# JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
12 October 1999 *

In Case T-216/96,

**Conserve Italia Soc. Coop. arl, formerly Massalombarda Colombani SpA**, a company incorporated under Italian law, established in Massa Lombarda (Italy), represented by Marina Averani and Andrea Pisaneschi, of the Sienna bar, and Paolo de Caterini, of the Rome bar, with an address for service in Luxembourg at the Chambers of Charles Turk, 13B avenue Guillaume,

applicant,

v

**Commission of the European Communities**, represented by Paolo Ziotti, of its Legal Service, acting as Agent, assisted by Massimo Moretto, of the Venice bar, with an address for service in Luxembourg at the Chambers of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: Italian.

APPLICATION for annulment of Commission Decision C (96) 2760 of 3 October 1996 discontinuing the financial aid from the European Agricultural Guidance and Guarantee Fund granted to the company Massalombarda Colombani SpA by Commission Decision C (90) 950/356 of 29 June 1990, and, in so far as is necessary, any measure of the Commission related to that Decision, in particular working document VI/1216/86-IT fixing the maximum amount of aid which may be granted from the Guidance Section of the European Agricultural Guidance and Guarantee Fund under Council Regulation (EEC) No 355/77 of 15 February 1977 on common measures to improve the conditions under which agricultural products are processed and marketed (OJ 1977 L 51, p. 1),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of: M. Jaeger, President, K. Lenaerts and J. Azizi, Judges,

Registrar: B. Pastor, Principal Administrator,

having regard to the written procedure and further to the hearing of 11 March 1999

gives the following

## Judgment

### The relevant legislation

1 Articles 1(3) and 2 of Council Regulation (EEC) No 355/77 of 15 February 1977 on common measures to improve the conditions under which agricultural products are processed and marketed (OJ 1977 L 51, p. 1, 'Regulation No 355/77') provide that the Commission may grant aid for common measures by financing, through the Guidance Section of the European Agricultural Guidance and Guarantee Fund ('EAGGF'), projects which form part of specific programmes which have been drawn up beforehand by the Member States and approved by the Commission and which are designed to develop or rationalise the treatment, processing or marketing of agricultural products.

2 The second recital in the preamble to that regulation states that 'the measures to be taken in this field are intended to achieve the objectives set out in Article 39(1)(a) of the EC Treaty [now Article 33(1)(a) EC]'. The fourth recital states that 'to be eligible for Community financing, projects must permit in particular the achievement of improvement and rationalisation of processing and marketing structures in respect of agricultural products and of a lasting beneficial effect on agriculture'. Finally, the seventh recital states that 'in order to ensure that beneficiaries observe the conditions imposed at the time aid from the [EAGGF] is granted, a procedure should be laid down for an effective check and for the possible suspension, reduction or discontinuation of aid from the [EAGGF]'.

3 Under Article 6 of Regulation No 355/77, for the purposes of Article 1 of that regulation 'project' means 'any project involving public, semi-public or private material investment relating wholly or in part to buildings and/or equipment for... rationalising or developing storage, market preparation, preservation, treatment or processing of agricultural products...'.

4 Article 19(2) of that regulation states:

'Throughout the period during which aid is granted from the [EAGGF], the authority or agency appointed for that purpose by the Member State concerned shall, at the request of the Commission, forward to it all supporting documents which are of relevance in proving that the financial or other conditions laid down for each project have been fulfilled. The Commission may, if necessary, carry out an on-the-spot check.

After it has consulted the [EAGGF] committee on the financial aspects the Commission may decide,... to suspend, reduce or discontinue aid from the [EAGGF]:

— if the project has not been carried out as planned, or

— if certain of the conditions laid down have not been fulfilled...'

5 Applications for aid must contain the information and documents specified in the annexes to Commission Regulation (EEC) No 2515/85 of 23 July 1985 on applications for aid from the Guidance Section of the EAGGF for projects to improve the conditions under which agricultural and fish products are processed and marketed (OJ 1985 L 243, p. 1, 'Regulation No 2515/85'). Those annexes include, firstly, models of forms to be completed by the applicants for aid and, secondly, explanatory notes to assist applicants in submitting their applications.

6 Point 5.3 of the 'Explanatory notes for each heading' in Annex A to that regulation states: 'projects begun before the application reaches the Commission cannot qualify for aid'. Those instructions relate to a undertaking which the applicant must enter into on the following terms: 'We undertake not to start work on the project before receipt of application for aid by the EAGGF Guidance Section.'

7 In 1986 the EAGGF drew up working document VI/1216/86-IT fixing the maximum amount of aid which may be granted from the Guidance Section of the EAGGF under Regulation No 355/77 ('the working document'). Point B.1 thereof lists the operations which are completely ineligible for aid. Under paragraph 5, operations or work which are started before the application is submitted are ineligible for aid, with the exception of:

'...

(b) the purchase of machines, equipment and building materials, including metal skeletons and prefabricated components (order and supply), provided that assembly, installation, incorporation and work on site, in so far as building materials are concerned, have not taken place before the application for aid was submitted;

...

The operations referred to at (a) and (b) are eligible, but the measures referred to at (c) and (d) are not and will render the project inadmissible. Any other measure or work which was started before the application concerning the project was submitted will render it inadmissible.'

8 Under point B.1, paragraph 12, of the working document, the following are also ineligible: 'charges for the hire of equipment and investments financed by leasing. For example: hire charges for the use of Tetra Pak machines; projects partially or completely financed by leasing. However, such investments may be eligible where the hire-purchase agreement... stipulates that the beneficiary will become the owner of the equipment hired or of the measure financed during the five years following the date on which the aid was granted. That period will be reduced to four years in respect of projects financed as of 1985'.

9 On 24 June 1988 the Council adopted Regulation (EEC) No 2052/88 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 185, p. 9, 'Regulation No 2052/88').

10 On 19 December 1988 the Council adopted, on the basis of that regulation, Council Regulation (EEC) No 4253/88 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 374, p. 1, 'Regulation No 4253/88'). That regulation, entered into force on 1 January 1989, as provided in Article 34 thereof.

11 Under the first subparagraph of Article 15(2) of Regulation No 4253/88, 'expenditure may not be considered eligible for assistance from the Funds if incurred before the date on which the corresponding application reaches the Commission'. Nevertheless, the second subparagraph of that provision granted the Commission the power to derogate from that rule in certain cases. It states: 'However, for the part-financing of projects and aid schemes, expenditure may be deemed to be eligible for assistance from the Funds if incurred during the six months preceding the date on which the Commission received the corresponding application.'

12 Article 24(2) of that regulation entitled 'Reduction, suspension and cancellation of assistance', provides as follows:

'... the Commission may reduce or suspend assistance in respect of the operation or measure concerned if the examination reveals an irregularity and in particular a significant change affecting the nature or conditions of the operation or measure for which the Commission's approval has not been sought.'

13 On 19 December 1988 the Council also adopted Regulation (EEC) No 4256/88 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards the EAGGF Guidance Section, which also entered into force, pursuant to Article 12 thereof, on 1 January 1989 (OJ 1988 L 374, p. 25, 'Regulation No 4256/88').

14 In its initial version Article 10(1) of that regulation provided as follows: 'The Council... shall by 31 December 1989 decide upon the forms of and the conditions for the [EAGGF] contribution to measures to improve the conditions under which agricultural... products are processed and marketed... with a view to achieving the objectives of Regulation... No 2052/88 and on the basis of the rules laid down by Regulation... No 4253/88.' Articles 10(2) and (3) stated that Regulation No 355/77 would be repealed with effect from the date of entry into force of the Council decision referred to in Article 10(1) with the exception of Articles 6 to 15 and 17 to 23 which would continue to apply to projects submitted by the date of entry into force of that decision.

15 On 29 March 1990 the Council adopted Regulation (EEC) No 866/90 on improving the processing and marketing conditions for agricultural products (OJ 1990 L 91, p. 1, 'Regulation No 866/90') pursuant to Article 10(1) of Regulation No 4256/88.

16 The possibility of derogation provided for in the second subparagraph of Article 15(2) of Regulation No 4253/88 was expressly repealed as from 3 August 1993 by Council Regulation (EEC) No 2082/93 of 20 July 1993 amending Regulation (EEC) No 4253/88 (OJ 1993 L 193, p. 20).

17 On 18 December 1995 the Council adopted Regulation (EC, Euratom) No 2988/95 on the protection of the European Communities financial interests (OJ 1995 L 312, p. 1, 'Regulation No 2988/95').

18 Article 4(3) of that regulation provides: 'Acts which are established to have as their purpose the obtaining of an advantage contrary to the objectives of the Community law applicable in the case by artificially creating the conditions required for obtaining that advantage shall result, as the case shall be, either in failure to obtain the advantage or in its withdrawal.'

19 Article 5(1) of Regulation No 2988/95 provides:

'Intentional irregularities or those caused by negligence may lead to the following administrative penalties:

...

(c) total or partial removal of an advantage granted by Community rules, even if the operator wrongly benefited from only a part of that advantage...'.

## Facts underlying the dispute

20 On 27 October 1988 the Commission received an application for the grant of aid from the EAGGF lodged by the Italian Government under Regulation No 355/77. That application had been submitted on behalf of Fedital SpA ('Fedital') by the Federazione Italiana dei Consorzi Agrari, an association of agricultural cooperatives which administered a large proportion of the Italian agri-foodstuffs sector until it was wound up in May 1991. The aid for which the application was made was intended to support a project for the development, rationalisation and technical modernisation of a Fedital establishment in the municipality of Massa Lombarda.

21 The application was not accepted for the financial year 1989 because it was not regarded as a priority in terms of the financial resources available. In accordance with Article 21 of Regulation No 355/77 it was carried forward for consideration in the next financial year.

22 While the application was being considered Fedital sold its Massa Lombarda establishment to Colombani Lusuco SpA, which the Federazione Italiana dei Consorzi Agrari also controlled, on 31 December 1989. The business name of the acquiring company was then changed to 'Massalombarda Colombani SpA' (hereinafter 'Massalombarda Colombani'). On 18 October 1994 that company was sold to Frabi SpA (which subsequently became Fincoserve SpA), the finance company of the group Conserve Italia Soc. Coop. arl (hereinafter 'Conserve Italia'), the applicant. It specialises in the processing, preservation and marketing of products intended for use as food, such as fruit and vegetables, agricultural products, fishery products, meats, pre-cooked products and foodstuffs in general.

23 On 23 March 1990 the Commission asked Fedital to specify the nature, cost and starting and finishing dates of the work to be financed and to state whether it had

been started before the date on which the application was received by the Commission (27 October 1988). Furthermore, the Commission asked for the balance sheet for 1988 and a copy of the contracts of sale relating to the various acquisitions made by the company.

24 On 17 April 1990 Massalombarda Colombani replied that the work had been started on 31 October 1988 and completed by 30 June 1990 and attached copies of the contracts to its reply. One of them, signed on 22 December 1988, concerned the sale of a Tetra Pak packing machine.

25 By decision of 29 June 1990 the Commission granted Massalombarda Colombani aid amounting to ITL 2 002 932 326 in respect of an overall investment of ITL 8 036 600 000 ('decision to grant aid').

26 By decision of 18 November 1991 the Italian Government awarded Massalombarda Colombani a grant of ITL 2 008 000 000 in addition to the financial aid from the EAGGF.

27 On 22 November 1991 the Italian authorities carried out a final inspection of the work and approved it on the ground that it satisfied all the conditions laid down in the decision to grant aid.

28 Following inspections carried out jointly by the Italian authorities and the Commission in March 1993 and from 26 to 30 September 1994, the Commission found that certain purchases had been made and work carried out before the date on which the application for aid had been received and that, contrary to the copy

of the contract of sale relating to a Tetra Pak machine which had been forwarded to it on 17 April 1990 in response to its request for information of 23 March 1990, the original showed that the machine in question had already been installed at the purchaser's establishment, under a contract for hire, before the date on which the application was received. Furthermore, a large number of delivery notes relating to machines acquired for the project bore a date before the date on which the application was received, whereas others were missing.

29 By fax to the Commission of 3 November 1994 the Italian authorities stated that they were in favour of initiating a procedure for the discontinuance of the aid granted by the EAGGF in view of the serious irregularities that had been found.

30 On 22 May 1995 the Commission informed Massalombarda Colombani and the Italian authorities of its intention to initiate such a procedure and recover the amounts wrongly paid and asked them to submit their observations on this.

31 Massalombarda Colombani submitted its observations on 3 August and 22 September 1995. It stated that it had in fact purchased the equipment before the Commission received the application for aid, but that those purchases had been made on a trial basis. Moreover, it acknowledged that the project related to some work that was carried out before the application for aid was submitted. Following discussions with officials of the competent services of the Commission on 19 January 1996, it submitted an additional statement on 27 February 1996.

32 On 3 October 1996 the Commission adopted Decision C (96) 2760 discontinuing the aid granted to the company Massalombarda Colombani by Commission Decision C (90) 950/356 of 29 June 1990 on the grant of aid from the EAGGF Guidance Section pursuant to Regulation No 355/77 in connection with EAGGF

project No 90.41.IT.109.0 entitled 'Potenziamento e aggiornamento tecnologico degli impianti di uno stabilimento ortofrutticolo in Massa Lombarda (Ravenna)' ('the contested decision').

33 The main grounds of that decision are reproduced below:

'...

Whereas the aid was granted having regard in particular to the technical description of the planned work and the period set aside to carry out the work referred to in the file attached to the application for aid and contained in the wording of the decision;

...

Whereas during [a] check it was found that certain definitive purchases had been effected and certain work carried out before the Commission received the application for aid from the beneficiary, that is to say before 27 October 1988, and that was contrary to the undertaking which the beneficiary entered into pursuant to the provision laid down on page 5 of Annex A1 to Regulation... No 2515/85..., in that application for aid;

Whereas it was also found that a contract of sale relating to a Tetra Pak packing machine had been falsified to conceal the fact that it had already been installed at the establishment before the date on which the application for aid was received;

...

Whereas, in view of the information provided above, the irregularities found affect the conditions of the project in question...'.

**Procedure and forms of order sought by the parties**

34 The applicant lodged the application initiating these proceeding at the Registry of the Court of First Instance on 23 December 1996.

35 The applicant claims that the Court of First Instance should:

— annul the contested decision;

— in so far as may be necessary, annul any measure carried out in relation to the contested decision, in particular the working document;

— order the Commission to pay the costs.

36 However, in response to a question put to it by the Court of First Instance the applicant stated that its application for the annulment of any measure related to the contested decision, in particular the working document, was based on Article 184 of the EC Treaty (now Article 241 EC).

37 The defendant contends that the Court of First Instance should:

— declare inadmissible the claim for annulment, in so far as may be necessary, of the working document;

— as for the remainder, dismiss the action as unfounded;

— order the applicant to pay the costs.

**Admissibility of the plea of illegality**

38 The defendant contends that the action is inadmissible in so far as it seeks to have the working document declared unlawful pursuant to Article 184 of the Treaty, since the contested decision is based not on the working document but on the combined provisions of point 5.3 of Annex A to Regulation No 2515/85 and of Article 24 of Regulation No 4253/88.

39 The Court considers that the assessment of the plea of illegality raised by the defendant requires an examination of the substance of the case and that both matters must therefore be dealt with together.

## Substance

### 1 — *Summary of the pleas in law put forward by the applicant*

40 In support of its action the applicant alleges various infringements of rules of law relating to the application of the EC Treaty and in particular Article 15(2) of Regulation No 4253/88, paragraphs 5 and 12 of point B.1 of the working document, and Article 24(2) of Regulation No 4253/88. In the context of those pleas it complains in particular that the defendant failed to observe the principles of legality of penalties, the protection of legitimate expectations and proportionality and that it has misused its powers. Finally, the applicant also puts forward a plea alleging infringement of essential procedural requirements on the ground that insufficient reasons were stated for the contested decision.

### 2 — *The alleged infringements of rules of law relating to the application of the EC Treaty*

41 In its pleas alleging infringements of rules of law relating to the application of the EC Treaty the applicant submits, first, that the beneficiary of the aid committed no irregularity, second, that the discontinuance of the aid does not rest on any legal basis and, third, that that discontinuance is disproportionate to the alleged irregularities.

*Pleas relating to the irregularities found by the Commission*

Arguments of the parties

42 The applicant puts two pleas forward alleging infringement of Article 15(2) of Regulation No 4253/88 and of paragraphs 5 and 12 of point B.1 of the working document, in which it criticises the sixth and seventh recitals in the preamble to the contested decision.

— Plea alleging infringement of Article 15(2) of Regulation No 4253/88

43 The applicant submits that the condition contained in point 5.3 of the 'Explanatory notes for each heading' in Annex A to Regulation No 2515/85, whereby 'projects begun before the application reaches the Commission cannot qualify for aid', must be construed in the light of Article 15(2) of Regulation No 4253/88 because the Commission decision on the eligibility of the project is governed by that provision.

44 The terms 'expenditure' and 'incurred' in the second paragraph of that article (see paragraph 11 above) suggest that account must be taken of the date of payment for the purchases or work, or at least the date of invoicing.

45 In this case all the payments were made after the date on which the application for aid was received by the Commission (27 October 1988), all the invoices bear a date after the commencement of the operation, which the applicant gives as 1 October 1988 in its originating application, and no delivery note was drawn up

more than six months before that date. Consequently, all the expenditure at issue is eligible.

46 Furthermore, the beneficiary never made any false declarations as to the date of the purchases or the work. The transactions carried out before the date on which the Commission received the application of aid (in particular the contract for the hire of the Tetra Pak machine) were not covered by definitive contracts but only by preliminary relationships or contracts subject to a condition having suspensory effect.

47 Finally, the defendant failed to observe the principle of the protection of legitimate expectations by discontinuing the aid at issue on the basis of criteria other than those referred to in Article 15(2) of Regulation No 4253/88 (Case 15/85 *Consorzio Cooperative d'Abruzzo* v *Commission* [1987] ECR 1005).

48 The defendant contends that the plea should be rejected. It is clear, it submits, from Article 10(3) of Regulation 4256/88 that Article 15(2) of Regulation 4253/88 is not applicable to the application in question but that it is governed by Articles 6 to 15 and 17 to 23 of Regulation No 355/77. Consequently, the applicant cannot plead infringement of Article 15(2) of Regulation 4253/88 or failure to observe the principle of the protection of legitimate expectations.

— Plea alleging infringement of paragraphs 5 and 12 of point B.1 of the working document

49 The applicant acknowledges that the beneficiary of the aid forwarded to the Commission a copy of the contract for the sale of a Tetra Pak packing machine which did not contain the reference, which appeared in the original, to the fact that the machine had already been installed at the purchaser's establishment pursuant to a contract for hire registered in Modena (Italy) on 30 November

1987. That act, for which Fedital but not the applicant itself could be held responsible, did not stem from any fraudulent intent but merely constituted a procedural defect.

50 In this case the defect in point is not substantive because even if the concealed reference had been brought to the attention of the Commission, it would not have prevented the aid for which the application had been made from being granted. First, since the contract for the purchase of the machine was signed on 22 December 1988, that is to say on a date after the date on which the Commission received the application, the rule concerning ineligibility laid down in paragraph 5(b) of point B.1 of the working document does not apply. Second, the derogation laid down in paragraph 12 of the working document should have applied to the contract for hire. That derogation provides that investments may be eligible if they form part of a hire-purchase contract or leasing contract which stipulates that the beneficiary will become the owner of the object hired during the five years following the date on which the aid was granted. Although in this case the contract for hire did not specify the date for the acquisition of the machine hired, it was in fact acquired within five years of the date on which the aid was granted.

51 Furthermore, the applicant states that the machine was not installed in the beneficiary's establishment before the six-month period preceding the date on which the Commission received the application for aid.

52 Since, in this case, the irregularity does not stem from any fraudulent intent and is not substantive, it does not justify the discontinuance of the aid.

53 In the alternative, the applicant alleges that the defendant has infringed essential procedural requirements in that it failed to publish, or notify to the beneficiary of the aid, the working document on which it had based the contested decision.

Consequently, that document is not enforceable against the applicant (Case C-366/88 *France* v *Commission* [1990] ECR I-3571).

54 That working document also infringes Article 15(2) of Regulation No 4253/88 in that it departs from the rule that expenditure incurred during the six months preceding the date on which the measure was started is eligible.

55 According to the defendant, the plea must be rejected. It essentially contends that even if it had been duly informed that the machine had already been installed at the beneficiary's establishment pursuant to a contract for hire, it could not have granted the aid at issue because Regulation No 355/77 was intended to improve the conditions under which agricultural products are processed and marketed. Neither the purchases made nor the work carried out before the Commission received the application for aid contribute to such improvement save where acquisition of ownership of a machine within a specified period is stipulated from the outset. It adds that the contested decision is not based on the working document.

Findings of the Court

56 In the contested decision the defendant noted two types of irregularity. First certain purchases had been made and work carried out before the date on which the Commission received the application for aid from the beneficiary in contravention of the undertaking which it had entered into. Second, a contract for the sale of a Tetra Pak packing machine had been falsified to conceal the fact that the machine had already been installed at the beneficiary's establishment before the date on which the application was received. Those contentions must be considered in turn.

— Purchases and work before the Commission received the application for aid

57 It is common ground that the application for aid was submitted in pursuance of Regulation No 355/77. Under Article 10(3) of Regulation No 4256/88, which entered into force on the same day as Article 15(2) of Regulation No 4253/88, on which the applicant relies, Articles 6 to 15 and 17 to 23 of Regulation No 355/77 were to continue to apply until the entry into force of Regulation No 866/90 (see paragraphs 14 and 15 above).

58 Articles 6 to 15 and 17 to 23 of Regulation No 355/77 do not specify the time from which purchases or work in respect of which applications for financial assistance are submitted may be made or carried out.

59 However, Article 19(2) of that regulation states that the Commission may decide to suspend, reduce or discontinue aid 'if the project has not been carried out as planned' and 'if certain of the conditions laid down have not been fulfilled'.

60 That provision does not state what those conditions are but refers expressly to the 'financial or other conditions laid down for each project'. It follows that all the conditions laid down for each project, irrespective of whether they are technical or financial or whether they lay down a time-limit, are covered by that expression.

61 Article 1(1) of Regulation No 2515/85 provides that '[a]pplications for aid from the EAGGF Guidance Section... shall contain the information and documents specified in the Annexes'. It follows that the instructions contained in the aid application form, in particular those relating to the undertaking which the applicant must enter into when submitting his application, examined in the light

of point 5.3 of the 'Explanatory notes for each heading' in Annex A to that regulation (see paragraph 6 above), have binding force identical to that of the provisions of the regulation to which the models and explanatory notes are annexed (see, to this effect, Joined Cases T-551/93, T-232/94, T-233/94 and T-234/94 *Industrias Pesqueras Campos and Others* v *Commission* [1996] ECR II-247, at paragraph 84). Moreover, the company Massalombarda Colombani entered, by its signature, into an express, solemn and unequivocal personal undertaking not to start work on the project before receipt of the application for aid by the EAGGF Guidance Section. Since that undertaking was accepted by the Commission, it became part of the measure granting the aid and is imbued with the legal force of that measure. The condition relating to the point in time to which the undertaking refers, which, amongst other things, makes for legal certainty and helps to further equal treatment of applicants for aid, constitutes a 'condition laid down' within the meaning of Article 19(2) of Regulation No 355/77 and failure to comply with it therefore means that the project financed has not been carried out as planned.

62 However, that undertaking — as prescribed in the aid application form and entered into by the beneficiary when he submits his application — does not refer to a six-month period before the application is received. It is therefore necessary to consider whether, as the applicant claims, the entry into force of Article 15(2) of Regulation No 4253/88 on 1 January 1989 amended the undertaking so as to allow expenditure to be incurred during the six months preceding the date on which the Commission received the application.

63 It is clear from the first subparagraph of Article 15(2) of Regulation No 4253/88 and the term 'may' in the second subparagraph thereof that, as a general rule, expenditure is eligible only if incurred after the date on which the Commission received the corresponding application. It is only in exceptional cases that the Commission has the power to consider expenditure eligible if it was incurred during the six months preceding the date on which the Commission received the application.

64 By the decision to grant aid (see paragraph 24 above) the Commission approved the application containing the personal undertaking not to start work on the project before receipt of the application for aid, without specifying that it

intended to use the power provided for in the second subparagraph of Article 15(2) of Regulation No 4253/88.

65 Even if it were necessary to accept the argument that the undertaking must be interpreted in the light of Article 15(2) of Regulation No 4253/88, the criterion to be taken into consideration for determining the date from which the work may be started is that set out in the first subparagraph of that provision, unless otherwise indicated by the Commission.

66 It is therefore necessary to ascertain the date to be taken into consideration for determining whether the work was started before receipt by the Commission of the application for aid, bearing in mind the undertaking entered into at the time the application for the aid at issue was submitted. In particular, it is necessary to consider whether, as the applicant claims, that date is the date on which the initial purchases or subsidised work were paid for or, possibly, the date on which they were invoiced.

67 The conclusion of contracts, even subject to a condition having suspensory effect, as part of a supported investment project has a decisive effect on the manner in which it is carried out. Such contracts therefore constitute a measure executing a project. Accordingly, it is their conclusion which determines the date on which work is started for the purposes of the undertaking entered into by the beneficiary.

68 The applicant does not deny that the contracts relating to the machines which are covered by the supported project were concluded before the date on which the Commission received the application for aid.

69 Consequently, the beneficiary acted in breach of the undertaking, entered into in the application form, not to start work on the project before that date. It follows

that the condition laid down in the decision to grant aid was not fulfilled and that the project was not carried out as planned.

70 The applicant's submission that the relevant date is the date of payment, or at least the date of invoicing, cannot be upheld. It is doubtful that the beneficiary of the aid could have thought that no start had been made on the work on the project before the invoices had been drawn up or paid. Even assuming that the beneficiary had no fraudulent intent, it must at the very least have had doubts as to its interpretation of the undertaking not to start work on the project before the Commission had received the application for aid. In such circumstances it was for the beneficiary to inform itself of the significance of the undertaking required, not only so as not to commit itself lightly but also to avoid any risk of misleading the Commission.

71 Applicants for, and beneficiaries of, aid are required to satisfy themselves that they are submitting to the Commission reliable information which is not liable to mislead it, otherwise the system of controls and evidence set up to determine whether the conditions for granting aid are fulfilled cannot function properly. In the absence of reliable information projects which do not fulfil the conditions required could become the subject of aid. It follows that the obligation on applicants for, and beneficiaries of, aid to provide information and act in good faith is inherent in the EAGGF aid system and essential for its effective functioning.

72 The fact that, in this case, the information relating to the date on which work was started was concealed or presented in such a way as to mislead the Commission constitutes breach of that obligation and, consequently, of the applicable rules.

73 Accordingly, there is no valid ground for charging the defendant with an infringement of Article 15(2) of Regulation No 4253/88.

74 Since the complaint alleging breach of the principle of the protection of legitimate expectations is based on the premiss that Article 15(2) of Regulation No 4253/88 has been infringed and the argument which the applicant derives from the alleged infringement of that provision is unfounded for the reasons set out above, it must also be rejected.

— Falsification of a contract for the purchase of a packing machine

75 The applicant acknowledges that the copy of the contract for the sale of a Tetra Pak packing machine forwarded to the Commission in response to a request for information did not show, as the original did, that the machine in question had been installed at the beneficiary's establishment pursuant to a contract for hire (see paragraph 49 above) by the date on which the Commission received the application for aid.

76 The beneficiary of the aid should have assumed that complete information concerning the contract in question was essential to enable the Commission to exercise its powers correctly, particularly as it had requested the relevant information. Consequently, the beneficiary should have forwarded a copy that was consistent with the original of the contract in question (see paragraph 71 above). The forwarding of a document that was not a true copy of that contract constitutes a manifest and serious irregularity which, even if it were not intentional, is at the very least the result of gross negligence.

77 Contrary to the contention of the applicant, that irregularity could have affected the amount of the aid. The purpose of Regulation No 355/77, as is clear from its title, the fourth recital in its preamble and the provisions under Title II, is to improve the conditions under which agricultural products are processed and marketed. Improvement is determined by comparing the situation which is intended to result from the measure financed with that which existed before the project was started. Since work on that project may not start before the Commission receives the application for aid, improvement must be assessed in relation to the situation prior to that date. However, it is possible that the

definitive purchase of a packaging machine, which has already been installed, under a contract for hire, at the establishment of the undertaking receiving the aid, may not constitute such an improvement. The applicant has in any event failed to show that the purchase of the machine would bring about improvement in the conditions under which the agricultural products in question are processed and marketed.

78 It cannot be inferred from the working document that the irregularity in question has no effect. First, even assuming that paragraph 5(b) of point B.1 of the working document relates to machines of the type at issue, it applies, on any view, only to machines which were not installed before the application for aid was submitted, which is not the case here. Second, paragraph 12 of point B.1 of the working document provides that investments financed by leasing are eligible only where the contract stipulates that the beneficiary will become the owner of the equipment financed during the four years following the date on which the aid is granted. In this instance the contract for hire contained no clause stipulating a transfer of ownership within such a period.

79 The complaint, raised in the alternative by the applicant, that the working document is illegal in no way detracts from the existence of the alleged irregularities and does not substantiate its submission that those irregularities did not affect the amount of the aid and therefore were not substantive. Consequently, there is no need to examine that complaint. Moreover, it should be observed that the applicant has no interest in pleading the illegality of the working document since to do so renders inoperative its plea alleging infringement of paragraphs 5 and 12 of point B.1 of that document.

80 It follows from all the foregoing that the pleas alleging infringement of Article 15(2) of Regulation No 4253/88 and paragraphs 5 and 12 of point B.1 of the working document must be rejected.

*The legal basis for the discontinuance of the aid and the alleged infringement of Article 24(2) of Regulation No 4253/88*

Arguments of the parties

81 The applicant submits that Article 24(2) of Regulation No 4253/88 is not applicable in this case. The purpose of that article is to prevent the operation financed from being executed in a manner other than that set out in the project submitted to the Commission, which is not the case here. The investments that were to be made were made as planned and the objectives set out in Article 9(1) of Regulation No 355/77 were attained. In particular, the Tetra Pak machine fulfilled the functions anticipated. Since the irregularities found do not affect the conditions of the operation, Article 24(2) of Regulation No 4253/88 is inapplicable.

82 In the alternative, the applicant contends that if that article is applicable, it does not provide for the possibility of discontinuing the aid, but at most for the possibility of reducing or suspending it. Consequently, the contested decision is unlawful inasmuch as it involves the adoption of a measure which has no legal basis.

83 That view is supported, according to the applicant, by Article 24(3) of Regulation No 4253/88 which states that any sum received unduly and to be recovered is to be repaid to the Commission. The purpose of the rules applicable in this case is to ensure recovery of sums unduly received and not to impose a penalty. Consequently, the Commission may discontinue aid only in a situation where all the expenditure relating to the project supported is unlawful and where *pro rata* reduction of the aid is tantamount to outright discontinuance.

84 The applicant submits that the discontinuance of aid has consequences which go beyond the mere recovery of the sum unduly received and constitutes a penalty. The principle of legality of penalties first laid down in the case-law (see Case 117/83 *Könecke* [1984] ECR 3291 and Case 137/85 *Maïzena* [1987] ECR 4587) and then in Article 2(3) of Regulation No 2988/95, allow a penalty to be imposed only where a provision of Community law so prescribes.

85 Nor, according to the applicant, does Regulation No 2988/88 constitute a sufficient legal basis for the penalty at issue. First, the provisions of that regulation which relate to penalties cannot be applied to events which occurred before it entered into force. Second, that regulation pursues two objectives, namely to protect the Community's financial interests and to guarantee legal certainty for recipients of subsidies. It constitutes a framework regulation whose application requires sectoral rules setting out the types of conduct which can be penalised and the relevant penalties. Article 24(2) of Regulation No 4253/88 in no way determines the conditions to which the imposition of a penalty is subject.

86 On the other hand, the applicant maintains, that regulation shows that the Commission was not entitled to discontinue the aid pursuant to Article 24(2) of Regulation No 4253/88, but at most reduce it by the amount unduly obtained as a result of the irregularities. Regulation No 2988/95 draws a distinction between measures and penalties. Under Article 4 of that regulation, the measures must be limited to the withdrawal of the advantage wrongfully obtained. Article 5, which relates to penalties, refers to future rules.

87 Finally, since the rules applicable in this case confer on the Commission only a power to recover sums paid and not a power to penalise, it misused it powers by imposing the penalty at issue.

88 The defendant contends that the plea should be rejected. It argues that the project approved by the Commission stipulated that the purchases would not be made and the work would not be carried out before the date on which the application for aid was received. However, in fact the purchases were made and the work carried out before that date. The project as carried out in fact was different from that which had been approved. Consequently, Article 24(2) of Regulation No 4253/88 applies.

89 Contrary to the contention of the applicant, that provision does confer on the Commission the power to discontinue aid which has been granted beforehand. Consequently, the complaints alleging breach of the principle of legality of penalties and a misuse of powers must be rejected.

Findings of the Court

90 As is clear from paragraphs 69 and 72 to 76 above, the beneficiary of the aid did not carry out the project as planned and certain conditions laid down were not fulfilled. Article 19(2) of Regulation No 355/77 allows the Commission to suspend, reduce or discontinue aid which has been granted beforehand where the project has not been carried out as planned or certain conditions laid down have not been fulfilled. Consequently, that provision constitutes a sufficient legal basis for the adoption of the contested decision.

91 The infringements found by the Court at paragraphs 69 and 72 to 76 above constitute irregularities within the meaning of Article 24(2) of Regulation No 4253/88. It follows that that provision is also applicable in this case.

92 Although the wording of Article 24(2) does not expressly provide for the possibility for the Commission to adopt a measure to cancel assistance, the fact remains that it is entitled 'Reduction, suspension and cancellation of assistance'.

Where there is a discrepancy between the wording of a provision and the title thereof, both must be construed in such a manner that all the terms employed serve a useful purpose. Having regard, first, to that rule of interpretation and, second, to the existence of another provision, also applicable to the aid in question, which provides for the possibility of discontinuing aid from the EAGGF in certain circumstances (Article 19(2) of Regulation No 355/77; see paragraph 90 above), Article 24(2) of Regulation No 4253/88 must be construed as meaning that all the terms employed by the legislature, in particular the word 'cancellation' in the title of that provision, serve a useful purpose. That article must therefore be construed as meaning that it allows the Commission to discontinue aid from the EAGGF in the event of an irregularity, in particular where a significant change to the operation affecting its nature or the conditions governing its execution is involved, for which the Commission's prior approval has not been sought.

93 Since the existence of a legal basis empowering the Commission to discontinue aid has been established, the complaints alleging infringement of the principle of legality of penalties and a misuse of powers cannot succeed.

94 It follows that the plea alleging the lack of a legal basis empowering the Commission to discontinue the financial assistance in question must be rejected.

*Proportionality of the discontinuance of the aid*

Arguments of the parties

95 The applicant submits that even if Article 24(2) of Regulation No 4253/88 does allow aid to be discontinued, the contested decision was unlawful because it was disproportionate. Since the irregularities complained of did not result in any

discrepancy between the project approved and the operation carried out and do not stem from any fraudulent intent or an effort to obtain financial assistance greater than the amount of the investments made, they do not justify the discontinuance of the aid at issue. In that respect it states that, unlike the situation which the Court had to consider in the case which gave rise to the judgment in *Industrias Pesqueras Campos and Others* v *Commission* (cited at paragraph 61 above), the irregularities complained of in this case did not enable the beneficiary to enrich itself unjustly.

96 In particular, the complete discontinuance of the aid was not justified in the light of the limited impact of the irregularity concerning the contract of sale relating to the Tetra Pak packing machine on the attainment of the objectives of the project. First, that investment can be separated from the rest of the project and, second, the cost thereof represents only 6% of the amount of aid (Case 122/78 *Buitoni* [1979] ECR 677).

97 The penalty imposed in this case is concurrent with national administrative fines (see Article 3 of Italian Law No 898 of 23 December 1986, *Official Journal of the Italian Republic* No 299 of 27 December 1986) and the ineligibility for any further EAGGF aid, as provided for in Article 3 of Commission Regulation (EC) No 860/94 of 18 April 1994 on plans and applications in the form of operational programmes for aid from the Guidance Section of the EAGGF for investments for improving the processing and marketing conditions for agricultural and forestry products (OJ 1994 L 99, p. 7). That concurrence causes the applicant damage which is wholly disproportionate to the irregularities with which it is charged.

98 Moreover, the complaints put forward by the defendant do not in any way involve the current owner of the company and therefore the penalty at issue is particularly disproportionate.

99 At the reply stage the applicant added that the solution adopted by the defendant, which consists in discontinuing EAGGF aid once expenditure has been incurred before start of the operation, infringes the principle of non-discrimination. It

leads to the discontinuance of aid both where an unintentional error is made and where fraud is committed and that amounts to treating different situations in an identical manner.

100 The defendant contends that this plea should be rejected. In this case the applicant acted in breach of fundamental commitments linked to the grant of the aid. With reference to paragraph 160 of the judgment in *Industrias Pesqueras Campos and Others* v *Commission* (cited at paragraph 61 above), it submits that the only appropriate response to the breach of those commitments in this case was to discontinue the aid.

Findings of the Court

101 It is settled case-law that by virtue of the principle of proportionality laid down in the third paragraph of Article 3b of the EC Treaty (now Article 5 EC) the measures adopted by Community institutions must not exceed what is appropriate and necessary for attaining the objective pursued (see, in particular, Case 15/83 *Denkavit Nederland* [1984] ECR 2171, at paragraph 25, and Case T-260/94 *Air Inter* v *Commission* [1997] ECR II-997, at paragraph 144).

102 The Court of Justice has held, furthermore, that where the evaluation of a complex situation is involved, which is the case with respect to the common agricultural policy, the Community institutions enjoy a wide measure of discretion (see, to this effect, in particular Case 29/77 *Roquette* [1977] ECR 1835, at paragraph 19). In reviewing the legality of the exercise of such discretion, the Court must confine itself to examining whether it discloses a manifest error or constitutes a misuse of powers or whether the institution has a clearly exceeded the limits of its discretion (see, to this effect, Joined Cases C-296/93 and C-307/93 *France and Ireland* v *Commission* [1996] ECR I-795, at paragraph 31).

103 Furthermore, the Court of Justice has held that the infringement of obligations whose observance is of fundamental importance to the proper functioning of a Community system may be penalised by forfeiture of a right conferred by Community legislation, such as entitlement to aid (see, to this effect, Case C-104/94 *Cereol Italia* [1995] ECR I-2983, at paragraph 24, and the case-law cited therein).

104 As has been pointed out at paragraph 77 above, the purpose of Regulation No 355/77 is to improve the conditions under which agricultural products are processed and marketed, improvement being assessed by comparing the situation which was intended to be the result of the operation funded with that which existed before the commencement of the project. It also follows from the seventh recital in the preamble to Regulation No 355/77 that the legislature sought to lay down an effective control procedure in order to ensure that beneficiaries comply with the conditions laid down when the EAGGF aid is granted. It follows from paragraph 71 above that the submission by the applicants for, and beneficiaries of, aid of reliable information which is not liable to mislead the Commission is essential for the proper functioning of the system of controls and evidence set up in order to determine, in particular, whether the condition that work on the project is not to be started before the Commission has received the application for aid has been fulfilled.

105 At the hearing the applicant acknowledged, first, that the work had been started before the Commission had received the application for aid in the sum of ITL 1 780 663 116 and, second, that the irregularity relating to the contract for the sale of the Tetra Pak packing machine involved a sum of ITL 470 000 000. A total of ITL 2 250 663 116 was thus involved. Since the aid granted from the EAGGF was ITL 2 002 932 326 and the overall investment was ITL 8 036 600 000, the irregularities complained of therefore represent 112% of the aid and 28% of the investment. The fact that the applicant failed to comply with its undertaking not to start work on the project before receipt of the application for aid by the Commission, failed to inform the Commission of this and, in response to a request for information, forwarded a copy which was not consistent with the original of the contract for the sale of a machine referred to in the subsidised project constitutes a serious breach of fundamental obligations.

106 Although the circumstances of this case differ from those which the Court of First Instance had to consider in the case which gave rise to the judgment in *Industrias Pesqueras Campos and Others* v *Commission*, cited at paragraph 61 above, it was reasonable for the Commission to take the view that any measure other than discontinuance of the aid might constitute an invitation to commit fraud. Beneficiaries might be tempted to supply false information or to conceal certain information in order to increase artificially the amount of investment eligible for financing, so that greater financial aid from the Community could be obtained, their risk being confined to having that aid reduced only by the amount of the investment which did not fulfil a condition governing the grant of the aid.

107 Furthermore, the applicant's argument that the discontinuance of the aid is disproportionate, on the ground that Fedital but not the applicant itself can be held responsible for the irregularities complained of, must be rejected since the applicant assumed Fedital's rights and obligations following the successive purchases referred to at paragraph 22 above.

108 Finally, the possibility of the Community penalty being applied concurrently with national administrative fines is purely hypothetical and in any event is not sufficient in itself to justify a finding that the measure contested in this case is disproportionate. It is for the applicant to seek relief before the national courts, should the need to so arise, on the grounds that concurrent application of Community and national penalties constitutes a breach of the principle of proportionality.

109 Consequently, the applicant has failed to show that the discontinuance of the aid was disproportionate in the light of the infringements committed and the objective of the legislation at issue.

110 It follows that the alleged breach of the principle of proportionality is not proven.

3 — *Alleged defects in the statement of reasons*

*Arguments of the parties*

111 The applicant submits that the reasons given for the contested decision are inadequate and that the decision does not enable it to acquire a clear and unequivocal understanding of the reasoning of the Community authority.

112 First of all, the contested decision does not respond in sufficient detail to some of the observations which it submitted on 3 August 1995 (see paragraph 31 above). The defendant did not respond to the observations which were intended to establish, first, that the invoices at issue were in order inasmuch as they bore a date less than six months before the date on which the operation was begun, and secondly, the illegality of a measure going beyond reduction of the aid.

113 Where the procedure provides for the right of the party concerned to submit observations on the complaints raised by the Commission, it is the duty of the Commission to take those observations to take into consideration. However, in this case, the defendant failed to specify the reasons for which the arguments put forward by the beneficiary did not justify the circumstances it pleaded. In particular, it should have listed the improper invoices and stated the reasons for which the irregularities found affected the project as a whole.

114 The defendant then failed to respond to the observations in which Massalombarda Colombani presented, with respect to the falsification of the contract for

the sale of the packing machine, the same arguments as those expounded by the applicant in these proceedings.

115 Finally, the applicant complains that the defendant justified, without providing an explanation, the discontinuance of the aid by reference to Article 24(2) of Regulation No 4253/88 which, however, provides only for the possibility of suspending or reducing aid but not of discontinuing it.

116 The defendant contends that the plea should be rejected since, in its submission, sufficient reasons were stated for the contested decision.

*Findings of the Court*

117 It is settled case-law, first, that, pursuant to Article 190 of the EC Treaty (now Article 253 EC), the reasons stated for a measure must disclose clearly and unequivocally the reasoning of the Community authority which adopted it, so as to make the persons concerned aware of the reasons for the measure and thus enable them to defend their rights, and so as to enable the Community courts to exercise their supervisory jurisdiction, and, second, that the extent of the obligation to state reasons must be assessed in the light of its context (*Industrias Pesqueras Campos and Others* v *Commission*, cited at paragraph 61 above, at paragraph 140, and the case-law cited therein).

118 In this case the contested decision refers to various stages in the procedure and states that the irregularities found, and in particular those described in the sixth and seventh recitals, affect the conditions of the project (18th recital) and consequently justify the discontinuance of the aid pursuant to Article 24(2) of Regulation No 4253/88.

119 The reasons stated disclose clearly and equivocally the reasoning of the defendant and enabled the party concerned to defend its rights and the Community courts to exercise their supervisory jurisdiction.

120 In particular, it is not open to the applicant to complain that the defendant did not respond sufficiently to the argument, which it expounded in its observations, to the effect that the invoices at issue bore a date less than six months before the date on which the application for aid was received and must, therefore, be regarded as in conformity with requirements. In the sixth recital in the preamble to the contested decision the defendant stated clearly that the fact that certain purchases and work had been effected before the date on which the Commission received the application for aid, that is to say before 27 October 1988, was contrary to the undertaking which the beneficiary entered into in its application for aid pursuant to Annex A to Regulation No 2515/85. It is clear from the contested decision that the criterion governing the eligibility of expenditure laid down by the defendant is that purchases and work to be financed may not be effected before the date on which the Commission receives the application for aid. In view of that criterion, the applicant was perfectly able to evaluate the irregularities for which the beneficiary of the aid was held responsible.

121 Nor can the defendant be validly criticised for responding inadequately to the applicant's argument that, first, the production of a copy which was not consistent with the original of a contract for the sale of a Tetra Pak packing machine had had no effect on the amount of the aid, and second, that a measure which goes further than reducing the aid is unlawful. The defendant stated that the irregularities found, as set out in the contested decision (see paragraph 33 above), affected the conditions of the project in question and that, having regard in particular to Article 24(2) of Regulation No 4253/88, it was necessary to discontinue the aid. Consequently, the defendant rejected the applicant's arguments and considered, first, that in view of the irregularities which, in the contested decision, it had found to exist certain expenditure was not eligible and, as a result, the amount of aid was affected, second, that Article 24(2) of Regulation No 4253/88 conferred on it the power to discontinue the aid and, third, that the discontinuance of the aid was not disproportionate in the circumstances of the case.

122 Moreover, it is clear from the arguments expounded by the applicant in support of its pleas that it understood the reasoning which led the defendant to adopt the contested decision.

123 It follows the contested decision is sufficiently reasoned for the purposes of Article 190 of the Treaty and that the plea must therefore be rejected.

124 Consequently, the application must be dismissed in its entirety.

## Costs

125 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for by the successful party. Since the applicant has been unsuccessful and the defendant has applied for costs, the applicant must be ordered to pay the defendant's costs and bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to pay the defendant's costs and bear its own costs.**

Jaeger Lenaerts Azizi

Delivered in open court in Luxembourg on 12 October 1999.

H. Jung K. Lenaerts

Registrar President

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