JUDGMENT OF THE COURT
27 February 1985 [1]

In Case 56/83

Italian Republic, represented by the Avvocatura Generale dello Stato, with an address for service in Luxembourg at the Italian Embassy,

applicant,

v

Commission of the European Communities, represented by Gianluigi Campogrande, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Oreste Montalto, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for a declaration that Commission Decision No 83/48 of 14 January 1983 concerning the clearance of the accounts presented by the Italian Republic in respect of the European Agricultural Guidance and Guarantee Fund, Guarantee Section, Expenditure for 1977 (Official Journal L 40, p. 55) is void in part,

THE COURT

composed of: Lord Mackenzie Stuart, President, G. Bosco and C. Kakouris (Presidents of Chambers), T. Koopmans, U. Everling, Y. Galmot and R. Joliet, Judges,

Advocate General: Sir Gordon Slynn
Registrar: H. A. Rühl, Principal Administrator

*

gives the following

1 — Language of the Case: Italian.

* after hearing the Opinion of the Advocate General delivered at the sitting on 5 December 1984,

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By application lodged at the Court Registry on 7 April 1983 the Italian Republic brought an action pursuant to the first paragraph of Article 173 of the EEC Treaty for a declaration that Commission Decision No 83/48 of 14 January 1983 concerning the clearance of the accounts presented by the Italian Republic in respect of the European Agricultural Guidance and Guarantee Fund, Guarantee Section, Expenditure for 1977 (Official Journal L 40, p. 55) is void in part.

2 The application seeks a declaration that the decision is void in so far as the Commission refused to charge to the European Agricultural Guidance and Guarantee Fund (hereinafter referred to as 'the Fund') in the first place a sum of LIT 9 368 828 535 in respect of the payment of aids for the distillation of table wine and in the second place a sum of LIT 543 747 547 in respect of the expenditure incurred in the transfer of cereals.

The Commission's refusal to charge to the Fund the payment of aids for the distillation of table wine

3 By Regulation No 567/76 of 15 March 1976 (Official Journal L 67, p. 25) the Council decided to undertake a distillation operation in respect of table wine in order to meet the difficulties on the wine market where stocks were very high and prices below the intervention price. Since that measure did not completely have the anticipated effect the Council considered it necessary to provide by Regulation No 1281/76 of 1 June 1976 (Official Journal L 144, p. 1) for a second distillation operation.

4 The two aforementioned regulations were adopted under Article 7 of Regulation No 816/70 of the Council of 28 April 1970 on the common organization of the market in wine (Official Journal, English Special Edition 1970 (I), p. 234), which permits distillation operations to be undertaken and lays down the conditions under which they are to be carried out, in particular so as to ensure that the balance of the market in ethyl alcohol is not adversely affected.

5 The system adopted in this case was based on the one hand on the conclusion of revocable delivery contracts between producers and distillers, and on the other hand the fixing of a minimum buying-in price for table wines which was in excess of the market price and which distillers were required to pay to producers. The difference between the cost of the alcohol thereby produced and the selling price of the same alcohol under normal marketing conditions was made up by an aid paid by the intervention agency and chargeable to the Guarantee Section of the Fund. The aid was fixed at a level which made it possible to market the products of distillation.

6 The Commission refused to charge to the Fund the sums paid out in respect of operations effected by the Azienda di Stato per gli Interventi sul Mercato Agricolo (hereinafter referred to as 'the Italian intervention agency') on three grounds: the first ground was that Italy had adopted a fiscal measure amounting to an indirect aid in addition to the Community aid; the second ground relates to the fact that, contrary to Articles 2 (4) and 6 (3) of Regulation No 567/76, the Italian intervention agency paid a large proportion of the aids to producers who had only delivered part of the wine contracted to be delivered; and the third ground relates to the fact that, contrary to Article 2 (3) and (5) of Regulation No 567/76, the Italian intervention agency paid the aid in a single payment and not in two instalments.

The principal ground: the alleged adoption by Italy of a fiscal measure amounting to an indirect aid in addition to the Community aid and capable of affecting the application of Community aid for distillation

7 It is common ground that three days after the publication of Regulation No 567/76 Italy adopted Decreto-Legge [Decree-Law] No 46 of 18 March 1976 concerning urgent fiscal measures (subsequently becoming Legge [Law] No 243 of 10 May 1976), which provided, *inter alia*, for the imposition of an increased duty on alcohol made from molasses. The effect of that fiscal measure was to invert the relationship between molasses-based alcohol and wine-based alcohol with the price of the former rising from LIT 143 000 per hectolitre to LIT 188 000 per hectolitre and the price of the latter going from LIT 147 000 per hectolitre to LIT 185 000 per hectolitre.

8 The Italian Government's main contention is that the fiscal measure in question falls within its sole competence and that the essential purpose of that measure was

to increase income from taxation and, in order to take account of the effects of inflation, merely to bring the tax on molasses-based alcohol, which had remained unchanged since 1955, up to date. It also contends that the measure applied to alcohols in general and did not give favourable treatment to wine-based alcohol in particular. Finally, it contends that the measure did not involve the grant of additional, unlawful benefits to Italian distillers.

9 The Commission maintains, conversely, that the Italian Government was indeed responsible for a 'fiscal contrivance' whereby the relationship between the prices of different alcohols was suddenly inverted for the benefit of wine-based alcohol and that the purpose or effect of that step was to increase the 'permitted profit margin' of wine distillers so that the latter were able to pass on all or part of that additional margin to the wine growers. In fact the Italian distillers of wine-based alcohol were able, by means of that national measure, to pay wine producers a price above the minimum price, to take over a larger share of the market to the detriment of the producers of molasses-based alcohol and to benefit from larger profit margins than those which they would have obtained on the open market with only Community aid as a corrective measure. In any event the producers' total profit was higher since they delivered larger quantities of wine for distillation.

10 Thus, according to the Commission, the measure in question was a unilateral measure which was adopted in an area coming under a common organization of the market, which was additional to the Community measure and which was capable of affecting the process of price formation, of jeopardizing the equal treatment of economic operators and of altering the conditions of competition. According to the Commission, when Community measures for the distillation of table wines were being implemented only the Community had the power to ensure or alter the balance of the market in ethyl alcohol.

11 It must be observed that at the present stage of development of Community law, characterized by only partial harmonization in this area, the Member States have retained extensive fiscal powers, in particular the power to levy indirect taxes on foodstuffs. The Member States must nevertheless in exercising those powers, comply with the relevant provisions of the Treaty. In agricultural matters the Member States must, in exercising their own fiscal powers, comply in particular with the basic rule that they must refrain from adopting any measure capable of

interfering with the functioning of the machinery established by the common organizations of the market.

12 Accordingly, as the Court pointed out in its judgments of 29 November 1978 (Case 83/78, *Pigs Marketing Board* v *Redmond*, [1978] ECR 2347) and of 26 June 1979 (Case 177/78, *Pigs and Bacon Commission* v *McCarren*, [1979] ECR 2161), once the Community has, pursuant to Article 40 of the Treaty, legislated for the establishment of a common organization of the market in a given sector, Member States are under an obligation to refrain from taking any measure which might undermine or create exceptions to it. The Court has also stated in its judgment of 10 March 1981 (Joined Cases 36 and 71/80, *Irish Creamery Milk Suppliers Association* v *Government of* Ireland, [1981] ECR 735 that the essential aim of the machinery of the common organizations in question is to achieve price levels at the production and wholesale stages which take into account both the interests of Community production as a whole in the relevant sector and those of the consumers, and which guarantee market supplies without encouraging over-production. Those aims might be jeopardized by national measures adopted unilaterally, which have an appreciable influence, even if unintentionally, on price levels on the market.

13 However, in this case, it must be observed that the contested fiscal measure is one of a series of fiscal measures intended to increase State revenues and that it is common ground that it updates the tax on molasses-based alcohol which had remained unchanged for 21 years despite the fall in the value of money. Furthermore the tax is not levied on alcohol produced by the distillation of wine which is covered by the common organization of the market in wine, which alone is the subject of this case, but not molasses-based alcohol.

14 In those circumstances, in order to justify the conclusion that the tax increase in question enabled the amount of wine delivered for distillation to increase, it must be established in the first place that the wine distillers were able to increase 'their permitted profit margins' by increasing their selling price to the level attained by molasses-based alcohol and in the second place that they did in fact pass on at least part of that additional benefit to the wine producers by an appropriate increase in the buying-in price of wines delivered for distillation.

15 It has to be stated that neither in the documents in the file on the case nor in the arguments presented before the Court has any statistical evidence been adduced to show that that had in fact been the case. In particular it has not been shown that distillers did in fact offer wine producers more favourable prices, thereby encouraging the latter to deliver greater quantities of wine for distillation.

16 In those circumstances and without the need to inquire whether the objective of the contested fiscal measure was other than to increase revenue from the tax in question it must be found that there is no evidence in any of the documents as submitted to the Court that that measure affected the market price for wine-based alcohol and was capable of jeopardizing the aims and functioning of the common organization of the market in wine. Accordingly the first ground relied upon by the Commission for refusing to charge to the Fund the expenditure incurred by the Italian intervention agency in respect of aids for the distillation of table wines, cannot be accepted.

The subsidiary ground that, contrary to Regulation No 567/76, the Italian intervention agency paid a large proportion of the aids to producers in respect of distillation contracts which had not been entirely performed

17 According to Articles 2 and 6 of Regulation No 567/76 the intervention organization is to pay the aid to producers in two parts: the first part, in the form of an advance, is to be paid within 15 days of approval of the contract and the second part, which is the balance of the aid, is to be paid according to Article 6 (3) 'when proof has been furnished that the full amount of the wine indicated in the contract has been distilled.'

18 The Commission alleges that the Italian Republic and its intervention agency paid aid without proof that the total quantity of wine indicated in the contract had been distilled.

19 The Italian Government maintains primarily that under Article 1 of Regulation No 567/76 contracts for the delivery of table wine are revocable and that the Community legislature did not intend to restrict the autonomy of the contracting parties but only to lay down the method of payment of the balance of the aid by subjecting such payment to proof that the total quantity of wine delivered under

the contract was actually distilled. In view of the purpose of the aid which was to restore the balance of the market, the Commission's argument is based on a misinterpretation of the provisions which leads to discrimination between those producers who have partially performed the distillation contracts and those who have not performed them at all.

20 In the alternative the Italian Government maintains that the expenditure incurred in respect of contracts which have been fully performed should still be charged to the Fund.

21 It must be pointed out that, as the Court held in its judgment of 7 February 1979 (Joined Cases 15 and 16/76 *French Government* v *Commission* [1979] ECR 321), where the Community rules only authorize payment of an aid on condition that certain formal evidence is supplied on payment, an aid paid without complying with that condition is not in accordance with Community law and the expenditure thereby incurred cannot therefore be charged to the Fund on the clearance of the accounts for the year in question.

22 The Commission rightly observes that the interpretation proposed by the Italian Government is contrary to the wording of the aforementioned Article 6 (3) which requires, as a precondition for the payment of the aid, that the full amount of the wine indicated in the contract has been distilled.

23 Furthermore, although it is true that contracts for the delivery of table wine for distillation are described as revocable in Article 1 of Regulation No 567/76, conditions relating to the time within which the right to revoke must be exercised and with regard to the substance of that right were laid down in Articles 1 and 4 of Regulation No 567/76 and by Article 4 of Commission Regulation No 588/76 of 15 March 1976 on detailed rules for the distillation of table wines (Official Journal L 69, p. 48). Those provisions only permit the exercise of the right to revoke such a distillation contract within the period laid down where the situation on the market enables the producer to obtain a better price for the wine. Those provisions therefore neither have the object nor the effect of setting aside the requirement laid down in Article 6 (3) of Regulation No 567/76 that the payment of the balance of the aid is subject to proof that the contract has been fully performed. In that respect therefore the Italian Government's arguments must be rejected.

24 However, as the Italian Government maintained and as was accepted by the Commission itself, the expenditure incurred in respect of contracts the entire performance of which can be proved by the intervention agency in compliance with the requirements of Article 6 (3) of Regulation No 567/76, should be charged to the Fund. The Commission has, moreover, stated that it is willing to carry out with the Italian authorities a check of the accounts relating to the various operations after the delivery of this judgment.

25 It is therefore necessary for the Court to declare that only the expenditure which has been incurred properly under Article 6 (3) of Regulation No 567/76 should be charged to the Fund. It follows that the parties must examine the accounts together in order to determine which sums should actually be charged to the Fund on that basis.

The subsidiary ground that, contrary to Article 2 (3) and (5) of Regulation No 567/76, the Italian intervention agency paid the aid in a single sum and not in two instalments

26 As has already been stated, under Articles 2 (3) and (5) and 6 (3) of Regulation No 567/76 the intervention agency is to pay the aid to producers in two instalments, namely an advance within 15 days of approval of the contract and the balance when proof has been furnished that the full amount of the wine indicated in the contract has been distilled. The reason for those provisions, as is clear from the seventh recital in the preamble to Regulation No 567/76, is the need to provide for a mechanism to enable part of the purchase price to be paid immediately to encourage producers who wish to have their wine distilled to take a decision.

27 It should be observed, as a preliminary point, that this subsidiary reason for refusing to charge sums to the Fund put forward by the Commission can only relate to distillation carried out under Regulation No 567/76 since, according to Article 2 of Council Regulation No 1281/76, in the context of the second distillation operation, the minimum buying-in price may be paid by the intervention agency in a single payment after distillation of the total quantity of wine indicated in the contract.

28 The Italian Government has accepted that in a certain number of cases its intervention agency had paid aid in a single sum and not in two instalments as is laid down in Article 2 of Regulation No 567/76. Nevertheless it stated that it had only had recourse to that practice in a limited number of cases and for reasons of expediency, that is to say, where it was not possible to make the payment on account within the prescribed period and where the conditions for the payment of the whole of the aid in a single sum were fulfilled. Consequently the Italian Government concludes primarily that, in view of the purpose of the aid, such a formal requirement is of little importance and in the alternative that that part of the expenditure to which the Commission's argument does not relate should, in any event, be charged to the Fund.

29 The Commission maintains, on the contrary, that the practice was in fact followed generally and that the failure to make an advance payment to producers constituted a serious failure to comply with the rules for undertaking the distillation operation in view, in particular, of the discouraging effect of such failure, an effect which, moreover, was intensified by the delays in payment.

30 Nevertheless the Commission accepted at the hearing that that subsidiary ground could not result in a refusal to charge to the Fund all the distillation aids granted under Regulation No 567/76 but only the expenditure incurred in respect of aids where the amount to be paid under the contract was paid in a single payment.

31 As the Court held in its judgment of 7 February 1979 (Case 11/76, *Government of the Kingdom of the Netherlands* v *Commission*, [1979] ECR 245) Article 8 of Regulation No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy (Official Journal, English Special Edition 1970 (I), p. 218) permits the Commission to charge to the Fund only sums paid in accordance with the rules laid down in the various sectors of agricultural production while leaving the Member States to bear the burden of any other sum paid. Moreover, the Court added that a strict interpretation of the conditions under which expenditure is to be borne by the Fund is necessary because the management of the common agricultural policy in conditions of equality between traders in the Member States

requires that the national authorities of a Member State should not, by the expedient of a wide interpretation of a given provision, favour or treat unfavourably traders of that State in comparison with those of other Member States.

32 Article 2 of Regulation No 567/76 requires the Member States to pay the aids not by means of a single payment but by means, initially, of an immediate payment on account intended to assist producers who wish to have their wine distilled to take a decision, and, secondly, a payment of the balance after proof has been furnished that the full amount of the wine indicated in the contract has in fact been distilled.

33 Accordingly the Commission was quite right in its contention that the sum representing the aids where the amount to be paid under the contract was paid in a single payment and not in two instalments as required by Regulation No 567/76 should not be charged to the Fund and should be borne by the Member State in question. However, the Italian Government is justified in requesting that the expenditure incurred in respect of aids where the amount to be paid under the contract was paid in accordance with Regulation Nos 567/76 and 1281/76 should be charged to the Fund. It therefore follows that the parties will have to examine the accounts together in order to determine which sums should actually be charged to the Fund on that basis.

The Commission's refusal to charge to the Fund the expenditure incurred in respect of the financial charges relating to the transferred cereals

34 In order to deal with special difficulties experienced in the supply of common wheat in Italy during 1977 the Council decided, by Regulation No 2255/77 of 11 October 1977 (Official Journal L 261, p. 4), that the German intervention agency was to hold 200 000 tonnes of common wheat of bread-making quality at the disposal of the Italian intervention agency which was to take delivery thereof by 31 December 1977 at the latest.

35 According to the special rules for carrying out the transfer operation laid down by Regulation No 2255/77, by way of derogation from the general rules laid down in Regulation No 787/69, the Italian intervention agency was to pay the purchase price of the transferred wheat to the Fund by means of an actual cash payment at the end of the 1977 financial year. Only after that date, that is to say 1 January 1978, was the Italian intervention agency entitled to reimbursement by the Fund of the financial charges incurred in that operation, that is to say the interest charges

paid by the intervention agency in respect of the sums advanced by it in connection with that purchase.

36 In addition a statement appended to the Council's minutes had authorized the Italian intervention agency to bring forward to 1 December 1977 the closure of the 1977 financial year provided that the price of the wheat was actually paid to the Fund on that date. Accordingly, in that event, the Italian intervention agency's right to reimbursement of financial charges from the Fund was subject to actual payment of the principal sum on 1 December 1977.

37 Whereas the Italian Government states that it made that payment on 1 December 1977 and is therefore entitled to reimbursement of the financial charges incurred since that date, the Commission maintains, on the contrary that the Italian intervention agency did not take advantage of the option to bring forward payment to 1 December 1977 and made no payment on that date and in support of its view produces its statements of account. It therefore follows, according to the Commission, that the Italian Republic could not reclaim in respect of December 1977 financial charges which it never incurred and which in fact the Italian intervention agency only incurred from the beginning of the 1978 financial year.

38 The Court invited the Italian Republic to produce before the hearing the document which shows actual payment of the cost of the transferred wheat, that is to say accompanied by a certificate of withdrawal dated 1 December 1977, but it was unable to produce such a document. It contended, however, that it was impossible to produce such documentary evidence since the movement of Community funds is effected on paper only by means of an account which records both debits and credits.

39 That argument cannot be accepted. As the Commission stated in the course of the hearing without being contradicted it keeps an account of all transactions notified to it by the intervention agencies and there is no record in its books of account of any actual payment made by the Italian intervention agency during the 1977 financial year in respect of transferred wheat.

40 In those circumstances the Court can only find that the Italian Republic has failed to produce evidence that it brought forward the payment in respect of transferred

wheat to 1 December 1977. Consequently the Commission was right to refuse to charge to the Fund the financial charges allegedly incurred from 1 December 1977. The application must therefore be dismissed on this point.

41 It follows from the whole of the foregoing that Commission Decision No 83/48 of 14 January 1983 must be declared void in so far as it refuses to charge to the Fund the payment of aids for the distillation of table wine to Italian producers under distillation contracts which have been entirely performed and in respect of which a financial settlement has been made in accordance, first, with the provisions of Article 2 of Regulation No 567/76 and secondly with the provisions of Article 2 of Regulation No 1281/76. The remainder of the application must be dismissed.

Costs

42 Article 69 (2) of the Rules of Procedure provides that the unsuccessful party is to be ordered to pay the costs. However, under the first subparagraph of Article 69 (3), where each party succeeds on some and fails on other heads the Court may order that the parties bear their own costs in whole or in part.

43 Since each party has succeeded on some and failed on other heads, each party must bear its own costs.

On those grounds,

THE COURT

hereby:

(1) Declares that Commission Decision No 83/48 of 14 January 1983 is void in so far as it refuses to charge to the Fund the payment of aids for the distillation of table wine to Italian producers under distillation contracts which have been entirely performed and in respect of which a financial settlement has been made in accordance, first, with the provisions of Article 2 of Regulation No 567/76 and secondly with the provisions of Article 2 of Regulation No 1281/76.

(2) Dismisses the remainder of the application.

(3) Orders each party to bear its own costs.

Mackenzie Stuart Bosco Kakouris

Koopmans Everling Galmot Joliet

Delivered in open court in Luxembourg on 27 February 1985.

P. Heim
Registrar

A. J. Mackenzie Stuart
President