JUDGMENT OF THE COURT (Fifth Chamber)

9 November 2000 *

In Case C-148/99,

United Kingdom of Great Britain and Northern Ireland, represented by J.E. Collins, Assistant Treasury Solicitor, acting as Agent, assisted by A. Sutton, Barrister, with an address for service in Luxembourg at the British Embassy, 14 Boulevard Roosevelt,

applicant,

v

Commission of the European Communities, represented by P. Oliver, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the partial annulment of Commission Decision 1999/187/EC of 3 February 1999 on the clearance of the accounts presented by the Member States in respect of the expenditure for 1995 of the Guarantee Section of the

* Language of the case: English.

European Agricultural Guidance and Guarantee Fund (OJ 1999 L 61, p. 37) in so far as it excludes from Community financing expenditure of GBP 869 283 incurred in the United Kingdom under the scheme established by Commission Regulation (EEC) No 1164/89 of 28 April 1989 laying down detailed rules concerning the aid for fibre flax and hemp (OJ 1989 L 121, p. 4),

THE COURT (Fifth Chamber),

composed of: D.A.O. Edward, acting as President of the Fifth Chamber, L. Sevón and P. Jann (Rapporteur), Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 29 March 2000,

after hearing the Opinion of the Advocate General at the sitting on 11 May 2000,

gives the following

Judgment

1 By application lodged at the Court Registry on 22 April 1999, the United Kingdom of Great Britain and Northern Ireland brought an action under the first paragraph of Article 173 of the EC Treaty (now, after amendment, the first paragraph of Article 230 EC) for the partial annulment of Commission Decision 1999/187/EC of 3 February 1999 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 (OJ 1999 L 61, p. 37; 'the contested decision') in so far as it excludes from Community financing expenditure of GBP 869 283 incurred by the United Kingdom under the scheme established by Commission Regulation (EEC) No 1164/89 of 28 April 1989 laying down detailed rules concerning the aid for fibre flax and hemp (OJ 1989 L 121, p. 4).

2 That amount is explained by the fact that the aid granted by the United Kingdom to flax producers for an area of 1 903 hectares was reimbursed by the Commission only in respect of 100 hectares.

Legal background

3 Council Regulation (EEC) No 1308/70 of 29 June 1970 on the common organisation of the market in flax and hemp (OJ, English Special Edition,

1970 (II), p. 411) establishes a system of aid for the growing of flax to produce fibres. Article 4 of that regulation, in the version resulting from Council Regulation (EEC) No 814/76 of 6 April 1976 (OJ 1976 L 94, p. 4), provides:

'1. A system of aid shall be introduced for flax grown mainly for fibre and for hemp grown in the Community.

Such aid, the amount of which shall be uniform throughout the Community for each of these products, shall be fixed each year...

2. The amount of aid shall be so fixed per hectare of area sown and harvested as to ensure an even balance between the volume of production required in the Community and the amount that can be marketed....

...'

4 Under Article 4(4) and (5) of Regulation No 1308/70, as amended by Regulation No 814/76, the Council and the Commission are responsible for adopting the detailed rules for granting the aid. Article 12 of Regulation No 1308/70 establishes the procedure which the Commission must follow in adopting measures in that respect, including consultation of a Management Committee for Flax and Hemp.

5 Pursuant to the powers thus conferred upon it, the Commission adopted Regulation No 1164/89.

6 Article 2 of Regulation No 1164/89 provides:

'[A]id shall be granted for flax grown from the seed varieties:

— specified in Annex A,

or

— currently under review by Member States' authorities for inclusion in the catalogue of flax varieties intended mainly for the production of fibre.'

7 The second indent of Article 2 had been inserted by Commission Regulation (EEC) No 174/81 of 22 January 1981 amending Regulation (EEC) No 771/74 laying down detailed rules for granting aid for flax and hemp (OJ 1981 L 20, p. 13). The second recital in the preamble to that regulation states in relation to the amendment of the former Article 2, the scope of which was limited to seed varieties listed in the annex, that '... that provision has the effect of disqualifying for aid new varieties of flax mainly intended for production of fibres and which are being studied by the authorities of the Member States with a view to entering them in the catalogue of varieties; whereas this situation could discourage the development of new flax varieties; whereas, in order to avoid that risk, the provision in question should be adapted.'

8 In 1997, the second indent was again repealed by Commission Regulation (EC) No 624/97 of 8 April 1997 amending Regulation (EEC) No 1164/89 (OJ 1997 L 95, p. 8).

9 Commission Directive 72/180/EEC of 14 April 1972 determining the characteristics and minimum conditions for examining agricultural varieties (OJ, English Special Edition 1972 (II), p. 404) specifies the minimum conditions which must be complied with in carrying out inspections in the Member States with a view to entering new varieties in the national catalogue. In Annex II, Part A, Point 5.6, the directive lays down the minimum general conditions for inspections relating to flax, concerning its distinctive nature, stability and uniformity, and provides that they must be carried out on at least two plots per year.

The background to the dispute and the clearance procedure for the 1995 financial year

10 In 1994, crop trials began in the United Kingdom of a new variety of fibre flax called 'Klasse', intended for use in the production of flax fibres for the motor vehicle industry. With a view to its inclusion in the United Kingdom national catalogue of flax varieties mainly intended for the production of fibres, the 'Klasse' variety underwent several inspections. It was included in the national catalogue at the end of 1996. However, it does not appear in Annex A to Regulation No 1164/89.

11 During the 1995 financial year, on the basis of the second indent of Article 2 of Regulation No 1164/89, the United Kingdom authorities granted aid to growers of the 'Klasse' variety for a total area of 1 903 hectares.

12 In 1995 and 1996, Commission staff carried out on-the-spot inspections. In a letter to the United Kingdom Government of 26 July 1996, accompanied by an

inspection report, the Commission stated that the reason given for sowing the 'Klasse' variety over large areas was to carry out industrial trials, for which provision was not made in the Community legislation, with the result that the aid capable of being granted would probably have to be restricted to areas that could be identified beyond doubt as experimental crops, and that financial adjustments were therefore envisaged.

13 In a fax message to the United Kingdom authorities of 18 July 1997, the Commission stated that, if there were no proof of the processing of the crops harvested, compensation would be limited to 100 hectares, which in the Commission's view was the maximum area for an industrial trial.

14 The United Kingdom Government, took the view that there was no legal justification for restricting the area eligible for the aid to 100 hectares, and, by letter of 4 December 1997, referred the matter to the Conciliation Body established by 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). In its final report, dated May 1998, the Conciliation Body expressed its understanding of 'the British authorities' perplexity in the face of the proposal from the Commission to limit — retrospectively — the area to be regarded as eligible for a variety under test to 100 hectares'. It found that an aid financing all the production expenses for the 'Klasse' variety was probably excessive, and that a 'relatively high correction' for the aid in question might be justified.

15 The Commission nevertheless maintained its position that an area of 100 hectares was ample for the experimental trials in question. In the contested decision, it disallowed the sum of GBP 869 283, corresponding to 1 803 hectares of planted areas. It is against that decision that the action is directed.

The action

16 The United Kingdom Government claims that the Court should annul the contested decision in so far as it excludes from Community financing the sum of GBP 869 283, corresponding to the amounts granted by the United Kingdom authorities under the system established by Regulation No 1164/89, and order the Commission to pay the costs.

17 The Commission contends that the Court should dismiss the application of the United Kingdom and order the applicant to pay the costs.

18 The United Kingdom Government puts forward four pleas in law in support of its claim for annulment:

— The contested decision is contrary to Regulation No 1164/89 as the latter contains no justification for limiting the aid payable under the scheme in question to 100 hectares;

— It is unlawful since, in its submission, the Commission does not have the power to limit the scope of Regulation No 1164/89 without going through the procedures laid down in Article 12 of Regulation No 1308/70;

— It is arbitrary and inadequately reasoned;

— It is in fact a legislative act retrospectively imposing a 100-hectare limitation, thereby infringing the principles of legal certainty and the protection of legitimate expectations.

19 The Commission contends that all those pleas are unfounded.

The first, second and fourth pleas

20 By its first, second and fourth pleas, which should be examined together, the United Kingdom Government argues that the contested decision is contrary to Regulation No 1164/89 because there is nothing in that regulation to justify limiting the aid due under the scheme concerned to a certain area. Since the 'Klasse' variety had undoubtedly undergone examinations with a view to its being entered in the national catalogue, and no abuse on the part of the growers had been discovered, the aid in question paid by the United Kingdom authorities to the growers pursuant to the Community provisions in force should be reimbursed by the Commission in its entirety.

21 Under the guise of an administrative decision, the Commission had in reality introduced a legislative measure, with the effect of limiting the scope of Regulation No 1164/89. The contested decision was unlawful because the Commission did not have the power to restrict the scope of that regulation without going through the relevant procedures under Regulation No 1308/70, namely consultation of the Management Committee for Flax and Hemp. The Commission never initiated any such procedure.

22 Moreover, being retroactive, the contested decision infringed the principles of legal certainty and protection of legitimate expectations. The 100-hectare limit

was first mentioned in the Commission's fax message of 18 July 1997, whilst the aid in question had already been granted to growers, in good faith and in accordance with the applicable legislation, between 1994 and 1995.

23 The United Kingdom Government refers to the judgment in Case C-233/96 *Denmark* v *Commission* [1998] ECR I-5759, at paragraph 38, according to which the Commission cannot choose, at the time of the clearance of the EAGGF accounts, an interpretation which departs from the normal meaning of the words used. Since the words of Regulation No 1164/89 were clear, in that they did not contain any limitation, the contested decision, being retroactive, infringed the principles of legal certainty and the protection of legitimate expectations.

24 The Commission contends, first, that it was entitled to limit the aid in question. In its submission, the sowing of 1 903 hectares for allegedly experimental purposes constitutes an abuse, and cannot be covered by the 'guarantee' section of the EAGGF. Whilst it is true that Regulation No 1164/89 does not expressly limit the maximum area sown by way of trial, the Commission maintains it is obvious that producers cannot produce unlimited quantities on that basis, and that the area sown must be reasonable and proportionate to scientific needs. In that context, account should be taken of Directive 72/180, which lays down minimum sowing conditions for obtaining reliable data, and states that two hectares of experimental area are sufficient for that purpose.

25 Next, the Commission maintains that Regulation No 1164/89 envisages scientific tests and not industrial trials. It was therefore not required to reimburse any amount at all, however small. Accordingly, its decision to grant aid for industrial

trials up to a maximum of 100 hectares should be regarded as a gratuitous concession.

26 Finally, the Commission emphasises that the flax in question was never processed, but remained in the fields where it rotted. The tests therefore proved to be fruitless, as the United Kingdom Government admitted in a letter of 4 December 1997. There was therefore no cause to grant Community aid in such circumstances, the obligation to process the harvest being 'inherent' in Article 2 of Regulation No 1164/89.

27 The Commission maintains that the contested decision could be taken by way of administrative action and within the scope of its powers in that respect, and denies having acted as a legislator.

28 At the hearing, the Commission stated that it was no longer disputing that industrial trials could be covered by Regulation No 1164/89.

29 It claimed, however, that limitation of the aid in question to an area of 100 hectares had been the subject of an agreement between the United Kingdom and the Commission, resulting from the fax message of 18 July 1997 sent by the Commission to the United Kingdom authorities.

30 The United Kingdom, whilst acknowledging that there had been discussions between the two parties, denied that there had been agreement on the principle of

a limitation to 100 hectares. The Commission's fax message constituted a unilateral stance to which the United Kingdom Government had not agreed.

31 On the last point, which should be examined first, it is sufficient to note that the disputed fax message constitutes only a unilateral stance and that the Commission has not adduced any other evidence to establish that agreement was reached. The Commission's argument based on the existence of such agreement must therefore be rejected. Moreover, the reference of the matter to the Conciliation Body by the United Kingdom Government in December 1997 supports the view that the United Kingdom Government did not consent to limitation of the aid by the Commission in July 1997.

32 Second, as regards the argument that the contested decision was vitiated by illegality on the ground that the Commission was not entitled unilaterally and retroactively to limit the aid in question to a maximum area of 100 hectares, reference should be made first to the wording of Regulation No 1164/89. Neither the second indent of Article 2 of that regulation, whereby aid is to be granted for flax grown from the seed varieties under review by Member States' authorities with a view to their entry in the national catalogue of varieties, nor any other provisions of that regulation lays down any limit on the sown areas eligible for the aid in question.

33 On the contrary, the history of Article 2 of Regulation No 1164/89, as referred to in paragraphs 5 to 8 of this judgment, shows that the second indent of that article was expressly introduced in order to encourage the development of new varieties of flax through the use of trial seeds under the supervision of the national authorities. Whilst it is possible, as the Commission claimed at the hearing, that trial production volumes reached a very high level, causing the second indent of Article 2 of Regulation No 1164/89 to be repealed in 1997, the fact remains that

that provision was applicable to the facts of this case, which came within the 1995 financial year.

34 Nor does any limitation of the trial areas arise from other legal instruments applicable to the facts of this case. In particular, Directive 72/180, which concerns determination of the characteristics and minimum conditions for examining varieties capable of being included in the common catalogue of varieties of agricultural plant species, has no connection with aid granted for trial plantings and contains no provision concerning a limitation of such plantings.

35 Whilst it is true that Regulation No 1164/89 provides no basis for allowing the aid in question to be granted for trial sowings over unlimited areas, it must nevertheless be emphasised that the aid is managed under the supervision of the Member State concerned, which has to ensure that there is no abuse and that the sowings are carried out within reasonable limits in relation to the examination envisaged. In the circumstances of this case, there is nothing to suggest that the United Kingdom has infringed that obligation or that the plantings of the 'Klasse' flax variety were clearly excessive in area for the examinations for which they were intended. In particular, the Commission's general accusation that there were abuses on the part of the growers has been neither proven nor even explained.

36 The Commission's argument that the flax should have been subject to some form of processing for the sowings to be eligible for aid finds no support in the applicable provisions. Such an obligation is not 'inherent' in Article 2 of Regulation No 1164/89, since it is clear from Articles 3 to 8 of Regulation No 1164/89, which define in detail the conditions for granting the aid, that it is granted for the areas sown and not for the processing of the harvest, which generally does not take place until several years later. Moreover, if aid is granted for sowings that are subject to examination, it is inherent in the idea of such sowings that there is a certain risk that the examinations will prove to be negative

and that processing will be impossible. This argument by the Commission must therefore be rejected.

37 It follows that the contested decision is unlawful, in so far as it excludes from Community financing expenses of GBP 869 283 incurred in the United Kingdom by way of aid for fibre flax, since it was taken in breach of Article 2 of Regulation No 1164/89. The contested decision must therefore be annulled to that extent.

The third plea in law

38 Since examination of the first, second and fourth pleas has led to the partial annulment of the contested decision, there is no need to examine the third plea.

Costs

39 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. Since the United Kingdom has applied for costs and the Commission has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Annuls Commission Decision 1999/187/EC of 3 February 1999 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, in so far as it excludes from Community financing expenses of GBP 869 283 incurred in the United Kingdom of Great Britain and Northern Ireland under the scheme established by Commission Regulation (EEC) No 1164/89 of 28 April 1989 laying down detailed rules concerning the aid for fibre flax and hemp;**

2. **Orders the Commission of the European Communities to pay the costs.**

Edward Sevón Jann

Delivered in open court in Luxembourg on 9 November 2000.

R. Grass

Registrar

A. La Pergola

President of the Fifth Chamber