

JUDGMENT OF THE COURT

19 March 1991 *

In Case C-32/89,

Hellenic Republic, represented by Kostas Stavropoulos, a lawyer attached to the Community legal affairs department in the Ministry of Foreign Affairs, Fotis Spathopoulos, head of the Community legal department in the Ministry of Economic Affairs, Ilias Laïos, legal adviser to the Minister for Agriculture, and Meletios Tsotsanis, head of the legislation and legal affairs directorate in the Ministry of Agriculture, with an address for service in Luxembourg at the Greek Embassy, 117 Val Sainte-Croix,

applicant,

v

Commission of the European Communities, represented by Dimitrios Gouloussis and Dierk Booss, Legal Advisers, assisted by Michail Villaras, Assessor in the Council of State, temporarily attached to the Commission's Legal Department, with an address for service in Luxembourg at the office of Guido Berardis, a member of the Commission's Legal Department, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of Commission Decision 88/630/EEC of 29 November 1988 on the clearance of the accounts presented by the Member States in respect of the expenditure for 1986 of the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (Official Journal 1988 L 353, p. 30),

THE COURT,

composed of: O. Due, President, G. F. Mancini, J. C. Moitinho de Almeida and M. Diez de Velasco (Presidents of Chambers), C. N. Kakouris, F. A. Schockweiler, F. Grévisse, M. Zuleeg and P. J. G. Kapteyn, Judges,

* Language of the case: Greek

Advocate General: F. G. Jacobs,
Registrar: H. A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument on behalf of the parties at the hearing on 8 November 1990, at which the Commission was represented by D. Gouloussis and G. Verhelst, acting as Agents,

after hearing the Opinion of the Advocate General delivered at the sitting on 6 December 1990,

gives the following

Judgment

- 1 By application lodged at the Court Registry on 6 February 1989, the Hellenic Republic brought an action under the first paragraph of Article 173 of the EEC Treaty for the annulment of Commission Decision 88/630/EEC of 29 November 1988 on the clearance of the accounts presented by the Member States in respect of the expenditure for 1986 of the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (Official Journal 1988 L 353, p. 30).
- 2 The application seeks the annulment of the decision in its entirety on the ground that the Commission lacked the power to adopt it and, in the alternative, its partial annulment in so far as the Commission declared the following sums not to be chargeable to the Fund:

DR 6 840 546 206 in respect of refunds and monetary compensatory amounts;

DR 26 358 604 in respect of investigations in the cereals sector relating to 65 000 tonnes of 'durum wheat';

DR 406 029 in respect of the conclusion of a private storage contract for Kefalotyri and Kasserri cheeses;

DR 6 173 884 in respect of the sale at a price fixed in advance of dried grapes from the 1983 harvest by Greek storage agencies; and

DR 50 762 546 in respect of consumption aid for olive oil not recognized because of irregularities in the procedure followed for the lodging of applications.

- 3 Following the judgments delivered by the Court on 10 July 1990 in Case C-259/87 *Greece v Commission* [1990] ECR I-2845, Case C-334/87 *Greece v Commission* [1990] ECR I-2849 and Case C-335/87 *Greece v Commission* [1990] ECR I-2875, and on 12 July 1990 in Case C-35/88 *Commission v Greece* [1990] ECR I-3125, the Greek Government withdrew a number of its claims, in particular those concerning the amount of DR 50 762 546 in respect of consumption aid not recognized because of irregularities in the procedure followed for the lodging of applications.
- 4 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure and the pleas in law and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The claim based on the Commission's lack of powers

- 5 Article 5(2) of Regulation (EEC) 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) is couched in the following terms:

'The Commission, after consulting the Fund Committee referred to in Article 11,

(a) shall decide:

- at the beginning of the year, on the basis of the documents referred to in paragraph 1(a), on an advance payment for the authorities and bodies not exceeding one third of the credits entered in the budget;
- during the year, on additional payments intended to cover expenditure to be borne by an authority or body;

(b) shall, before the end of the following year, on the basis of the documents referred to in paragraph 1(b), make up the accounts of the authorities and bodies.⁷

- 6 The Greek Government claims that the contested decision is *ultra vires*. The Commission has power to adopt a decision within the meaning of Article 189 of the EEC Treaty only for the purpose of granting the advance or supplementary payments provided for in Article 5(2)(a) of Regulation No 729/70, and not for the purpose of clearing, in accordance with Article 5(2)(b), the accounts of the authorities and bodies of the Member States empowered to pay out refunds on exports to non-member countries and intervention intended to stabilize the agricultural markets.
- 7 That plea must be dismissed. It is clear from the context of Article 5 that the clearance referred to in Article 5(2)(b) involves the adoption of a decision by the Commission. It is inconceivable that the Commission should be able to clear the accounts, with considerable financial consequences, other than by a binding act. That is why Article 8 of Regulation (EEC) No 1723/72 of the Commission of 26 July 1972 on making up accounts for the European Agricultural Guidance and Guarantee Fund, Guarantee Section, (Official Journal, English Special Edition, Second Series (III), p. 109) refers to 'the decision to make up the accounts'. The Commission therefore has the power to adopt a decision within the meaning of Article 189 of the Treaty in order to clear Fund accounts.

Expenditure in respect of refunds and monetary compensatory amounts not recognized following investigations in Greece in the cereals sector

- 8 The contested decision refuses to charge to the Fund a sum of DR 6 840 546 206 in respect of refunds and monetary compensatory amounts. That expenditure was disallowed following investigations in Greece in the cereals sector. It appears from the Summary Report concerning the results of investigations carried out in connection with the clearance of the accounts of the Guarantee Section of the Fund for 1986 (hereinafter referred to as 'the Summary Report') sent to the Hellenic Republic that Greece had taken a number of measures liable to upset Community policy in the cereals sector and subvert the principles of free movement of goods and equal treatment for traders.
- 9 In particular, the Hellenic Republic had intervened actively on the cereals market through the Central Office for the Management of National Produce (hereinafter referred to as 'KYDEP'), which undertook on behalf of the State to dispose of the stocks of wheat held by it by means of four programme contracts. Moreover, KYDEP operates a monopoly as an agent of the State, and the State covers all the deficits incurred by KYDEP, thus enabling it to sell below cost price.
- 10 The Greek Government admits the existence of three programme contracts, two concerning common wheat flour and one concerning pasta products. It denies, however, that a fourth programme contract concerning durum wheat meal was concluded between KYDEP and the Ministry of Economic Affairs. It also considers that KYDEP, which is a third-level cooperative, covers half of its own deficits, the remainder being covered by the producers' associations. Finally, it states that KYDEP does not operate a monopoly and that, although it does receive financial contributions from the State, it does not sell its products below cost price, so that free competition with other traders is not affected.
- 11 First, as regards the existence of the fourth programme contract, the Commission cites a note dated 6 June 1985, sent by KYDEP's director-general to its board, which states that 'a programme contract has already been signed by the Ministry

of Economic Affairs with a view to exporting 40 000 tonnes of meal, which will dispose of 78 000 tonnes of durum wheat . . . '.

- 12 In the light of that note, the authenticity of which is not disputed by the Greek Government, and since the Greek Government merely denies the existence of a programme contract for durum wheat meal without putting forward any argument or evidence in support of its denial, the Commission must be held not to have acted in error in concluding that there was a fourth programme contract involving durum wheat meal.
- 13 Secondly, in support of its assertion that the State covers KYDEP's deficits, the Commission refers *inter alia* in addition to the note of 6 June 1985 referred to above, to the minutes of the 36th general meeting of KYDEP and those of the 189th meeting of the committee set up by joint decision of the Ministries of Trade and Agriculture (No A6/2028 of 17 March 1981), drawn up on 12 December 1986 and 14 February 1984 respectively, and to the report of KYDEP's legal department of 4 November 1985 and the annual reports of the Bank of Greece.
- 14 The Greek Government does not dispute any of those documents. It admits, moreover, that the public authorities paid over certain sums in order to meet KYDEP's increasing financial needs. It is clear from KYDEP's operating accounts that its financial reserves were insufficient to cover even 50% of the losses which it incurred in 1982. The abovementioned minutes of 14 February 1984 state that those losses are to be borne by the State. Finally, according to the note of 6 June 1985 and the minutes of the 36th general meeting of KYDEP, cited above, the Ministry of Economic Affairs took a decision to cover all the deficits incurred by KYDEP as a result of the programme contracts in question.
- 15 The Court has already held, in its judgment of 12 July 1990 in Case C-35/88 *Commission v Greece*, cited above, that by adopting budgetary measures to cover the deficit incurred by KYDEP as a result of its intervention on the market in feed grain and by enabling KYDEP to obtain loans from the Bank of Greece by virtue of a State guarantee, the Greek Government intervened, contrary to Community

law, between 1 January 1981 and 26 March 1984 with regard to the conditions under which KYDEP bought and sold feed grain.

16 The Greek Government has not put forward any evidence or argument from which it may be inferred that the relationship between KYDEP and the Greek authorities, as illustrated by that conduct, has changed since the end of the period with which that judgment is concerned.

17 In view of the foregoing, the Greek authorities must be held to have controlled KYDEP's operations and covered its deficits during the period with which the present proceedings are concerned.

18 The Commission could therefore justifiably refuse to recognize the amounts in issue as chargeable to the Fund on the ground that the Greek authorities took measures which interfered with Community policy in the cereals sector. This plea in law of the Greek Government must therefore be dismissed as unfounded.

Expenditure not recognized as chargeable following investigations in Greece in the cereals sector relating to 65 000 tonnes of durum wheat

19 In the contested decision the Commission refused on two grounds to charge to the Fund the DR 26 358 604 expended by the Hellenic Republic in respect of the transfer of 65 000 tonnes of durum wheat into Community intervention. First, the wheat did not meet the quality criteria for Community intervention laid down by Commission Regulation (EEC) No 1569/77 of 11 July 1977 fixing the procedure and conditions for the taking over of cereals by intervention agencies (Official Journal 1977 L 174, p. 15). Secondly, it appears from the minutes of the meeting of 12 December 1986 that the durum wheat in question was acquired by KYDEP on State instructions issued within the framework of a national policy of support for the cereals market. The subsequent transfer into intervention was a merely formal matter, in view of KYDEP's role as a storage agency, and was decided upon both because of the financial burden on KYDEP resulting from the bank commitments which it had had to incur when paying for successive harvests and because of the volume of the stocks built up by KYDEP.

- 20 With regard to the second ground, the Court has held (see, *inter alia*, the judgment in Case 90/86 *Criminal proceedings against Zoni* [1988] ECR 4285) that once the Community has established a common market organization in a particular sector, the Member States must refrain from taking any unilateral action which might undermine or create exceptions to it.
- 21 The Greek Government has not contradicted the allegation that the transfer into Community intervention of 65 000 tonnes of durum wheat was decided upon on State instructions.
- 22 The circumstances in which the 65 000 tonnes of durum wheat were acquired by KYDEP and offered for intervention are therefore inconsistent with the operation of the common organization of the market in cereals. It must be concluded, without there being any need to consider the argument concerning the quality of the durum wheat, that the Commission had sufficient reasons for refusing to charge the costs of the operation concerned to the Fund.
- 23 It follows that the Greek Government's plea in law seeking the annulment of the contested decision as regards the expenditure relating to the 65 000 tonnes of durum wheat must be dismissed.

Expenditure relating to the conclusion of a private storage contract for cheese after the expiry of the time-limit

- 24 Article 2(2)(b) of Commission Regulation (EEC) No 1082/85 of 26 April 1985 introducing private storage aid for Kefalotyri and Kasseri cheeses (Official Journal 1985 L 114, p. 29) is couched in the following terms:

Article 2

1. ...

2. The storage contract shall be concluded:

(a) . . .

(b) after completion of the operations connected with putting the batch of cheese covered by the contract into storage and at the latest 40 days after the date on which the storage covered by the contract begins.'

25 In the contested decision the Commission refused to charge to the Fund the DR 406 029 laid out by the Hellenic Republic for a storage contract of the kind referred to in the above provision on the ground that a quantity of 20 tonnes was put into storage on 7 October 1985 but the relevant contract was not concluded until 94 days later, on 9 January 1986.

26 The Greek Government does not deny those facts, but considers that the delay in concluding the storage contract in question was due to *force majeure* in the form of excessive pressure during the pre-Christmas period on the postal services, by which the documentary evidence of the storage was sent.

27 It is sufficient to observe that under Article 2 of the abovementioned regulation the storage contract should have been concluded by 16 November 1985 at the latest, that is to say well before the beginning of the period to which the Greek Government refers. The submission based on *force majeure* must therefore be dismissed.

Expenditure relating to the sale at a price fixed in advance of dried grapes from the 1983 harvest

28 In the contested decision the Commission refused to charge to the Fund a sum of DR 6 173 884 expended by the Greek authorities in connection with the sale at a price fixed in advance of dried grapes from the 1983 harvest in Greece. According to the Summary Report for 1984 and 1985, to which the contested decision refers, the Greek authorities prohibited exports of such dried grapes from 1 December

1984 to 9 January 1985. That measure prevented the proper operation of the system of fixed-price sales provided for during the period from 10 December 1984 to 31 January 1985 by Commission Regulation No 3444/84 of 5 December 1984 on the sale at a price fixed in advance of dried grapes from the 1983 harvest held by Greek storage agencies (Official Journal 1984 L 318, p. 33). That entailed a considerable drop in the quantities sold and a correlative increase in expenditure in respect of storage and financial costs.

- 29 The Greek Government seeks the annulment of this part of the decision on the ground that dried grapes were exported without impediment during the whole of the period during which Regulation No 3444/84 was in force and at least until 10 February 1985; in any event, such exports were authorized in general by Presidential Decree No 215/86 of 13 June 1986. The absence of any impediment is confirmed by the constant flow of exports of dried grapes throughout 1986, as may be seen from the monthly tables of the Greek national statistical service for the first half of 1986.
- 30 In its judgment in Case C-335/87 *Greece v Commission*, cited above, the Court found that under Decision No 306 855 of the Greek Ministers for Agriculture and for Economic Affairs of 17 August 1984 exports of dried grapes from the 1983 harvest were authorized only until 30 November 1984 and that Ministerial Decision No 261 869 extending that period until 31 January 1985 was not issued until 10 January 1985. Consequently, as the Commission rightly points out, the latter decision could not have any actual effect between 1 December 1984 and 10 January 1985, when a prohibition on exports was temporarily in force.
- 31 In that judgment the Court also found that even after the decision of 10 January 1985 was adopted it was still extremely difficult to export dried grapes in view of the fact that only 21 days remained for that purpose. The Greek Government's assertion that exports were possible until 10 February 1985 is unsupported by the terms of the aforementioned ministerial decisions or by any other evidence.

32 Furthermore, it became apparent at the hearing that Presidential Decree
No 215/86 did not alter the situation resulting from the previous ministerial
decisions in the light of which the Court, in the judgment cited above, dismissed
the submissions concerning the storage and financial costs incurred in respect of
dried grapes from the 1983 harvest.

33 It follows from the foregoing that the application must be dismissed in its entirety.

Costs

34 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be
ordered to pay the costs if they have been asked for in the successful party's
pleadings. Since the Hellenic Republic has been unsuccessful, it must be ordered to
pay the costs, including those of the application for interim measures.

On those grounds,

THE COURT

hereby:

(1) Dismisses the application;

**(2) Orders the Hellenic Republic to pay the costs, including those of the
application for interim measures.**

Due

Mancini

Moitinho de Almeida

Díez de Velasco

Kakouris

Schockweiler

Grévisse

Zuleeg

Kapteyn

Delivered in open court in Luxembourg on 19 March 1991.

J.-G. Giraud
Registrar

O. Due
President