JUDGMENT OF THE COURT (Sixth Chamber)
29 January 1998 *

In Case C-61/95,

Hellenic Republic, represented by Panagiotis Milonopoulos, lawyer in the Special Legal Service for the European Communities of the Ministry of Foreign Affairs, and Meletis Tsotsanis, Head of the Legal Affairs Department of the Ministry of Agriculture, acting as Agents, with an address for service in Luxembourg at the Greek Embassy, 117 Val Sainte-Croix,

applicant,

v

Commission of the European Communities, represented by Xenophon Yataganas and Dimitrios Gouloussis, Legal Advisers, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of Commission Decision 94/871/EC of 21 December 1994 on the clearance of the accounts presented by the Member States in respect of the expenditure for 1991 of the European Agricultural Guidance and Guarantee Fund (EAGGF), Guarantee Section (OJ 1994 L 352, p. 82), in so far as it concerns the Hellenic Republic,

* Language of the case: Greek.

THE COURT (Sixth Chamber),

composed of: H. Ragnemalm, President of the Chamber, G. F. Mancini, P. J. G. Kapteyn, J. L. Murray and G. Hirsch (Rapporteur), Judges,

Advocate General: A. La Pergola,
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 28 November 1996, at which the Hellenic Republic was represented by Panagiotis Milonopoulos and Ioannis Khalkias, Assistant Legal Adviser in the State Legal Service, acting as Agent, and the Commission by Dimitrios Gouloussis,

after hearing the Opinion of the Advocate General at the sitting on 17 April 1997,

gives the following

Judgment

1 By application lodged at the Court Registry on 9 March 1995, the Hellenic Republic brought an action under the first paragraph of Article 173 of the EC Treaty for the partial annulment of Commission Decision 94/871/EC of 21 December 1994 on the clearance of the accounts presented by the Member States in respect of the expenditure for 1991 of the European Agricultural Guidance and Guarantee Fund (EAGGF) Guarantee Section (OJ 1994 L 352, p. 82, 'the contested decision'), in so far as it concerns the Hellenic Republic.

2 The application seeks the annulment of that decision in so far as the Commission did not recognise the following sums as chargeable to the EAGGF:

— DR 1 592 000 000 and DR 372 933 493, in respect of supplementary levy on milk for exceeding the national guaranteed quantity (deliveries to dairies and direct sales);

— DR 2 465 573 475 in respect of aid for the production of olive oil;

— DR 16 735 309 160 in respect of aid for the production of cotton;

— DR 10 450 292 347 in respect of tobacco, of which DR 3 531 558 038 represented irregular premiums, DR 2 705 095 represented securities in connection with leaf tobacco premiums, DR 4 922 442 527 represented reduction in premiums and intervention prices where the maximum guaranteed quantities were exceeded and DR 1 993 586 687 represented the calculation of the final adjustment.

3 The reasons for the corrections made are set out in a summary report of 21 December 1994.

4 By letter of 24 May 1995, the terms of which were confirmed at the hearing, the Greek Government withdrew the part of its application that concerned sums claimed in respect of the supplementary levy on milk.

Expenditure in respect of production aid for olive oil

5 According to the summary report, supervision of expenditure in the olive oil sector is inadequate in Greece. In particular, there is no register of olive cultivation, the computerised data files are unusable, the percentage of on-the-spot checks is insufficient and the checking of documents does not properly satisfy EAGGF requirements. According to the report, 'Apparently the Ministry of Agriculture staff of each Nomos (Department) monitors the activity of olive growers, producer organisations and mills. In practice it would appear that one or two persons are responsible for dealing with several thousands of individual files; reservations must therefore be expressed as regards the scope and effectiveness of their work. Since there are no reports on those checks, it is impossible for the EAGGF to take them into account.'

6 The Greek Government disputes those findings.

7 In its view, first, the establishment of a register of olive cultivation is objectively impossible. On 28 December 1988 the Greek Government submitted to the Commission a programme of trials for the purposes of establishing a register of olive cultivation in accordance with Commission Regulation (EEC) No 586/88 of 2 March 1988 amending Regulation (EEC) No 2276/79 laying down detailed rules for the drawing up of a register of olive cultivation in the Member States producing olive oil (OJ 1988 L 57, p. 18). In so far as the Commission undertook to carry out the main part of the programme, no complaint can be made against the Greek authorities if that programme has not, as yet, been put into effect.

8 Secondly, as regards computerised data files, the Greek Government states that computerisation of the applications submitted by producers has, for the most part, been completed. If monitoring proves inadequate, supplementary checks are carried out by the Ministry of Agriculture, producer organisations and the Organismos Elenkhou Eniskhiseon sto Elaiolado (Olive-Oil Production-Aid Control Agency).

9 Lastly, with regard to the alleged inadequacy of the checks carried out by the control agency, the Greek Government maintains that in the marketing year 1991/92 it carried out checks at 596 olive mills out of a total of 2 949, corresponding to 19.9%, at the premises of the sole producers' association, corresponding to 100%, at those of 42 producers' organisations out of a total of 70, corresponding to 58%, and at those of 4 698 producers belonging to an organisation out of a total of 169 863, corresponding to 0.87%.

10 The Commission points out that the Hellenic Republic would not appear to be disputing the lack of a register of olive cultivation or computerised data files, or the inadequacy of traditional checks. Regardless of the veracity of the arguments put forward to conceal those fundamental lacunae, the Commission considers that a monitoring system for the olive oil sector is wholly lacking.

11 The Commission states that, having examined the entire administrative and monitoring procedure for olive oil production aid, it concluded that that procedure had a number of defects to which it drew the attention of the Greek authorities. Thus while, in theory, Ministry of Agriculture staff supervise the activity of olive growers and producer organisations in each Nomos, it would appear in reality that one or two persons are responsible for dealing with thousands of individual files. Lastly, the Commission points out that no reports on checks were drawn up, so that its services were not able to take the results of those checks into account.

12 With regard to the claim that it was objectively impossible to establish a register of olive cultivation, it is sufficient to note that it was not until its letter of 28 December 1988, that is, after the deadline of 31 October 1988 (see Council Regulation No 3453/80 of 22 December 1980 amending Council Regulation (EEC) No 154/75 on the establishment of a register of olive cultivation in the Member States producing olive oil (OJ 1980 L 360, p. 15)), that the Greek Government submitted to the Commission a programme of trials for the purposes of establishing the register. As the Court held in Case C-50/94 *Greece* v *Commission* [1996] ECR I-3331, paragraph 40, the fact that after that date the Commission assisted the Greek

Government in its efforts to fulfil its obligations cannot, in those circumstances, prove that it was absolutely impossible to establish the register by the required date, since the Greek Government has not put forward any argument relating to the period before 31 October 1988.

13 As regards, next, the delay in the establishment of computerised data files, that cannot, on any view, be justified by a general reference to supplementary checks, the scope and thoroughness of which have not been specified and the effectiveness of which is, moreover, disputed by the Commission.

14 Lastly, as far as the checks provided for by the Community provisions are concerned, Article 14(2) of Council Regulation (EEC) No 2261/84 of 17 July 1984 laying down general rules on the granting of aid for the production of olive oil and of aid to olive oil producer organisations (OJ 1984 L 208, p. 3) provides that producer Member States are to verify the activities of each producer organisation and association, and, in particular, that the checking operations have been carried out by those bodies. For that purpose, pursuant to the last paragraph of Article 4(2) of Commission Regulation (EEC) No 3061/84 of 31 October 1984 laying down detailed rules for the application of the system of production aid for olive oil (OJ 1984 L 288, p. 52), producer organisations are to prepare a detailed report on each of the checks carried out and forward a copy thereof as soon as possible to the Member State concerned. In the case of independent producers, the Member State concerned must, in accordance with Article 14(4) of Regulation No 2261/84, carry out checking by sampling on the spot.

15 In this case the Greek Government does not challenge the Commission's statements to the effect that the checks carried out by the Ministry of Agriculture were ineffective because of the insufficient number of qualified staff responsible for the checks and the absence of reports on the checks enabling them to be verified. Since effective controls are, however, an indispensable requirement for the proper functioning of the aid system, arguments relying simply on the percentages of checks carried out do not prove that these constitute compliance with the system.

16 In those circumstances, the pleas in law relating to expenditure under the heading of production aid for olive oil must be rejected.

Expenditure in respect of production aid for cotton

17 Under the heading 'Production aid for cotton', the summary report also points to deficiencies in the monitoring of expenditure. In particular, it refers to a request by the EAGGF to the Greek authorities to hold an inquiry pursuant to Article 6 of Council Regulation (EEC) No 595/91 of 4 March 1991 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organisation of an information system in this field and repealing Regulation (EEC) No 283/72 (OJ 1991 L 67, p. 11) for the purpose of detecting fraud in the cotton sector.

18 However, according to that report, '[T]he various correspondence addressed by the Greek authorities to the EAGGF on the course of the inquiry does not satisfactorily answer the requests for precise information formulated by the EAGGF since February 1993. The Greek authorities did not communicate either the final inquiry findings or a specific evaluation of the financial impact of the irregularities found, as required by the inquiry procedure under Regulation (EEC) No 595/91. In addition, the information communicated does not enable an assessment to be made of the actual progress achieved with regard to the Greek monitoring system.'

19 The Hellenic Republic asks for the contested decision to be annulled on this point, principally on the grounds that the Commission lacked competence, that its rights of defence were infringed and that the Commission exercised its discretion improperly. In the alternative, it claims that there was a substantive breach of a provision of Community law in that reference was made to a legally non-existent condition and the statement of reasons was erroneous.

20 In support of its plea that the Commission lacked competence, the Hellenic Republic maintains that the Commission cannot base itself either on Article 155 of the EC Treaty or on 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) for the purposes of adopting a measure defining the criteria for fixing the percentages on the basis of which it will disallow expenditure as Community expenditure in the Guarantee Section.

21 On this point, it need merely be observed that in Case C-50/94 *Greece* v *Commission*, cited above, at paragraph 28, the Court has already held that if, in its function of clearing the accounts the Commission, instead of refusing the entire expenditure, endeavours to draw up rules to differentiate according to the degree of risk posed to the EAGGF by different levels of defective supervision, the Member State must show that those criteria are arbitrary and unfair. Since the Greek Government has adduced no such evidence, its plea that the Commission had no such power must be rejected.

22 As regards the pleas alleging breach of the rights of defence, the improper exercise by the Commission of its discretion, or, in the alternative, a substantive breach of a provision of Community law, the Hellenic Republic claims that at a bilateral meeting between the Greek authorities and those of the Commission held on 6 October 1993 to deal with questions arising from the clearance of expenditure, the cotton sector was not mentioned. Accordingly the Greek Government believed that there were no difficulties in that sector.

23 However, at an EAGGF Committee meeting held in September 1994, the representatives of the Hellenic Republic learned that the EAGGF had proposed to refuse to recognise 10% of the expenditure incurred in that sector — subject to a negative reservation. According to the Hellenic Republic, when that proposal was brought to the attention of the Director General for Agriculture at the Commission, he raised the percentage to 50%, which the Commission then reduced to 25%. The Hellenic Republic considers that the way in which such a damaging measure was announced, without official bilateral meetings first being organised,

constitutes a breach of the rights of defence. Furthermore, those factual circumstances led to the adoption of arbitrary decisions both by the EAGGF and — principally — by the Director General for Agriculture, and then by the Commission.

24 The Commission maintains that well before the contested decision was drawn up it had on several occasions drawn the attention of the Greek authorities to inadequate monitoring in the cotton sector and had given notice of its intention to make a flat-rate correction of 25%. It points out to that effect that during 1992 the Commission's services carried out four inspection visits to the Hellenic Republic, resulting in reports that were notified to the Greek authorities on 28 January 1993. The inspection visits took place as a result of suspicions of fraud aroused by the significant difference between the production figures estimated by the Greek authorities in August 1991 (596 107 tonnes for the period 1991/92) and the 718 657 tonnes worth of production in respect of which applications for aid were made.

25 The Commission adds that, in accordance with Article 6 of Regulation No 595/91 and Article 9 of Regulation No 729/70, the Hellenic Republic was requested to hold an inquiry, the first stage of which took place between 26 October and 4 December 1992. According to the Commission, the Hellenic Republic subsequently accepted that it was required to communicate to the Commission cases of irregularity that had been brought to light (Articles 3 and 5 of Regulation No 595/91). It states that despite repeated formal requests by the EAGGF, the second stage of the inquiry has not yet begun, as the Ministry of Agriculture itself admitted (letter of 14 June 1994 from the Secretary General for Agriculture). By letter of 18 August 1994 Commissioner Steichen drew the attention of the Minister for Agriculture to the lack of cooperation shown by the Greek authorities to the Commission in the cotton sector.

26 As is shown by the exchange of correspondence between the Hellenic Republic and the Commission, the Greek authorities were, at least from 1992, fully aware of the gravity of the problem of monitoring in the cotton sector. The Commission's announcement in September 1994 that it was going to apply a flat-rate correction of 25% was not, therefore, unexpected, so that the Commission has not infringed the rights of defence.

27 In so far as the Hellenic Republic alleges that the Commission exercised its discretion improperly, and refers in that connection to the internal discussions at Commission level, prior to the contested decision, concerning the extent of the correction, it need merely be pointed out that those considerations have no effect on the legality of the contested decision. That plea must therefore be rejected.

28 In support of its plea that there was a substantive breach of a provision of Community law, or that reference was made to a legally non-existent condition, the Hellenic Republic claims that a rule such as that set out in the ninth recital in the preamble to the contested decision, according to which the special circumstances in the cotton sector, however, 'justify re-examination by the Commission of the disallowance during the present clearance in the light of the findings and verifications currently under way' is unknown in international law and, in any case, is dependent on a number of conditions, none of which is fulfilled in this case.

29 The Commission states that the ninth recital in the preamble to the contested decision constitutes a negative reservation. In its view, the expenditure was corrected for 1991, but disallowed expenditure will be re-examined in the light of the findings of the inquiries held and, if need be, the correction will be amended in a later clearance of accounts.

30 On this point, it should be observed that, in accordance with Article 5(2)(b) of Regulation No 729/70, the Commission, after consulting the EAGGF Committee, is to make up the accounts of the authorities and bodies, before the end of the following year, on the basis of the annual accounts. However, if the information that should be supplied by the Member States and the checks that it considers necessary to undertake do not lead to any definite results, the Commission is entitled to draw up the accounts on the basis of the information obtained during the clearance procedure, reserving to itself the possibility of correcting that decision in a subsequent clearance.

31 Since that was the course taken by the Commission in this case, the plea at present under consideration must be rejected.

32 Lastly, the Hellenic Republic complains that the Commission's statement of reasons is erroneous. It disputes the account of the facts in the summary report concerning the inadequacy of checks.

33 As is clear, in particular, from the correspondence between the Greek Minister for Agriculture and Commissioner Steichen, the Greek authorities did not give satisfactory replies to the various specific questions put by the EAGGF at the stage preceding the contested decision. In those circumstances, the Hellenic Republic cannot dispute the Commission's findings as to the facts, particularly since those findings correspond to the results of various inquiries.

34 The pleas in law concerning expenditure in respect of production aid for cotton must therefore be rejected.

Expenditure in respect of tobacco

35 The irregularities found in the summary report concerning expenditure in respect of tobacco relate to four different complaints, namely the granting of irregular premiums, securities in the context of premiums for leaf tobacco, the fact that premiums and intervention prices were not immediately reduced where the maximum guaranteed quantities were exceeded, and the use of incorrect methods for calculating the final adjustment.

Complaint concerning irregularly granted tobacco premiums

36 As regards the complaint that tobacco premiums were granted irregularly, the summary report states:

'The results of the inquiry concerning tobacco exported to Albania and Bulgaria confirm the EAGGF's findings in point 4.9.2.1.1 of the summary report, EAGGF-Guarantee 1990. For the same reasons as those set out in that point, it is proposed to make a correction for certain expenditure relating to leaf tobacco premiums and corresponding refunds.'

37 According to the Hellenic Republic, the contested decision should be annulled on that point for breach of the rights of defence. The results of the inquiry concerning tobacco exported to Albania and Bulgaria ('Report of the Fraud Inspection Visit — Tobacco — Greece, 4-8 July 1994' of 28 September 1994), on which the contested decision was based, were brought to the attention of the Greek authorities on 22 December 1994, in other words the day after the decision was adopted. Had the Commission given the Greek authorities a prior opportunity to put forward a defence, it is certain that the result would have been different from the decision that was reached before the Greek authorities began to address themselves to refuting the substance of the Commission's allegations.

38 The Commission states that the contested decision was published approximately three months after the 'Fraud Inspection Visit' report was drawn up and consequently it was not based on facts that were non-existent at that time. In that connection, the Commission considers that there was no breach of the rights of defence. When the Hellenic Republic brought its action, the contested report was available to it and could have been refuted. Moreover, the handling of the matter was the subject of repeated lengthy negotiations between the Community authorities and the Greek authorities, during which the latter did not show particular diligence in undertaking investigations of fraud and irregularities in the tobacco aid sector.

39 As the Court held in Case C-342/89 *Germany* v *Commission* [1991] ECR I-5031, paragraph 18, Case C-346/89 *Italy* v *Commission* [1991] ECR I-5057, paragraph 18, and Case C-69/94 *France* v *Commission* [1997] ECR I-2599, paragraph 30, the final and conclusive decision on the annual clearance of accounts is taken at the conclusion of the specific procedure giving effect to the *audi alteram partem* rule, during which the Member States concerned are provided with all the guarantees necessary for them to present their point of view.

40 In this case, the summary report of 21 December 1994 expressly refers to an inquiry, the results of which are summarised in an inspection visit report of 28 September 1994. Since the latter report was not, however, received by the Permanent Representation of the Hellenic Republic to the European Communities until 22 December 1994, that is to say, the day after the contested decision was adopted, the applicant was not able to discuss the results of the inquiry before the final decision. In contrast to the summary report for 1990, which, under the heading 'Irregularly granted tobacco premiums' had entered a negative reservation in respect of the correction while the results of the inquiry were awaited, the correction entered in the summary report for 1991 is conclusive in character. Since the Commission has not shown that the Greek authorities were aware of the inspection visit report before it was officially distributed, the contested decision must be annulled on that point for breach of the *audi alteram partem* rule.

Complaints concerning: securities in respect of premiums for leaf tobacco; reduction of premiums and intervention prices where maximum guaranteed quantities were exceeded; and calculation of the final adjustment

41 In addition, the Hellenic Republic seeks the annulment of the contested decision on the further ground that the Communities were unjustly enriched in so far as concerns the complaints concerning securities in respect of premiums for leaf tobacco, reduction of premiums and intervention prices where maximum guaranteed quantities were exceeded and calculation of the final adjustment.

42 With regard to the complaint concerning securities in respect of tobacco premiums, the Greek Government claims that, in a note of 12 December 1994, it informed the EAGGF that it had retained DR 372 762 124 from processors' expenditure by way of set-off and that it had also informed the Court of Auditors of that measure. The Commission nevertheless retained DR 370 057 029 which it had withheld on the clearance of expenditure for 1989 together with the remaining sum of DR 2 705 095. Thus the Commission was enriched by DR 372 762 124 at the expense of the Hellenic Republic.

43 Similarly, with regard to the complaint concerning reductions in premiums and intervention prices where maximum guaranteed quantities were exceeded, the EAGGF was informed, by the note of 12 December 1994, that all sums relating to the fact that the maximum quantities for the 1989 and 1990 harvests had been exceeded had been recovered, either directly or by set-off. If the Commission, on the one hand, continued to retain DR 4 922 442 527 and, on the other hand received that same amount from the Hellenic Republic as a credit, it would be in receipt of that sum twice over.

44 Lastly, with regard to the complaint concerning calculation of the final adjustment, the Hellenic Republic emphasises that, in another note of 12 December 1994, a table showing a new method of calculation was transmitted to the Commission. It follows from that table that the correction effected against the expenditure of the Hellenic Republic should be limited to DR 80 379 053 rather than amounting to DR 1 993 586 637, since DR 1 913 207 634 had already been credited to the EAGGF.

45 It should be noted in this connection that, by decision of 21 January 1994 addressed to the Member States, the Commission set a deadline of 31 January 1994 for the transmission of supplementary information with regard to the clearance of accounts for 1991. In this case, it was only in notes dated 12 December 1994, in other words a few days before the final decision, that the Hellenic Republic informed the Commission of certain facts which, in its view, were relevant. Since that information obviously reached the Commission outside the prescribed period, the Commission was not bound to take it into account in the final decision. The application should therefore be dismissed on those heads.

46 It follows from the foregoing considerations that the decision in question must be annulled in so far as it did not conclusively accept the amount of DR 3 531 558 038 in respect of expenditure relating to leaf tobacco premiums and the corresponding refunds.

Costs

47 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. However, under the first paragraph of Article 69(3), the Court may order that the costs be shared or that the parties bear their own costs where each party succeeds on some and fails on other heads. Since the Hellenic Republic and the Commission have been partially unsuccessful, the parties must be ordered to bear their own costs.

On those grounds,

THE COURT (Sixth Chamber),

hereby:

1. **Annuls Commission Decision 94/871/EC of 21 December 1994 on the clearance of the accounts presented by the Member States in respect of the expenditure for 1991 of the European Agricultural Guidance and Guarantee Fund (EAGGF), Guarantee Section in so far as it did not conclusively accept the amount of DR 3 531 558 038 in respect of expenditure relating to leaf tobacco premiums and corresponding refunds as chargeable to the EAGGF;**

2. For the remainder, dismisses the application;

3. Orders the parties to bear their own costs.

Ragnemalm Mancini Kapteyn

Murray Hirsch

Delivered in open court in Luxembourg on 29 January 1998.

R. Grass H. Ragnemalm

Registrar President of the Sixth Chamber