavourable opinion, the conditions laid down to that effect in Article 13(3) of Regulation No 355/77 were not fulfilled.

5 By order of 25 February 1992 the Court declared that it had no jurisdiction to hear the application in so far as it was brought against the region of Liguria and sought the annulment of the national procedural measures which had led up to the Commission's decision.

6 Reference is made to the Report for the Hearing for a fuller account of the facts, the course of the procedure and the pleas and arguments of the parties, which are mentioned hereinafter only in so far as is necessary for the reasoning of the Court.

The submissions in support of the application for annulment

7 The applicant claims that the contested decision is unlawful on the ground that the unfavourable opinion of the region of Liguria on the basis of which that decision was adopted was itself unlawful. It considers that that opinion was adopted in breach of Article 9 of Regulation No 355/77 in so far as the region of Liguria made an erroneous appraisal of the supply contracts concluded with producers which the applicant had appended to the application for aid. In its view, that opinion also constitutes a misuse of power on the ground that the statement of the reasons on which it was based differs from the reasons which actually led to its adoption.

8 The applicant considers that if the unlawfulness of the opinion of the Regional Council of Liguria were to have no effect on the validity of the contested decision it would be deprived of any judicial redress, since the opinion is a preparatory measure against which no action will lie under Italian law.

9 It should be pointed out that in an action brought under Article 173 of the Treaty the Court has no jurisdiction to rule on the lawfulness of a measure adopted by a national authority.

10 That position cannot be altered by the fact that the measure in question forms part of a Community decision-making procedure, since it clearly follows from the division of powers in the field in question between the national authorities and the Community institutions that the measure adopted by the national authority is binding on the Community decision-taking authority and therefore determines the terms of the Community decision to be adopted.

11 That is so where the competent national authority issues an unfavourable opinion on an application for aid from the Fund. It follows from Article 13(3) of Regulation No 355/77 that a project may receive aid from the Fund only if it is approved by the Member State on whose territory it is to be carried out and that, consequently, where the opinion is unfavourable the Commission can neither follow the procedure for the examination of the project in accordance with the rules laid down in that regulation nor *a fortiori* review the lawfulness of the opinion thus issued.

12 In those circumstances, any irregularity that might affect the opinion cannot affect the validity of the decision by which the Commission refused the aid applied for.

13 Accordingly, it is for the national courts, where appropriate after obtaining a preliminary ruling from the Court, to rule on the lawfulness of the national measure at issue on the same terms on which they review any definitive measure adopted by the same national authority which is capable of adversely affecting third parties and, consequently, to regard an action brought for that purpose as admissible even if the domestic rules of procedure do not provide for this in such a case.

14 As the Court observed in particular in Case 222/84 *Johnston* v *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraph 18, and in Case 222/86 *UNECTEF* v *Heylens* [1987] ECR 4097, paragraph 14, the requirement of judicial control of any decision of a national authority reflects a general principle of Community law stemming from the constitutional traditions common to the Member States and has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

15 Since the opinion of the Member State on whose territory the project is to be carried out forms part of a procedure which leads to the adoption of a Community decision, that Member State is obliged to comply with the aforesaid requirement of judicial control.

16 Finally, in the reply the applicant introduces a new plea alleging infringement and misapplication of the combined provisions of Articles 13 and 21 of Regulation No 355/77 on the basis of facts of which it claims to have become aware only in the course of these proceedings.

17 In that respect, the applicant claims that when it brought these proceedings it did not know that the unfavourable opinion of 18 January 1990 had been delivered not

at the conclusion of the examination of the application for aid but when the project was carried forward to the 1990 financial year. According to the applicant, there is no provision in Regulation No 355/77 that provides for a new opinion on the application for aid to be delivered at that stage of the procedure. The Commission should therefore not have taken the opinion given in 1990 into account as a condition for implementing the procedure referred to in Article 21 of that regulation.

18 It must be held that, contrary to the applicant's claim, the unfavourable opinion concerned the application for aid, not the carrying forward of the project to the 1990 financial year. In those circumstances, the plea raised by the applicant, which is the result not of a new factor which came to light during the procedure but of a misinterpretation of the unfavourable opinion and of Articles 13 and 21 of Regulation No 355/77, should have been raised in the application in accordance with Article 38(1)(c) of the Rules of Procedure. It cannot therefore be regarded as a new plea within the meaning of Article 42(2) of the Rules of Procedure.

19 That plea must therefore be rejected and, accordingly, the submissions seeking annulment must be rejected in their entirety.

The submissions aimed at establishing non-contractual liability

20 It should be observed that the combined provisions of Articles 178 and 215 of the Treaty give the Court jurisdiction only to make good any damage caused by the Community institutions or their servants in the performance of their duties. It is common ground in this case that the damage alleged stems from a measure adopted by the national authorities.

21 The submissions aimed at establishing that the Community is liable must therefore be rejected and, consequently, the application as a whole must be dismissed.

Costs

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

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs.

Rodríguez Iglesias Zuleeg

Joliet Moitinho de Almeida Edward

Delivered in open court in Luxembourg on 3 December 1992.

J.-G. Giraud
Registrar

G. C. Rodríguez Iglesias
President of the Fifth Chamber