JUDGMENT OF THE COURT (Sixth Chamber)
18 April 2002 *

In Case C-332/00,

Kingdom of Belgium, represented by A. Snoecx, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by A. Bordes and M. Niejahr, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for, first, annulment of Commission Decision 2000/448/EC of 5 July 2000 amending Decision 1999/187/EC on the clearance of the accounts presented by the Member States in respect of the expenditure for 1995 of the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) (OJ 2000 L 180, p. 46) in so far as it excludes from Community financing expenditure in the amount of BEF 50 763 827 incurred by the Kingdom

* Language of the case: French.

of Belgium in the context of aid for the sale at a reduced price of butter and the grant of aid for butter and concentrated butter intended for the manufacture of pastry products, ice-cream and other foodstuffs and, second, partial annulment of Commission Decision 2000/449/EC of 5 July 2000 excluding from Community financing certain expenditure incurred by the Member States under the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) (OJ 2000 L 180, p. 49) in so far as it excludes from Community financing expenditure in the amount of EUR 1 602 256.45 and EUR 31 883.22 respectively incurred by the Kingdom of Belgium in the context of aid for the sale at a reduced price of butter and the grant of aid for concentrated butter intended for the manufacture of pastry products, ice-cream and other foodstuffs,

THE COURT (Sixth Chamber),

composed of: F. Macken, President of the Chamber, C. Gulmann, J.-P. Puissochet, R. Schintgen and J.N. Cunha Rodrigues (Rapporteur), Judges,

Advocate General: C. Stix-Hackl,
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 4 October 2001, at which the Kingdom of Belgium was represented by J. Devadder and C. Pochet, acting as Agents, and the Commission by A. Bordes,

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

gives the following

Judgment

1 By application received at the Court Registry on 11 September 2000, the Kingdom of Belgium brought an action under Article 230 EC for, first, annulment of Commission Decision 2000/448/EC of 5 July 2000 amending Decision 1999/187/EC on the clearance of the accounts presented by the Member States in respect of the expenditure for 1995 of the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) (OJ 2000 L 180, p. 46) in so far as it excludes from Community financing expenditure in the amount of BEF 50 763 827 incurred by the Kingdom of Belgium in the context of aid for the sale at a reduced price of butter and the grant of aid for butter and concentrated butter intended for the manufacture of pastry products, ice-cream and other foodstuffs and, second, partial annulment of Commission Decision 2000/449/EC of 5 July 2000 excluding from Community financing certain expenditure incurred by the Member States under the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) (OJ 2000 L 180, p. 49) in so far as it excludes from Community financing expenditure in the amounts of EUR 1 602 256.45 and EUR 31 883.22 respectively incurred by the Kingdom of Belgium in the context of aid for the sale at a reduced price of butter and the grant of aid for concentrated butter intended for the manufacture of pastry products, ice-cream and other foodstuffs.

2 The corrections at issue correspond to the total amount of aid paid by the Kingdom of Belgium to N. Corman SA (hereinafter 'Corman') from 22 February

1994 to 14 February 1995 under Article 1 of Commission Regulation (EEC) No 570/88 of 16 February 1988 on the sale of butter at reduced prices and the granting of aid for butter and concentrated butter for use in the manufacture of pastry products, ice-cream and other foodstuffs (OJ 1988 L 55, p. 31) in the version applicable when the aid was granted, namely that amended by Commission Regulation (EEC) No 2443/93 of 2 September 1993 (OJ 1993 L 224, p. 8 — hereinafter 'Regulation No 570/88, as amended') with a view to manufacturing technologically adapted industrial butter (hereinafter 'TAIB').

Legal background

3 Article 1 of Regulation No 570/88, as amended, lays down the conditions for granting aid for butter and concentrated butter. It provides as follows:

'Subject to the conditions laid down hereinafter, butter bought in pursuant to Article 6(1) of Regulation (EEC) No 804/68 and taken into storage before a date to be determined shall be sold and special aid shall be granted for the use of butter and concentrated butter as referred to in the second paragraph.

Notwithstanding Article 9a(a), only the following may qualify for aid:

(a) butter which, in the Member State of manufacture, meets the definition and grading requirements laid down in Article 1(3)(b) of Regulation (EEC) No 985/68 and the packaging of which is marked accordingly. Where the

butter is manufactured in the same establishment as that in which the tracers are added, the packaging of the butter prior to the addition of tracers shall not be required;

...'

4 When Regulation No 570/88, as amended, came into force, Article 1 of Regulation (EEC) No 985/68 of the Council of 15 July 1968 laying down general rules for intervention on the market in butter and cream (OJ, English Special Edition 1968 (I), p. 256), as amended by Council Regulation (EEC) No 1897/87 of 2 July 1987 (OJ 1987 L 182, p. 35) (hereinafter 'Regulation No 985/68'), was worded as follows:

'1. Intervention agencies shall buy in only such butter as:

(a) is produced by an approved undertaking;

(b) meets the definition and classification contained in paragraph 3(a) and (b),

...

2. Until the date of implementation of the provisions adopted pursuant to Article 27 of Regulation (EEC) No 804/68 an undertaking shall only be approved if it manufactures butter meeting the requirements laid down in paragraph 3(a) and (b).

3. Until the date referred to in paragraph 2, the butter referred to in paragraph 1:

(a) must have the following composition and characteristics:

either

(aa) — a minimum butterfat content, by weight, of 82%,

— a maximum water content, by weight, of 16%,

— be manufactured from sour cream,

or

(bb) — a minimum butterfat content, by weight, of 82%,

— a maximum water content, by weight, of 16%,

— be manufactured from sweet cream;

(b) must be:

— graded "beurre marque de contrôle", as regards Belgian butter;

...'.

5 Article 9 of Regulation No 570/88, as amended, also provides for the possibility of granting aid 'if the concentrated butter or the butter, to which tracers have or have not been added, is incorporated at an intermediate stage in products other than the final products and in an establishment other than that of final processing'. In this case the granting of aid is subject to certain conditions including, *inter alia*, approval of the establishment where the intermediate products are processed and a marking on the packaging that the product is an intermediate one.

6 Article 9a of Regulation No 570/88, as amended, which was inserted by Commission Regulation (EEC) No 1813/93 of 7 July 1993 amending Regulation No 570/88 (OJ 1993 L 166, p. 16), defines intermediate products. It provides as follows:

'The intermediate products referred to in Article 9 shall, without prejudice to Article 4, be products other than the products falling within CN codes 0401 and 0405.

However,

(a) products with a butterfat content of not less than 82% manufactured exclusively from the concentrated butter referred to in point (b) of the second paragraph of Article 1 at an establishment approved to that effect in accordance with Article 10, on condition that the tracers referred to in Article 6(1) have been added to them shall be considered as intermediate products;...

...'

7 Under Articles 1 to 3 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), as amended by Council Regulation (EC) No 1287/95 of 22 May 1995 (OJ 1995 L 125, p. 1) ('Regulation No 729/70'), the guarantee section of the EAGGF is to finance, first, refunds on exports 'granted in accordance with the Community rules within the framework of the common organisation of agricultural markets' and, second, intervention intended to stabilise the agricultural markets 'undertaken according to Community rules within the framework of the common organisation of agricultural markets'.

8 According to the first subparagraph of Article 5(2)(c) of Regulation No 729/70, the Commission 'shall decide on the expenditure to be excluded from the Community financing referred to in Articles 2 and 3 where it finds that expenditure has not been effected in compliance with Community rules'.

9 The first subparagraph of Article 8(1) of Regulation No 729/70 provides as follows:

'The Member States, in accordance with national provisions laid down by law, regulation or administrative action, shall take the measures necessary to:

— satisfy themselves that transactions financed by the Fund are actually carried out and are executed correctly;

— prevent and deal with irregularities;

— recover sums lost as a result of irregularities or negligence.'

10 Article 8(2) of Regulation No 729/70 provides that the financial consequences of irregularities or negligence attributable to administrative authorities or other bodies of the Member States are not to be borne by the Community.

Factual background

11 The Kingdom of Belgium granted aid to Corman for the manufacture of TAIB pursuant to Article 1 of Regulation No 570/88, as amended. The Commission

did not agree with the Belgian authorities' interpretation of that article, taking the view that the aid should have been granted under Article 9a of the regulation, provided that the butter could be traced.

12 That difference of opinion related to the types of product eligible for aid under Article 1 of Regulation No 570/88, as amended, laid down in Article 1 of that regulation in respect of 'primary' products, that is, butter and concentrated butter for use in final products such as pastry products, ice-cream and cake pastry, and in Article 9 thereof in respect of products known as 'intermediate' products manufactured either from butter or from concentrated butter.

13 By a letter of 16 February 1998 the Commission stated that it intended to fine the Kingdom of Belgium for the aid in question. The Belgian Government submitted a memorandum in reply on 28 June 1999 at a meeting with the Commission's 'EAGGF accounts clearance' department.

14 On 14 October 1999 the Kingdom of Belgium lodged a request for conciliation pursuant to Article 2(1) of 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 1994 L 182, p. 45).

15 In its report of 7 April 2000 (Case 99/BE/150), the conciliation body created under Article 1 of Decision 94/442/EC stated that, whilst TAIB clearly did not fall within the scope of the basic products referred to in Article 1 of Regulation No 570/88, as amended, it was none the less eligible for competition aid in the same amounts as an intermediate product, provided that it was marked. According to the Belgian authorities, all the TAIB for which aid was granted was marked, with the exception of 84 tonnes. The conciliation body therefore queried

in its report whether it was appropriate for a correction to be effected for 100% of the aid granted.

16 Following that report, the Commission proceeded to clear the EAGGF accounts and, without altering its position, adopted Decisions 2000/448 and 2000/449.

First plea in law

17 By its first plea the Belgian Government submits that Decisions 2000/448 and 2000/449 have no foundation in law. This plea may be broken down into three parts, namely the submission that the Kingdom of Belgium did not infringe Article 1 of Regulation No 570/88, as amended, the submission that no irregularities or negligence were attributable to the Belgian authorities, and the Member States' residual powers when a measure of harmonisation at Community level is not total.

The submission that there was no infringement of Article 1 of Regulation No 570/88, as amended, and the Member States' residual powers

Arguments of the parties

18 By the first limb of its first plea the Belgian Government argues that the TAIB was eligible for aid under Article 1 of Regulation No 570/88, as amended, because it had been classified as 'beurre de laiterie: qualité extra' ('dairy butter: extra quality') by the Belgian authorities.

19 According to the Belgian Government, subparagraph (a) of the second paragraph of Article 1 of Regulation No 570/88, as amended, governing the grant of aid, simply refers to Article 1(3)(b) of Regulation No 985/68, and the classification of butter by the national authorities is therefore the sole criterion governing the eligibility of butter for aid under Article 1 of Regulation No 570/88, as amended. The Commission cannot therefore successfully argue that the conditions laid down in Article 1(3)(a) of Regulation No 985/68 were applicable on the ground that they set out a general definition of butter.

20 The Belgian Government also maintains that the requirement that butter be manufactured directly and exclusively from pasteurised cream has only applied since 1 March 1995, the date of implementation of Commission Regulation (EC) No 455/95 of 28 February 1995 amending Regulations (EEC) No 1547/87 and (EEC) No 1589/87 as regards the buying-in of butter by the intervention agencies and Regulations (EEC) No 2191/81 and (EEC) No 570/88 as regards the grant of aid for the purchase and sale of butter at a reduced price to certain categories of consumers and industries (OJ 1995 L 46, p. 31).

21 The Commission, on the other hand, contends that the applicable rules require not only that the butter be classified by the Belgian authorities as 'beurre marque de contrôle' but also that the objective qualities of the butter fall within the definition in Article 1(3)(a) of Regulation No 985/68.

22 By the third part of its first plea, the Belgian Government argues that, under the principle of subsidiarity and the settled case-law of the Court in regard to the Member States' residual powers, where Community harmonisation is not total and comprehensive, the Kingdom of Belgium remains competent to determine what butter falls within the scope of the classification 'beurre marque de contrôle'. Since it had exercised that residual power it was entitled to grant the aid in question on the basis of the second paragraph of Article 1 of Regulation No 570/88, as amended.

23 The Commission does not contest the existence of those residual powers, but argues that they do not entitle the Kingdom of Belgium to forgo compliance with the requirements of Article 1(3)(a) of Regulation No 985/68.

Findings of the Court

24 As regards that part of the plea that there was no infringement of Article 1 of Regulation No 570/88, as amended, it must be observed that the second paragraph of Article 1, notwithstanding the references therein to the definition and classification of butter as conditions governing the grant of aid, refers to Article 1(3)(b) of Regulation No 985/68, which, in regard to butter produced in Belgium, simply states that the butter must be graded by the Belgian authorities as 'beurre marque de contrôle'.

25 Those provisions of Regulation No 570/88, as amended, must be interpreted in the light not only of their wording but also of the objectives of the regulation, which are to encourage the disposal of intervention butter purchased pursuant to Regulation No 985/68 and to institute a system of aid aimed at restoring the price of butter on the market to a level similar to that of intervention butter.

26 As the Advocate General has pointed out at points 46 to 53 of her Opinion, there is a link between Regulation No 570/88, as amended, and Regulation No 985/68, which explains that the measures provided for in Regulation No 570/88, as amended, to encourage the disposal of butter constitute a complementary mechanism to the intervention system laid down for butter in Regulation No 985/68. Those measures aim to ensure, on the one hand, that butter stored under the latter regulation is channelled towards consumption, and, on the other, that the price of butter is brought to the price level of intervention butter.

27 The legal basis for both of those regulations is the intervention system laid down by Article 6 of Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organisation of the market in milk and milk products (OJ, English Special Edition 1968 (I), p. 176), which constitutes the reason why the butter has to satisfy the same conditions in the context of purchase by intervention bodies as in the context of the grant of aid.

28 It follows that, contrary to the contention of the Kingdom of Belgium, in order to be eligible for aid under Regulation No 570/88, as amended, butter must comply with the requirements laid down for purchase under Regulation No 985/68, including those governing its production and composition in Article 1(3)(a) of that regulation.

29 As regards the part of the plea relating to the residual powers of the Member States, it must be pointed out that where the Community has passed legislation, the Member States are under a duty to refrain from taking any measure which might undermine or create exceptions to it (see, along these lines, Case C-507/99 *Denkavit* [2002] ECR I-169, paragraph 32).

30 It must therefore be concluded that a Member State may exercise its power to grade butter under Article 1(3)(b) of Regulation No 985/68 only if it takes account of the requirements of that regulation.

31 It follows that the first and third limbs of the first plea are unfounded.

The submission that no irregularities or negligence were attributable to the national authorities

Arguments of the parties

32 By the second limb of its first plea the Kingdom of Belgium submits that its authorities and bodies were never guilty of irregularities or negligence within the meaning of Articles 2 and 3 of Regulation No 729/70.

33 According to the Kingdom of Belgium, if it has misinterpreted the applicable rules in this case, that is attributable first and foremost to an infringement of the principle of legal certainty by the Commission itself. That principle requires that the Community institutions refrain from adopting unclear or unpredictable legal provisions. The rules here, however, contain at least 15 different definitions of butter.

34 The Commission contends that that argument is irrelevant in so far as Decisions 2000/448 and 2000/449 are based principally on Articles 3(1) and 5(2)(c) of Regulation 729/70 and the finding that the aid in question does not comply with the Community rules, irrespective of whether the Kingdom of Belgium was guilty of irregularities or negligence.

Findings of the Court

35 First, it is settled case-law that the EAGGF finances only interventions undertaken in accordance with the Community rules in the framework of the common

organisation of agricultural markets (Case C-263/98 *Belgium* v *Commission* [2001] ECR I-6063, paragraph 35). Accordingly, it is for the Member States to bear the burden of any other sum paid, and in particular any amounts which the national authorities wrongly believed themselves authorised to pay in the context of the common organisation of those markets (Case 347/85 *United Kingdom* v *Commission* [1988] ECR 1749, paragraph 52).

36 As is clear from paragraph 28 of the present judgment, the Kingdom of Belgium incurred expenditure corresponding to the aid in question on the basis of an incorrect legal basis, which had the effect, pursuant to Article 5(2)(c) of Regulation No 729/70, of excluding that expenditure from Community financing, irrespective of whether or not there was any irregularity or negligence on the part of the Belgian authorities. The second limb of the first plea is therefore unfounded.

37 In the light of all the foregoing, the first plea, to the effect that Decisions 2000/448 and 2000/449 lack a proper legal basis, must be dismissed.

Second plea in law

Arguments of the parties

38 By its second plea the Belgian Government argues that the adoption of Decisions 2000/448 and 2000/449 infringed the principle of proportionality.

39 In that regard the Belgian Government argues that Corman obtained the same amount of aid on the — allegedly erroneous — basis of Article 1 of Regulation 570/88, as amended, as on the basis of Article 9a, which the Commission accepted as valid.

40 If TAIB were not a basic product but an intermediate one it would be eligible for similar aid provided it were traceable. Ninety-six per cent of the TAIB in respect of which the aid at issue was granted was traceable, as the conciliation body's report of 7 April 2000 makes clear.

41 In the Belgian Government's view, under the principle of proportionality, which the Commission should have respected when it adopted Decisions 2000/448 and 2000/449, only 4% at most of the aid in question could have been excluded from Community financing under those decisions.

42 The Commission contends on the basis of the Court's case-law that its discretion under Article 5 of Regulation No 729/70 is exhausted if it becomes apparent that the expenditure in respect of which clearance is contested was not incurred in accordance with Community law (Case 11/76 *Netherlands* v *Commission* [1979] ECR 245, paragraph 21). According to that case-law, the Commission is under a duty to bear such expenditure only if the misapplication of Community law is attributable to a Community institution (*Netherlands* v *Commission*, cited above, paragraph 25).

43 As regards the fact that there are no financial consequences for the EAGGF if the legal basis for the aid in question is flawed, the Commission argues that if a national practice that is not consistent with Community law cannot be eligible for EAGGF financing where the effect is financially favourable to the EAGGF itself (*United Kingdom* v *Commission*, cited above, paragraph 53), the same must *a fortiori* be true where the effect is neutral.

Findings of the Court

44 It must be recalled that, as paragraph 35 of the present judgment makes clear, Articles 2 and 3 of Regulation No 729/70 authorise the Commission to charge to the EAGGF only sums paid in accordance with the rules laid down in the context of the common organisation of the agricultural markets, and leaving all other sums to be borne by the Member States, in particular sums which the national authorities wrongly considered themselves authorised to pay in the context of that common organisation.

45 The Commission has no discretion in that regard even in cases where national practices incompatible with Community law have a beneficial effect on the amounts recorded in other EAGGF items (*United Kingdom* v *Commission*, paragraph 53).

46 The purpose of the EAGGF account clearing procedure, which is to check that refunds and interventions are made in accordance with the Community rules and thereby to guarantee that all traders are subject to the same conditions of competition, would be jeopardised if the Commission were able, when it finds a national practice to be irregular, to invoke a discretionary power to accept or reject it for Community financing according to the seriousness of its financial repercussions for the EAGGF.

47 In view of the foregoing considerations it must be concluded that the Commission was entitled in this case to refuse to charge to the EAGGF the expenditure corresponding to the aid erroneously paid by the Kingdom of Belgium under Article 1 of Regulation No 570/88, as amended.

48 The second plea, alleging infringement of the principle of proportionality, must therefore be dismissed.

Third plea in law

Arguments of the parties

49 By its third plea in law the Belgian Government submits that the Commission failed in its duty of genuine cooperation under Article 10 EC.

50 Having regard to the interpretation given by the Court to Article 10 EC, to the effect that the duty of genuine cooperation binds the institutions as well as the Member States, the Belgian Government argues that that duty applies *a fortiori* to the Commission where it does not have to give grounds for its decisions, as in the context of clearance of EAGGF accounts. Accordingly, the Commission should have undertaken conciliation efforts and should in particular have discussed the interpretation of the applicable rules with the Belgian authorities.

51 According to the Commission, the Belgian Government's arguments in support of the third plea relating to the alleged refusal to inform it of the real reasons for Decisions 2000/448 and 2000/449, and to resolve the difficulties of interpretation connected with the definition of butter, are contradicted by an examination of the facts of the case.

Findings of the Court

52 In this regard, it is clear from the file that a great deal of information on the interpretation of the rules applicable to the case was exchanged by the Commission and the Belgian authorities in the course of 1991 and 1995 in relation to the eligibility of the TAIB for Community aid.

53 It is also clear from the file, in particular from the conciliation body's report of 7 April 2000, that the allegation that the Commission made no effort to reach agreement cannot be upheld.

54 It follows that the third plea, alleging failure to comply with the duty of genuine cooperation, is unfounded.

Fourth plea in law

Arguments of the parties

55 By its fourth plea the Belgian Government alleges that the Commission infringed the principle of the protection of legitimate expectations.

56 It argues that Decisions 2000/448 and 2000/449 were adopted in contravention of that principle in so far as the Commission essentially based those decisions on a paragraph of the grounds of a judgment handed down by the Court of First Instance of the European Communities three years after the facts in a case where Regulation No 570/88 was not at issue (Case T-117/95 *Corman* v *Commission* [1997] ECR II-95).

57 The Commission claims that its own legitimate expectations were confounded by the Belgian authorities' classification of TAIB as 'beurre de laiterie: qualité extra' ('dairy butter: extra quality') after they had accepted that it was not eligible for aid, without informing the Commission. Furthermore the Commission denies that it 'essentially' based its Decisions 2000/448 and 2000/449 on the above judgment in *Corman* v *Commission*. That case merely served to confirm its consistent position.

Findings of the Court

58 As regards this plea, the Court has ruled that the principle of the protection of legitimate expectations can be invoked as against a Community rule only to the extent to which the Community has itself created a situation which may give rise to a legitimate expectation (Case C-177/90 *Kühn* [1992] ECR I-35, paragraph 14).

59 As is clear from the file, the Commission informed the Belgian authorities as early as June 1991 of its doubts as to the eligibility of TAIB for aid under Article 1 of Regulation No 570/88. It also stated very clearly in a letter of 3 July 1991 addressed to the French customs authorities, of which the Belgian Ministry of

Agriculture was aware, that TAIB could not be considered to constitute butter within the meaning of Article 1(3)(b) of Regulation No 985/68.

60 It follows that the Commission at no time created a situation such as to give rise to a legitimate expectation on the part of the Kingdom of Belgium that aid granted to TAIB under Article 1 of Regulation No 570/88, as amended, could be charged to the EAGGF. That being so, the Commission's reference to the case of *Corman* v *Commission* cannot call that finding into question.

61 The fourth plea, alleging infringement of the principle of the protection of legitimate expectations, cannot therefore be upheld.

62 Regard being had to all of the foregoing, the Kingdom of Belgium's action must be dismissed in its entirety.

Costs

63 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. As the Commission has applied for costs, and the Kingdom of Belgium has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the Kingdom of Belgium to pay the costs.**

Macken Gulmann Puissochet

Schintgen Cunha Rodrigues

Delivered in open court in Luxembourg on 18 April 2002.

R. Grass

Registrar

F. Macken

President of the Sixth Chamber