JUDGMENT OF THE COURT (Sixth Chamber)
4 July 1996 *

In Case C-50/94,

Hellenic Republic, represented by Vassilios Kondolaimos and Ioannis Chalkias, Assistant Legal Advisers in the State Legal Service, and Christina Sitara and Vassileia Pelekou, legal representatives of the State Legal Service, with an address for service in Luxembourg at the Greek Embassy, 117 Val Sainte-Croix,

applicant,

v

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

defendant,

APPLICATION for annulment of Commission Decision 93/659/EC of 25 November 1993 on the clearance of the accounts presented by the Member States in respect of the expenditure for 1990 of the European Agricultural Guidance and Guarantee Fund (EAGGF), Guarantee Section (OJ 1993 L 301, p. 13), in so far as it concerns the Hellenic Republic,

* Language of the case: Greek.

THE COURT (Sixth Chamber),

composed of: C. N. Kakouris, President of the Chamber, G. Hirsch (Rapporteur) and P. J. G. Kapteyn, Judges,

Advocate General: N. Fennelly,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 18 January 1996,

after hearing the Opinion of the Advocate General at the sitting on 14 March 1996,

gives the following

Judgment

1 By application lodged at the Court Registry on 7 February 1994 the Hellenic Republic brought an action under the first paragraph of Article 173 of the EC Treaty for the partial annulment of Commission Decision 93/659/EC of 25 November 1993 on the clearance of the accounts presented by the Member States in respect of the expenditure for 1990 of the European Agricultural Guidance and Guarantee Fund (EAGGF), Guarantee Section (OJ 1993 L 301, p. 13), in so far as it concerned the Hellenic Republic.

2 The application seeks annulment of that decision in so far as the Commission declared that the following sums were not chargeable to the EAGGF:

— DR 866 305 307 in respect of export refunds on animal feed;

— DR 981 233 150 in respect of one-tenth of production aid for olive oil;

— DR 4 491 969 372 in respect of export refunds and premiums on tobacco paid on the basis of a quantity of 9 786 652 kg, equivalent to the sum of DR 3 632 654 033, and in respect of export refunds and premiums on tobacco equivalent to the sum of DR 859 315 339, those sums being the subject of a negative reserve for 1990.

3 At the hearing the Greek Government abandoned its claim relating to the sum of DR 4 491 969 372 in respect of export refunds and premiums on tobacco.

The expenditure in respect of export refunds on animal feed

4 The Commission set out the reasons for the financial adjustments imposed in a Summary Report of 10 June 1993, which shows that on the basis of an inspection visit in 1992 it concluded that the Central Office for the Management of National Produce (KYDEP) had intervened in the animal feed market until 16 November 1990 by fixing buying and selling prices, and that losses from those operations, with the interest charged by the Agricultural Bank of Greece, had been declared to the State. During the inspection visit it became apparent that KYDEP had continued to sell cereals (maize and barley) to animal feed producers at below-cost prices. Since the deficits declared to the State following the interventions in the

animal feed market greatly exceeded the amounts declared to the EAGGF in respect of export refunds, the Commission imposed a financial adjustment of DR 866 305 307, that is, the entire amount declared in respect of export refunds on animal feed for the 1990 financial year.

5 The Greek Government argues, firstly, that when clearing the accounts the Commission was not entitled to rely on facts which, as in the present case, came to its knowledge only after the deadline referred to in Article 5(2)(b) of Regulation (EEC) No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy (OJ, English Special Edition 1970 (I), p. 218), which provides that the accounts are to be cleared before the end of the year following the financial year in question. Since the clearance at issue related to 1990, and more particularly to the period from 16 October 1989 to 15 October 1990, the Commission was wrong to take into consideration information which was obtained during the 1992 inspection visit and was thus later than 31 December 1991.

6 The Court has held (Case 349/85 *Denmark* v *Commission* [1988] ECR 169, paragraph 19) that until the accounts have been duly cleared, the Commission is required by Article 2 of Regulation No 729/70 to refuse to charge to the EAGGF refunds which have not been granted in accordance with the Community rules. That obligation does not disappear merely because the accounts are cleared after the expiry of the period prescribed in Article 5 of that regulation. No penalty is imposed for failure to comply with that time-limit, which may therefore be regarded, having regard to the nature of the decision on the clearance of the accounts, the essential purpose of which is to ensure that expenditure incurred by the national authorities is in accordance with the Community rules, as a merely formal limit, save where the interests of a Member State are affected.

7 It follows that in the present case the Commission was entitled to take into account the results of the 1992 inspection visit. In those circumstances, the Greek Government's argument on this point cannot be accepted.

8 Secondly, the Greek Government submits that the Commission did not give a sufficient statement of reasons for its decision not to accept the entire export refund expenditure. It considers that the Commission should have shown not only that there was a link between KYDEP's policy and exports of animal feed, but also what the level of animal feed prices and of the corresponding expenditure would have been in the absence of such a link.

9 On this point, it must first be noted that the Court has held (see, in particular, Case 347/85 *United Kingdom* v *Commission* [1988] ECR 1749, paragraph 60) that decisions concerning the clearance of accounts do not require detailed reasons if the government concerned was closely involved in the process by which the decision came about and is therefore aware of the reason for which the Commission considers that it must not charge the sums in dispute to the EAGGF.

10 In the present case, it is common ground that the Greek Government was closely involved in the process by which the contested decision came about and was therefore aware of the reason for which the Commission considered that it might not charge the sum in dispute to the EAGGF. The Commission's conclusions were based on information obtained during the inspection visit to Greece of 1 to 4 June 1992, and the Commission discussed those findings with the Greek authorities, since, as the summary report shows, the latter, unable to accept the proposed adjustments, asked for a positive reserve, which was refused.

11 The Court has also held (*United Kingdom* v *Commission*, paragraph 14) that when the Commission refuses to charge certain expenditure to the EAGGF on the ground that it was incurred as a result of breaches of Community rules imputable

to a Member State, it is for that State to show that the conditions for obtaining the financing refused by the Commission are fulfilled.

12 In the present case, it follows from the findings in the summary report that animal feed was managed by KYDEP in implementation of a State monopoly with the costs incurred, in particular the losses on sales of those products, being completely covered by the State budget. According to the Commission, selling below cost constitutes an illegal national aid which, if the products are exported, is added to the Community refund. The effect of that lowering of the cost price of the feed was such that in a normal situation, without any national aid, the products could not have been exported, because of their high price.

13 In support of its assertions, the Commission referred in particular to a letter from the Greek Ministry of Agriculture to KYDEP, as a result of which KYDEP ceased its interventions in the market from 16 November 1990. The Greek Government, at the Court's request, produced a copy of the letter before the hearing. In the confidential letter, dated 9 November 1990, the ministry informed KYDEP of the partial abrogation by the National Bank of Greece of two of its decisions, of 26 July and 27 August 1990. At the Court's request, the Greek Government, after the hearing, produced copies of those documents, the author of which was the Commission on Prices and Incomes.

14 The decision of 27 August 1990, which refers to a number of earlier decisions of 1983, 1988 and 1990 on the same subject, specified the prices for the supply of fodder cereals by KYDEP to Greek farmers and to industrial and artisanal manufacturers of compound animal feed, whose products were intended exclusively for domestic consumption. With regard to animal feed intended for export, the decision authorized KYDEP to make fodder cereals available to manufacturers of

compound animal feed at a price equal to the cost price (the market price plus all costs relating to management, transport, and so forth), without there being any burden whatever on the public purse.

15 That document shows that throughout the period in question KYDEP was intervening in the national animal feed market by artificially depressing prices. It is not impossible that intervention had effects on exports of animal feed. As the Advocate General has observed in point 25 of his Opinion, the aid given to the animal feed producers in respect of their domestic sales may have enabled them to continue operations, whereas without that aid other Community producers would have had a competitive advantage over them, so that the continued capacity of the former producers to export and benefit from export refunds may have depended on that support in the domestic market.

16 As the link between KYDEP's policy of selling cereals at below cost price and its effects on the export refund system had thus been established, it was for the Greek Government to refute the Commission's argument that the deficits declared to the State following the interventions in the animal feed market greatly exceeded the amounts declared to the EAGGF for export refunds. Since the Greek Government did not provide such proof, the Commission was entitled to withhold payment of the entire amount of the expenditure declared in respect of export refunds on animal feed.

17 The Greek Government maintains, thirdly, that during the period in question the State had no links with KYDEP. The links described in the Court's earlier case-law did not exist in that period. It submits that KYDEP had full control of its

operations, with no participation or encouragement by the Greek Government, and its losses were not covered by the Hellenic Republic or the Agricultural Bank of Greece.

18 In that connection the Greek Government points out that by decision of 31 May 1993 the Efetio (Court of Appeal), Athens, put KYDEP into special liquidation. If KYDEP had had real claims against the State, it could have had recourse to two procedures to avoid being wound up at short notice, either calling on the State for payment of what it owed or bringing an action for damages against it. In accordance with the national provisions in force, claims against the State become statute-barred five years from when they arise. Consequently, for any claims against the State apparent on 1 January 1988, an action for damages should have been brought by 1992 at the latest, which was not the case. According to the Greek Government, there was therefore no commitment by the State after the end of 1987.

19 As follows from paragraphs 12 to 16 above, it is clear, in the first place, that during the period in question the Greek authorities controlled KYDEP's operations in the national animal feed market and that those interventions had effects on the export refund system. Secondly, although KYDEP was put into liquidation in 1993 on application by the Agricultural Bank of Greece, since its assets were far from sufficient to cover its losses, the writing-off of its debts to a State-owned bank ultimately had the effect that the State thus covered the costs of its interventions in the market.

20 The plea in law concerning the expenditure in respect of export refunds on animal feed must therefore be rejected.

The expenditure in respect of production aid for olive oil

21 In the section on aid for the production of olive oil, the summary report found that there was inadequate control of expenditure. An audit in connection with the clearance of accounts had, according to the report, disclosed serious deficiencies in the organization of supervision of the aid. In particular, the report found that there was no register of olive cultivation, whereas under Council Regulation (EEC) No 154/75 of 21 January 1975 on the establishment of a register of olive cultivation in the Member States producing olive oil (OJ 1975 L 19, p. 1), as amended by Council Regulation (EEC) No 3453/80 of 22 December 1980 (OJ 1980 L 360, p. 15), it should have been completed by 31 October 1988. Moreover, there had been serious delays in compiling the computerized files, which should have been created before 31 October 1990 (first sentence of Article 11(2) of Commission Regulation (EEC) No 3061/84 of 31 October 1984 laying down detailed rules for the application of the system of production aid for olive oil (OJ 1984 L 288, p. 52), as amended by Commission Regulation (EEC) No 98/89 of 17 January 1989 (OJ 1989 L 14, p. 14)). During the inspection it became apparent that the data relating to major olive-oil producing regions had still not been recorded.

22 The report further found in particular that the paying agency, Didagep, was not using the information in the files to make checks before paying the aid. The control agency for olive oil had performed only 499 on-the-spot checks in the entire territory of Greece for the 1989/90 marketing year, an altogether insufficient percentage, whereas the rules in force for that year prescribed checks of 5% of applications for aid. Consequently, having regard to the lack of a register of olive cultivation and of computerized files, the situation in the Hellenic Republic did not offer the guarantees required by the EAGGF. A flat-rate adjustment of 10% of the amount of aid paid for the 1989/90 marketing year was therefore justified with respect to the clearance of accounts.

23 The Greek Government argues, firstly, that the disallowance of a flat-rate proportion of the expenditure constitutes a penalty which is not provided for in the Community legislation and which exceeds the limits of the Commission's discretion.

24 The Commission observes that, in accordance with the settled case-law of the Court, if it finds that the control machinery is lacking, it may refuse payment of the entire amount. Despite that, it took into account in the present case only 10% of the amount declared, applying the criteria which had been adopted by the inter-service committee, approved by the Commission and communicated to all the Member States within the EAGGF management committee, where they were well received. According to the Commission, those criteria constitute a common basis of agreement in that, if it proves impossible to determine the amount of the adjustments precisely, a middle way is chosen by withholding a flat-rate amount, thus making it possible both to respect Community law and the sound management of Community resources and to comply with the understandable wish of the Member States to avoid excessive and disproportionate adjustments.

25 The criteria provide for three levels of flat-rate reductions of reimbursements, namely 2%, 5% and 10%, to take account of the degree of risk posed to the EAGGF by different levels of defective supervision. A flat-rate adjustment of 10% of expenditure may be imposed if the defect relates to the whole or the essential elements of the system of supervision or the application of essential checks which are designed to ensure regularity of expenditure, so that it can reasonably be concluded that there was a serious risk of generalized losses for the EAGGF.

26 The Court observes that, according to its case-law (*United Kingdom* v *Commission*, paragraph 13), where it proves impossible to establish with certainty the extent to which a national measure which is incompatible with Community law has caused an increase in the expenditure entered under a budgetary item of the EAGGF, the Commission has no choice but to disallow all the expenditure in question.

27 When the Commission refuses to charge certain expenditure to the EAGGF, on the ground that it was incurred as a result of breaches of Community rules imputable to a Member State, it is for that State to show that the conditions for obtaining the financing refused by the Commission are fulfilled (*United Kingdom* v *Commission*, paragraph 14). According to paragraph 15 of that judgment, the

same considerations apply where the Commission, instead of rejecting all the expenditure affected by the infringement, has endeavoured to establish the financial impact of the unlawful action by means of calculations based on an assessment of what the situation on the relevant market would have been if the infringement had not occurred. In such a case, the burden of proving that those calculations are not correct rests on the State seeking to have the disallowance annulled.

28 If, then, in its function of clearing the accounts the Commission, instead of refusing the entire expenditure, endeavours to draw up rules to differentiate according to the degree of risk posed to the EAGGF by different levels of defective supervision, the Member State must show that those criteria are arbitrary and unfair. Since the Greek Government has not produced such proof, its arguments on this point must be rejected.

29 Secondly, the Greek Government declines all responsibility on its part for the delay in establishing the register of olive cultivation and the computerized files. It claims that the delay was instead imputable to objective reasons.

30 With regard to the register of olive cultivation, it observes in particular that on 28 December 1988 it transmitted to the Commission a programme of tests for the establishment of such a register. On 21 June 1991 the Commission proposed to the Minister of Agriculture that a pilot scheme be carried out before the main work. Although the Greek authorities had informed the Commission directly at the outset of the problem of the objective impossibility of implementation and rapid application of the register, and although the Hellenic Republic had cooperated closely with the Commission to resolve that problem from 1988, the Commission *a posteriori* imputes responsibility to the Hellenic Republic and refuses to recognize the expenditure incurred on aid for the production of olive oil.

31 With regard to the computerized files, the Greek Government observes that the delay in creating them relates only to the special index. 89% of the production data for 1985/86 to 1988/89 has already been computerized. 47% of the computerization of applications by producers for the 1989/90 period has been completed. There too the delay is due to objective impossibility.

32 The Commission does not dispute that there was an exchange of correspondence during 1991 and 1992 between the Greek and the Community authorities on the difficulties of establishing the register of olive cultivation, or that it undertook to assist with the relevant operations. It points out that it fulfilled its commitments and will continue to do so, but that the result was not achieved, which shows at least that the national administration was negligent in not introducing an indispensable means for effective supervision of the sector. There was no realistic plan in 1990 for establishing a register of olive cultivation.

33 The Commission further observes that the computerized files, which are the traditional means of exercising supervision in the olive oil sector, have no longer been updated for many years.

34 Under Article 14(1) of Council Regulation (EEC) No 2261/84 of 17 July 1984 laying down general rules on the granting of aid for the production of olive oil and of aid to olive oil producer organizations (OJ 1984 L 208, p. 3), 'Each producer Member State shall apply a system of checks to ensure that the product in respect of which aid is granted is eligible for such aid'.

35 For the checks and verifications the Member State is to use *inter alia* permanent computerized files of olive and olive-oil production data (Article 14(5) of Regulation No 2261/84). Those files are to contain all the information needed to facilitate checking and the prompt detection of irregularities (Article 16(2) of that regulation).

36 The first sentence of Article 11(2) of Regulation No 3061/84, as amended by Regulation No 98/89, prescribes that all the components of the computerized files are to be operational before 31 October 1990. Member States are moreover to use the data for the checks as and when the specific files are established (second sentence of Article 11(2)).

37 Furthermore, under the second indent of Article 11(1) of that regulation, the Member States are to enter in the files the basic data contained in the register of olive cultivation. That register, whose function is to provide the necessary data on production potential and to improve the operation of the aid system, was to be fully established in the Hellenic Republic by 31 October 1988 (Article 1 of Regulation No 154/75, as amended by Regulation No 3453/80).

38 The Greek Government does not dispute that there was considerable delay in establishing the register of olive cultivation and in making progress with the work of creating the computerized files.

39 In so far as the Greek Government claims that it was objectively impossible to comply with the prescribed time-limits, it must be observed that while the Court accepts that a Member State may plead that it was absolutely impossible to implement a Community decision properly (judgment in Case 213/85 *Commission* v *Netherlands* [1988] ECR 281, paragraph 22), the Member State must in any event submit the problems linked with such implementation in good time to the appropriate institution for consideration. In such cases, the institution and the Member State must, by virtue of the rule imposing on the Member States and the Community institutions a duty of genuine cooperation which underlies, in particular, Article 5 of the EC Treaty, work together in good faith with a view to overcoming the difficulties while fully observing the Treaty provisions (see, *inter alia*, the judgment in Case C-348/93 *Commission* v *Italy* [1995] ECR I-673, paragraph 17).

40 With respect to the register of olive cultivation, it was not until its letter of 28 December 1988, that is, after the expiry of the period laid down by Regulation No 3453/80, that the Greek Government submitted to the Commission a programme of trials for establishing the register. The representative of the Greek Government confirmed at the hearing that the difficulties in establishing the register were not notified to the Commission until after the expiry of the prescribed period. The fact that after that date the Commission assisted the Greek Government in its efforts to fulfil its obligations cannot, in those circumstances, prove that it was absolutely impossible to establish the register by the required date, since the Greek Government has not put forward any argument relating to the period before 31 October 1988.

41 With respect to the computerized files, the report of the inspection visit to the olive oil control agency on 4 to 8 November 1991 shows that the data relating to some major production regions was not in the files. The report states that no justification could be given for the delay in establishing the files.

42 In those circumstances, the Greek Government has not shown that the delay in establishing the register of olive cultivation and the computerized files was due to absolute impossibility.

43 Thirdly, the Greek Government observes that when problems arose in collecting the data, a supplementary check of the data was carried out by the local directorates of agriculture. There had essentially been no problem of inadequate checks for those whose data had not yet been recorded.

44 In that connection, the Greek Government states that the shortfall in on-the-spot checks by the olive oil control agency, of which there were 499 for the marketing year in question, was compensated by the 1 534 checks performed by the local

directorates of agriculture. Since the check rate was thus 4.89% for the year in question, the rate of 4% required by Regulation No 98/89 was easily attained.

45 The Commission notes that in the present case the EAGGF based its adjustment of DR 981 233 150 not only on the absence of the register of olive cultivation, although that is the principal instrument of supervision in the olive oil sector, but above all on the very defective implementation of the checks prescribed, including those by means of the computerized files.

46 It further observes that, according to the report of the inspection of 4 to 8 November 1991, the control agency for olive oil carried out about 500 checks in 1990, instead of the minimum of 2 000 initially prescribed. On the basis of that report the Commission considers that the payment by the competent agency, Didagep, of subsidies such as those submitted by producers through Eleourgiki, an association of 76 producer organizations, without any verification or other check of the data, appears to be an established practice.

47 The Court observes that the checks to be carried out under Regulation No 2261/84 depend on whether the producer belongs to a producer organization or association.

48 As regards producers who belong to associations, the recognized organizations are to lodge the crop declarations of their members and make on-the-spot checks of 5% of those declarations (Article 6(1) of Regulation No 2261/84 read together with Article 4(2) of Regulation No 3061/84). Under Article 14(2) of Regulation No 2261/84, producer Member States are to verify the activities of each producer organization and association, and in particular the checking operations carried out by those bodies.

49 In the case of independent producers, the Member State concerned must carry out checking by sampling on the spot, in order to verify that the crop declarations are accurate and that the olives are to be used to produce oil, and, if possible, that they have actually been processed into oil (Article 14(4) of Regulation No 2261/84). Those checks are to apply to 1% of olive growers in zones where the basic data in the register of olive cultivation is available, and to 4% of growers in other zones (Article 10(2) of Regulation No 3061/84, as amended by Regulation No 98/89).

50 As regards checks on producers who belong to associations, it is apparent from the Commission's report on its visit of 4 to 8 November 1991 that the producer organizations only carried out purely documentary checks of 5% of aid applications on the basis of earlier records, instead of on-the-spot checks as prescribed by Article 6(1) of Regulation No 2261/84. The Greek Government and the Commission further agree that the olive oil control agency, which is responsible for checking on the producer organizations under Article 14(2) of Regulation No 2261/84, itself carried out only 499 checks instead of the 2 000 prescribed.

51 The fact that, as the Greek Government maintains, the local directorates of the Ministry of Agriculture performed 1 534 on-the-spot checks cannot remedy those deficiencies, since those authorities were responsible only for checking independent producers.

52 The Greek Government has therefore failed to show that the Commission's statements relating to the inadequacy of checks are incorrect.

53 Finally, in so far as the Greek Government maintains that the olive oil control agency is a Community body rather than a national one and that its defects cannot be imputed to the Hellenic Republic, it must be observed that, according to the findings of the inspection report, the control agency comes under the authority of

the Greek Ministry of Agriculture and its employees are public officials. That argument by the Greek Government cannot therefore be upheld.

54 The plea in law relating to the expenditure in respect of production aid for olive oil must therefore also be rejected.

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

Costs

56 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Hellenic Republic has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Dismisses the application;

2. Orders the Hellenic Republic to pay the costs.

Kakouris Hirsch Kapteyn

Delivered in open court in Luxembourg on 4 July 1996.

R. Grass

Registrar

C. N. Kakouris

President of the Sixth Chamber