# REPORT FOR THE HEARING
in Case C-97/91 *

## I — Facts

On 17 October 1988 the *applicant*, Oleificio Borelli SpA ('Borelli') submitted an application to the region of Liguria pursuant to 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) for aid from the European Guidance and Guarantee Fund ('the EAGGF'), Guidance Section, for 1990 in order to construct a new oil production plant in Pontedassio (Imperia).

In accordance with the conditions laid down in Regulation No 355/77, in particular those referred to in Article 9, the application for aid was accompanied by projects and explanatory annexes and also by copies of contracts for the supply of raw material concluded with producers of the basic product in Liguria, Apulia and Calabria.

Borelli claims that the application was initially approved by the region and taken into consideration in the order of priority established for the grant of aid to traders in the region of Liguria (Decision No 17 of the Regional Council of Liguria of 20 March 1990, Annex V to the application).

Since Borelli was informed that during the subsequent examination carried out by the region of Liguria, the Servizio Provinciale Agroalimentare di Imperia (Provincial Agri-Food Department of Imperia) and the competent councillors of the Regions concerned had expressed doubts as to the reliability of the contracts submitted with the application for aid, Borelli replaced the contracts concluded in the regions of Apulia and Calabria by five new contracts concluded with producers in the former region (Annex VII to the application) and explained that the total quantity of oil covered by the contracts (some 68 000 quintals) corresponded to its annual requirements (Annex VIII to the application). Borelli also provided detailed information and particulars identifying the contracting parties in the region of Liguria (Annex IX to the application).

By letter dated 10 October 1989, the Servizio Provinciale Agroalimentare di Imperia of the region of Liguria adopted an opinion in favour of proceeding with the examination. However, in a letter to the region of Liguria regarding the examination which that region had requested, the region of Calabria stated that it had observed that in a number of the contracts for its region — which Borelli had already replaced — the signature of the contracting producers was not authentic, as a result of which the region of Liguria reported the possible commission of a criminal offence to the State Prosecutor's office in Genoa.

* Language of the case: Italian.

On the ground that the region of Apulia, which was responsible for the investigation, had not obtained all the necessary information (Annex XIII to the application), the region of Liguria did not insist that all the inquiries regarding the contracts in question be carried out; since it regarded those contracts as unreliable, it expressed the opinion that the aid requested should not be granted.

The Giunta Regionale of the region of Liguria came to the same conclusion in Decision No 109 of 18 January 1990 (Annex XIV to the application). Because of that unfavourable opinion, the Commission, by letter No 69915 of 21 December 1990 (hereinafter 'the contested decision'), informed Borelli that the aid for which it had applied could not be granted.

The *Commission* states that the application submitted by Borelli on 16 December 1988 for EAGGF aid for the construction of an oil mill at Pontedassio (Imperia), which had been approved by the Italian authorities, did not qualify for EAGGF aid in 1989 (Annex I to the defence) because applications had considerably exceeded the financial resources available during that financial year (364 applications forwarded by the Italian Ministry of Agriculture amounting to an aggregate LIT 549 billion). Pursuant to Article 21 of Regulation No 355/77, the application for aid was carried forward to the 1990 financial year by the Italian administration.

The Commission claims that since applications for EAGGF aid for the 1990 financial year were also very numerous (applications from Italy related to 298 projects amounting to an aggregate LIT 461.4 billion in aid, of which only 111 aid projects, amounting to LIT 132.4 billion, were accepted), Borelli would probably also have been unable to obtain EAGGF aid in 1990.

However, it was owing to the unfavourable opinion delivered by the Italian authorities on Borelli's application (Annexes II, III and IV to the defence) that the Commission decided that the project at issue did not qualify to be admitted to the procedure for the grant of aid on the ground that the requirements relating to the examination of applications laid down in Article 13(3) of Regulation No 355/77 were not fulfilled in this case.

At a meeting of the Standing Committee on Agricultural Structures held on 18 December 1990, the Italian delegation made no objection and came out in favour of the adoption of the Commission's proposals in their entirety (projects accepted, projects rejected and projects declared ineligible for consideration). Borelli was informed of the outcome of its application by the contested decision.

## II — Written procedure and forms of order sought by the parties

Borelli's application was lodged at the Court Registry on 21 March 1991.

By order of 25 February 1992 the Court held that it had no jurisdiction to hear the application in so far as it was directed against the region of Liguria and sought the annulment

of all the procedural measures which had led up to the Commission's decision.

Upon hearing the Report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

Pursuant to Article 95(1) and (2) of the Rules of Procedure, the Court assigned the case to the Fifth Chamber by decision of 25 February 1992.

The *applicant* claims that the Court should:

— adopt, where appropriate, the following measures of inquiry:

— order the parties in question, particularly Giuseppe Merlo, acting 'Assessore' for agriculture of the region of Liguria, and Roberto Ajmar, an official of the region of Liguria, to appear before the Court;

— effect a possible visit in order to verify the layout and scale of the industrial plant of Oleificio Borelli SpA and the nature of the product processed;

— order the Commission to produce all the documentation relating to the application for aid submitted by Borelli and subsequent measures, together with the measures relating to the carrying over of the application to the 1990 financial year;

— order any other more appropriate evidence to be produced;

— annul Commission Decision No 69915 of 21 December 1990;

— declare accordingly that Oleificio Borelli SpA is entitled to obtain the aid applied for or, in the alternative, order the Commission and/or the region of Liguria to make good the loss caused to the applicant;

— uphold the claims set out in the application in the light of the considerations and supplementary information contained in the reply, in particular the new plea introduced pursuant to Article 42(2) of the Rules of Procedure;

— order the Commission and/or the region of Liguria to pay the costs.

The *Commission* claims that the Court should:

— declare Oleificio Borelli SpA's application inadmissible as regards the part directed against the region of Liguria;

— dismiss the claim for the annulment of the decision by which the Commission declared the applicant's application for EAGGF aid inadmissible together with the claim for damages in so far as they are both unfounded;

— order the applicant to pay the costs.

## III — Submissions and arguments of the parties

### A — *The claim for annulment*

*Borelli* first claims that the contested decision is invalid owing to the unlawfulness of Decision No 109 of the region of Liguria of 18 December 1990, which constituted the sole and essential requirement for the adoption of the contested decision.

Article 1(2) of Regulation No 355/77 provides that 'all the measures provided for in this Regulation shall constitute common measures within the meaning of Article 6(1) of Regulation (EEC) No 729/70'. The practical reflection of such common measures, interpreted in the light of Articles 39 to 43 of the EEC Treaty, is a form of cooperation between the Member States and the Community institutions with a view to achieving certain objectives, in this case increasing agricultural productivity and improving the standard of living of the agricultural community.

That cooperation follows complex procedures in which acts of the Member States intermesh with acts of the Community institutions and which generally terminate in a final act of the Commission. That is the case with the procedure provided for in Article 13 et seq. of Regulation No 355/77, in which the Member State takes part by giving its opinion on the application for aid and the Commission decides whether or not it can be granted.

In view of the principle that an action will not lie against an intermediate act in a procedure — and this is precisely what such an opinion is — because the subject-matter of the relevant proceedings must be the final act in the procedure which encapsulates all the decisions of the institutions and bodies involved in the procedure, any illegality affecting intermediate acts is reflected in the final act. It is against that act alone that an individual who considers that his rights have been impaired may bring proceedings before the competent court.

Borelli considers that the opinion issued by the region of Liguria is unlawful in so far as:

*The opinion infringes Article 9 of Regulation No 355/77*

*Borelli* maintains that the region of Liguria infringed Article 9 of Regulation No 355/77 on the ground that, during the examination as to whether its project fulfilled the conditions laid down in that article, it took account only of the long-term supply contracts entered into with producers of the basic agricultural product which were submitted in support of the application for aid, and thus failed to consider any other factor.

According to Borelli, the conditions for the grant of aid laid down in Article 9 of Regulation No 355/77 are fulfilled in this case. As regards in particular the condition laid down in Article 9(1) of that regulation, which provides that projects must guarantee the producers of the basic agricultural product an adequate and lasting share in the resulting economic benefits, Borelli observes that

examination of the projects submitted with the application for aid and the annexes thereto proves that the benefit will be passed on to such producers. The scale of the undertaking (the cost of building the plant comes to LIT 6.87 billion), its production capacity (the plant has a marketing potential amounting to 68 000 quintals of oil per annum), the costs borne by the company (some LIT 3.5 billion) and the fact that the company buys its raw materials exclusively in Italy afford such proof in themselves. Further evidence is also to be found in the documentation annexed to the reply (Annexes I, II and III).

The region of Liguria therefore did not take into consideration the information which is disclosed by the documentation annexed to the application for aid and set out below, and concentrated its examination on the supply contracts alone, even though those contracts constituted only one of the possible items of evidence, as is clear from Article 9(2) of Regulation No 355/77, which provides that 'account may be taken *inter alia* of long-term supply contracts ...'. Their probative value is completely relative, moreover, as witness the fact that they are no longer referred to in Council Regulation (EEC) No 866/90 of 21 March 1990 on improving the processing and marketing conditions for agricultural products (OJ 1990 L 91, p. 1), Articles 10 and 11(2) of which give priority to improving marketing structures.

In any event, Borelli maintains that the supply contracts appear to be capable of satisfying the requirements of Article 9 of Regulation 355/77. First, the assessment of the reliability of the contracts by the Servizio Provinciale Agroalimentare di Imperia of the region of Liguria was generally favourable. Secondly, the region of Liguria should have checked the reliability of the contracts in the region of Apulia instead of basing its decision on the incomplete information supplied by that region.

*The opinion constitutes a misuse of power*

*Borelli* disputes the ground which the region of Liguria invoked in support of its unfavourable opinion to the effect that the contracts entered into with producers in Apulia and Liguria do not guarantee that the benefits will be passed on to the producers in a lasting fashion, as required by Article 9 of Regulation No 355/77, because they contain a five-year validity clause subject to annual confirmation by both parties (hereinafter 'the disputed clause').

Those contracts are of the type generally used for applications for aid like that in question and their wording has never been regarded as inadequate by either the national or the Community authorities. In this case, furthermore, the region of Liguria raised no such objection during an investigation lasting approximately one and a half years and did not ask Borelli to alter the disputed clause, whilst the Community authorities which received the documentation relating to the contracts (Annex XVII to the application) confined themselves to asking Borelli for further particulars of a different nature. Moreover, the disputed clause is intended to protect producers, who are reluctant to commit

themselves contractually for five years, since it is impossible to foresee at the time when the contract is entered into what quantities they will produce over the next five years.

When, upon being informed of the region of Liguria's doubts about the disputed clause, Borelli amended the contracts by adding supplementary clauses (Annex XV to the application), the region had already issued its unfavourable opinion.

According to Borelli, it was not the ground set out above that determined the region of Liguria's unfavourable opinion, but the desire to be done with this matter, since the course of the procedure set it apart from the cases which it customarily examined.

The region of Liguria therefore attempted, by letters dated 14 and 18 April 1989, to hand the investigation of the application for aid over to the Ministry of Agriculture, a delaying move probably prompted by the fact that the regional institutions were not accustomed to investigating matters of such major economic significance. Such conduct was also evident during the investigation which the region of Liguria had to carry out as a result of the Guardia di Finanza's contemplating the commission of an offence by the Assessore and the responsible officials of the region, consisting in their having omitted to carry out acts incumbent upon them.

Finally, it is the doubts expressed regarding the reliability of the original contracts lodged with the application for aid, not the ground mentioned above, that constituted the basis on which the region of Liguria brought the matter to a close in a manner unfavourable to Borelli.

*Borelli* also considers that the contested decision infringes the combined provisions of Articles 13 and 21 of Regulation No 355/77.

In the reply Borelli introduces a new plea pursuant to Article 42(2) of the Rules of Procedure based on the facts as set out by the Commission, of which it cites the following:

— the application for aid relating to the 1989 financial year was approved by the region of Liguria on the basis of the project and the accompanying documentation;

— the aid was not granted because insufficient funds were available in that financial year;

— the Italian State, pursuant to Article 21 of Regulation No 355/77, carried forward the application for aid and the project relating thereto to the 1990 financial year;

— the unfavourable opinion of the Giunta Regionale of Liguria, set out in Decision No 109 of 18 January 1990, was issued in respect of the carrying forward of the application (Annex II to the defence);

— that decision, together with a report from the Guardia di Finanza (Annexes III and

IV to the defence), was forwarded to the Commission, which regarded it as an essential and sufficient ground for refusing to admit Borelli's project to the EAGGF aid procedure for the 1990 financial year.

Borelli states that when it brought these proceedings it had not realized, owing to the incomplete state of the documentation available in the file, that the unfavourable opinion given by the region of Liguria in Decision No 109 of 18 January 1990 related to the application to carry the project forward to the 1990 financial year and not, as it had supposed, to the initial application for aid for the 1989 financial year. That incorrect conclusion was the result, first, of various documents in which the above-mentioned unfavourable opinion and the relevant application for aid referred to the 1989 financial year and, secondly, of the absence of any reference in the above-mentioned documents to the region of Liguria's favourable opinion given in respect of the application for aid for the 1989 financial year.

According to Borelli, it is clear from the wording of Articles 13 and 21 of Regulation No 355/77 that whether an application for aid is admissible depends on the approval of the Member State; however, there is no comparable requirement as regards the examination of the request that the same project be carried forward to the next financial year.

Borelli maintains that the region of Liguria was therefore not required to express an opinion on the application itself when the application for aid was carried forward and the Commission was not entitled to regard such approval as an essential requirement of the procedure referred to in Article 21 of Regulation No 355/77 or to consider that, as far as the part of the examination for which it was responsible was concerned, any further action was precluded.

By failing to carry out any further examination of Borelli's project after it had been carried forward, solely because the region of Liguria had issued an unfavourable opinion, the Commission applied Article 13 of Regulation No 355/77 when considering the request that the application be carried forward, when it should have referred to Article 21 of that regulation and reassessed Borelli's application.

The *Commission* claims that the pleas relied on by Borelli in support of its application for annulment are essentially aimed at the decision of the Regional Council of Liguria, which issued an unfavourable opinion on Borelli's application for EAGGF aid. Those pleas do not relate to the contested decision.

The Commission observes that the contested decision was drawn up in the context of two distinct legal systems. On the one hand, certain measures are within the competence and responsibility of the national authorities alone (forwarding projects to the Commission, granting or refusing approval, delegating power to authorities other than central government authorities and applying for an application to be carried forward) while, on the other hand, the final decisions taken on projects submitted or carried forward fall within the Commission's competence. Depending on the authority which adopted them, those two types of measure may be challenged in the national courts or before Community institutions.

The Commission's decision to regard the application for aid submitted by Borelli as inadmissible was adopted by reason of the failure to comply with the peremptory requirements laid down by Article 13(3) of Regulation No 355/77. The Commission did not adopt the reasoning of the Regional Council of Liguria when it decided to reject the application on its merits; it found that the Italian authority had not adopted a favourable opinion on the application, and therefore declared it inadmissible. The fact that Borelli had initially received the approval of the national authorities could make no difference to that decision. Neither was the Commission entitled to substitute itself for the national authorities, both because Article 13 of Regulation No 355/77 makes no provision for it to do so and because to do so would have been manifestly contrary to that article.

With regard to the plea alleging infringement of the combined provisions of Article 13 and 21 of Regulation No 355/77, the Commission argues, first, that Borelli is wrong to claim that it is possible to draw a distinction between two different procedures for the grant of EAGGF aid, one consisting in ascertaining that the project satisfies the legal requirements and assessing the merits of the project and the other in examining projects carried forward from the previous year.

There is in fact only one procedure, which is followed either in the actual financial year in which the project is forwarded to the Commission or in a subsequent financial year, and it requires there to be the approval of the national authority.

Furthermore, the requirement laid down in Article 13 for the grant of aid to have been approved by the Member State concerned is designed to prevent aid from being granted at the end of the administrative procedure in the absence of approval of the national authority or contrary to its opinion; moreover, the national authority's approval is indissociable from the Member State's commitment to assist in financing the project, which is also a requirement for the grant of aid.

The Commission further contends that the approval which is forwarded to it with the application for aid is not inviolable or irrevocable, as administrative acts are susceptible of amendment when this is required by re-examination of the situation, as was the case here.

Finally, the procedure laid down by Regulation No 355/77 presupposes that the Member States will subsequently take part in drawing up the final decisions and in this case the contested decision was notified to the Member States together with all the proposals with an eye to the meeting of the Standing Committee on Agricultural Structures, which is required to deliver an opinion before decisions are finally adopted.

B — *The claim for damages*

*Borelli* claims that in so far as its claim for the annulment of the contested decision and for a declaration that it is therefore entitled to obtain the aid should not be upheld, it is entitled to be compensated for the damage ensuing as a result of the region of Liguria's omission, as proved by the foregoing considerations. Liability lies primarily with the region of Liguria and secondarily with the European Economic Community, since,

given that the procedures for the adoption of the opinion of the Member State and the decision of the Commission are connected, the Commission adopted the region of Liguria's decision as its own.

The existence of the alleged damage cannot be called in question by the Commission's claim that even if Borelli's application had been accepted after being carried forward to the 1990 financial year it would not have been granted owing to the insufficiency of Community funds. No evidence has produced to support that claim.

Similarly, when the Commission claims that the application could not have been carried forward more than once, Borelli points out that according to Article 20 of Regulation No 866/90 projects submitted on or after 1 May 1988, such as the one in question, 'may be included in operational programmes to be financed in 1990 and 1991 provided that they meet the criteria and conditions stipulated in this Regulation'. It is clear from the wording of Borelli's project that it satisfies the criteria set out in Articles 10 and 11 of Regulation No 866/90 and that it could therefore have been given the financing requested.

With regard to the quantum, Borelli leaves it to the Court to determine this *ex aequo et bono*.

The *Commission* considers that the damages claim is groundless as far as the Commission's liability is concerned. It maintains that, quite apart from the fact that it is hard to bring such liability within the scope of Article 215 of the EEC Treaty, the Commission did not adopt or share or cover the assessments of the merits made by the national authorities. The Commission found that the requirements laid down by Article 13(3) of Regulation No 355/77 were not satisfied and decided accordingly.

J. C. Moitinho de Almeida
Judge-Rapporteur