

JUDGMENT OF THE COURT (Sixth Chamber)

5 October 1999 \*

In Case C-240/97,

**Kingdom of Spain**, represented by S. Ortiz Vaamonde, Abogado del Estado, acting as Agent, with an address for service in Luxembourg at the Spanish Embassy, 4-6 Boulevard E. Servais,

applicant,

v

**Commission of the European Communities**, represented by M. Díaz-Llanos La Roche, Legal Adviser, and C. Gómez de la Cruz, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the latter's office, Wagner Centre, Kirchberg,

defendant,

**APPLICATION** for the partial annulment of Commission Decision 97/333/EC of 23 April 1997 on the clearance of the accounts presented by the Member States in respect of the expenditure for 1993 of the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) (OJ 1997 L 139, p. 30),

\* Language of the case: Spanish.

THE COURT (Sixth Chamber),

composed of: P.J.G. Kapteyn, President of the Chamber, G. Hirsch and J.L. Murray (Rapporteur), Judges,

Advocate General: P. Léger,  
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 14 January 1999,

after hearing the Opinion of the Advocate General at the sitting on 22 April 1999,

gives the following

**Judgment**

- 1 By application lodged at the Court Registry on 30 June 1997 the Kingdom of Spain brought an action under the first paragraph of Article 173 of the EC Treaty (now, after amendment, the first paragraph of Article 230 EC) for the partial annulment of Commission Decision 97/333/EC of 23 April 1997 on the clearance of the accounts presented by the Member States in respect of the expenditure for 1993 of the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) (OJ 1997 L 139, p. 30).

- 2 The application seeks the annulment of that decision in so far as it refused to charge to the EAGGF, first, ESP 518 290 080 in respect of export refunds for butter, second, ESP 74 468 109 in respect of export refunds for beef and veal and, finally, ESP 58 804 012 in respect of aid for the processing of fruit and vegetables (citrus fruit).

### **The export refunds for butter**

- 3 Regulation (EEC) No 804/68 of the Council of 27 June 1968 (OJ, English Special Edition 1968 (I), p. 176) establishes a common organisation of the market in milk and milk products.
- 4 Article 17 of that regulation, as amended by Council Regulation (EEC) No 3904/87 of 22 December 1987 (OJ 1987 L 370, p. 1), provides that, to the extent necessary to enable the products covered by that regulation, which include butter, to be exported on the basis of the prices for those products in international trade, the difference between those prices and prices in the Community may be covered by an export refund.
- 5 Under Article 1(2)(a) 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), the Guarantee Section of the EAGGF is to finance refunds on exports to non-member countries.
- 6 Under Article 2(1) of that regulation, refunds on exports to third countries are to be financed by the Guarantee Section of the EAGGF if they were granted in accordance with the Community rules within the framework of the common organisation of agricultural markets.

7 Article 8(1) of Regulation No 729/70 provides:

‘The Member States in accordance with national provisions laid down by law, regulation or administrative action shall take the measures necessary to:

- satisfy themselves that transactions financed by the Fund are actually carried out and are executed correctly;
  
- prevent and deal with irregularities;
  
- recover sums lost as the result of irregularities or negligence.

...’

8 According to Article 8(2) of the same regulation, the financial consequences of irregularities or negligence attributable to administrative authorities or other bodies of the Member States are not to be borne by the Community.

9 Article 5(1) of Council Regulation (EEC) No 565/80 of 4 March 1980 on the advance payment of export refunds in respect of agricultural products (OJ 1980 L 62, p. 5) provides: ‘An amount equal to the export refund shall, at the request of the party concerned, be paid as soon as the products or goods have been brought under the customs warehousing or free zone procedure with a view to their being exported within a set time-limit.’

- 10 Commission Regulation (EEC) No 3665/87 of 27 November 1987 lays down common detailed rules for the application of the system of export refunds on agricultural products (OJ 1987 L 351, p. 1). Article 4(1) of that regulation provides that the refund is to be paid only upon proof being furnished that the products for which the export declaration was accepted have, within 60 days from the date of such acceptance of the export declaration, left the customs territory of the Community in the unaltered state.
- 11 The first and last subparagraphs of Article 5(1) of the same regulation provide:

‘Payment of the differentiated or non-differentiated refund shall be conditional not only on the product having left the customs territory of the Community but also — save where it has perished in transit as a result of *force majeure* — on its having been imported into a non-member country and, where appropriate, into a specific non-member country within 12 months following the date of acceptance of the export declaration:

- (a) where there is serious doubt as to the true destination of the product, or
- (b) where, by reason of the difference between the amount of the refund on the exported product and the amount of the import duties applicable to an identical product on the date of acceptance of the export declaration, it is possible that the product may be re-introduced into the Community.

...

In addition, the competent authorities of the Member States may require that additional evidence be provided such as to satisfy them that the product has actually been placed on the market in the non-member country of import in the unaltered state.'

12 Article 13 provides:

'No refund shall be granted on products which are not of sound and fair marketable quality, or on products intended for human consumption whose characteristics or condition exclude or substantially impair their use for that purpose.'

13 Council Regulation (EEC) No 595/91 of 4 March 1991 concerns irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organisation of an information system in that field (OJ 1991 L 67, p. 11). Article 5(2) thereof provides:

'Where a Member State considers that an amount cannot be totally recovered, or cannot be expected to be totally recovered, it shall inform the Commission, in a special notification, of the amount not recovered and the reasons why the amount should, in its view, be borne by the Community or by the Member State.'

14 Article 6(1) of the same regulation provides:

'Where the Commission considers that irregularities have taken place in one or more Member States, it shall inform the Member State or States concerned

thereof and that State or those States shall, at the earliest opportunity, hold an inquiry in which officials of the Commission may take part.'

- 15 The first subparagraph of Article 6(2) provides that 'the Member State shall, as soon as possible, communicate to the Commission the inquiry findings.'
  
- 16 On 21 January 1992 Quesos Frías SA ('Quesos Frías') concluded with the All-Union Association for Foreign Economic Affairs 'Prodintorg' ('Prodintorg'), a State undertaking whose headquarters are in Moscow, a contract for the sale of 1 550 tonnes of butter to be shipped to Kaliningrad, in Russia.
  
- 17 The sale price fixed by the parties in an endorsement to the contract dated 8 May 1992 was USD 1 959 per tonne c.i.f. Baltic port.
  
- 18 On 28 May 1992 Quesos Frías completed three single customs documents at the Bilbao Customs Office for the export of butter to Russia, the total price indicated being USD 3 036 450.
  
- 19 On 3 June and 8 July 1992 Quesos Frías submitted three applications for advance export refunds to the competent authority, Servicio Nacional de Productos Agrarios ('Senpa'), accompanied by a guarantee for 120% of their amount and subject to fulfilment of the requirement that the butter be exported outside the customs territory of the Community.

- 20 Senpa granted an advance of ESP 431 909 672 to Quesos Frías after checking the guarantees given, in accordance with Article 5(1) of Regulation No 565/80.
- 21 Having been informed that risks associated with exports to Russia were no longer covered in view of political instability in that country and that it could no longer take advantage of the line of credit established to finance the export transaction, in view of breaches by the Russian lending institution, Quesos Frías sought a new purchaser outside the customs territory of the Community in order to avoid losing the guarantee set up in respect of the payment of advance export refunds.
- 22 Quesos Frías sold 500 tonnes of butter stored at the Bilbao bonded warehouse to the company Rossmarsh Limited, to be sent to Alexandria, in Egypt.
- 23 Following negotiations conducted at the same time, Quesos Frías concluded a sale contract on 24 November 1992 with the French company Union Commerciale pour l'Europe et l'Afrique in respect of 1 050 tonnes of butter for the price of USD 1 185 per tonne f.o.b. Bilbao, to be marketed in Algeria.
- 24 Performance of the contract was assigned to the English company in the same group, Commagric UK (hereinafter 'Commagric'), whose registered office is in London.
- 25 On 21 December 1992 the 1 550 tonnes of butter were shipped at Bilbao aboard the vessel *Maere*, which proceeded to sea on 24 December 1992 bound for the port of Skikda, in Algeria, where it arrived on 29 December.

- 26 Unloading of the butter was suspended following a check by the Algerian veterinary authorities, which had discovered stains on a number of packages.
- 27 On 3 February 1993 Quesos Frías and Commagric agreed to cancel the sale contract. The sale of the consignment of 500 tonnes for Egypt was also cancelled because it was impossible to deliver the goods within the time-limit.
- 28 The consignment of butter was then carried by the vessel *Maere* from Skikda to Limassol in Cyprus, arriving on 22 February 1993. It was placed in storage in the Limassol and Larnaka refrigerated bonded warehouses.
- 29 On 18 June 1993 at the port of Limassol the goods were shipped aboard the vessel *Reefer Sea* bound for Kaliningrad after 1 550 tonnes of butter had been sold to the Swedish firm Handelshuset Redline AP, which acted as an intermediary for export of the butter to Russia, the final consignee of the goods being Prodintorg.
- 30 The goods were discharged on 5 July 1993 at Kaliningrad and cleared through customs there. The price for the 1 550 tonnes sold to Prodintorg was fixed at USD 936 per tonne c.i.f. Baltic port. For that operation Quesos Frias received the gross sum of ESP 200 864 500.
- 31 The Spanish Government considers that the problem that has arisen in this case is entirely artificial: the Commission refused to pay it the funds advanced on the ground that, because of the poor quality of the butter, it had not been proved that it had actually been exported to a non-member country. It considers that the evidence furnished by the exporter and the explanations given by it, annexed to the application, were more than sufficient to prove that the goods left

Community territory and that as evidence they were sufficient to make further checks unnecessary. It contends that it has been adequately demonstrated that the quality of the exported butter met the prescribed conditions both when it left the Community customs territory and when it reached its final destination and was cleared through customs there with a view to release for human consumption.

- 32 The Commission doubts the existence of the transaction at issue in three respects. It refers, first, to the poor quality of the goods at the time of shipment in Spain, owing to which unloading was suspended following an inspection carried out at the port of Skikda. It alleges, secondly, that the goods finally sold in Russia did not correspond to those which initially gave rise to the refund. Finally, it points out that the sum ultimately received by Quesos Frías was very low, the butter having been sold for less than the minimum laid down in the international agreements and less than the price initially agreed with the buying agency.
- 33 The Commission contends that a Member State is required to undertake all necessary inquiries to resolve any doubts and contradictions which might arise in an export operation. It is the Member State which is best placed to gather and check the requisite data and which, ultimately, bears responsibility for furnishing complete proof of the accuracy of the particulars that have been challenged and for showing that the Commission's doubts are misplaced.
- 34 It must be borne in mind, first, that according to Articles 4(1) and 5(1) of Regulation No 3665/87, export refunds are to be paid only upon proof being furnished that the products have left the customs territory of the Community in the unaltered state for importation into a non-member country.

- 35 It is also clear from Article 13 of the same regulation that an export refund can be paid only if the exported products are of sound and fair marketable quality.
- 36 As regards the obligations of the Member States under the common organisation of the agricultural markets, Articles 2 and 3 of Regulation No 729/70 make it clear that the EAGGF can fund only transactions carried out in accordance with the applicable rules.
- 37 Article 8(1) of the same regulation requires the Member States to take, in accordance with national provisions laid down by law, regulation or administrative action, the measures necessary to satisfy themselves that transactions financed by the EAGGF are actually carried out and to prevent and deal with irregularities. However, whilst the national authorities remain free to choose such measures as they consider appropriate to protect Community financial interests, their choice must not in any way hinder speedy, efficient and thorough performance of the necessary checks and inquiries (see Case C-54/95 *Germany v Commission* [1999] ECR I-35, paragraph 96).
- 38 It must also be borne in mind that, whilst it is for the Commission to justify a decision as to the absence or inadequacy of supervision in the Member State concerned, 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 (see Case 347/85 *United Kingdom v Commission* [1988] ECR 1749, paragraph 14, and Case C-50/94 *Greece v Commission* [1996] ECR I-3331, paragraph 27). That also applies where the Commission considers that the Member State has not discharged its obligation to check the various operations properly and to recover the refunds and aid improperly received by the beneficiaries.

39 It follows that where the Commission has doubts concerning a transaction which it considers to be justified by the surrounding facts or circumstances it must withhold the sums corresponding to that transaction unless the Member State produces sufficient evidence to dispel those doubts.

40 In this case, as the Advocate General correctly observes in points 55 to 110 of his Opinion, the Commission refers to numerous items of evidence which tend to show that the goods shipped did not meet the quality conditions laid down in Article 13 of Regulation No 3665/87 either when exported or at their destination.

41 Those items include:

- the official certificate from the Spanish veterinary authorities dated 17 December 1992 stating that the butter was less than six months old, a finding which contradicts the undisputed fact that the butter had already been placed in storage on 28 May 1992;
  
- reservations expressed by Commagric as to the quality of the butter at the time of loading aboard the vessel *Maere* at Bilbao;
  
- observations of the Algerian veterinary authorities dated 29 December 1992 noting the presence of abnormal stains on some packages of the butter shipped on the *Maere*;

— an agreed record drawn up on 2 January 1993 aboard the vessel *Maere* and signed by experts representing the owner, the shipper and the consignee of the goods and by the master of the vessel recording the presence of abnormal stains on a number of boxes in hold No 1 and a rancid odour in that hold;

— the experts' report prepared at the request of Commagric by the Institut Scientifique d'Hygiène Alimentaire stating that the goods had a rancid odour and a rancid or very slightly oxidised taste and that there were stains of varying number and intensity together with signs of high levels of acid and peroxide and the presence of mould and contaminating and caseolytic bacteria.

42 In those circumstances, there could be no export refund on the cargo as long as the doubts arising from the circumstances described in paragraph 41 of this judgment had not been resolved.

43 In the light of the information available to it, therefore, the Commission was entitled to ask the Spanish authorities to inquire into the matter.

44 If serious doubts persisted despite the answers given by the Spanish authorities, the Commission would be entitled to refuse the expenditure in respect of that export of butter when clearing the EAGGF accounts.

45 It follows that the requirement that the Spanish authorities investigate was justified by the serious doubts entertained by the Commission concerning the

state of the goods as evidenced by the information on the file and that the lack of diligence on the part of those authorities is such as to expose the Kingdom of Spain to the risk of financial adjustments at the time of clearance of the EAGGF accounts.

- 46 In this case the Kingdom of Spain has provided no specific, significant evidence such as to call in question the Commission's analysis or the inferences which it drew therefrom. Moreover, the evidence provided by the Spanish authorities is essentially based on documents forwarded by the exporter and those authorities have not produced any further information resulting from their own inquiries, as the Advocate General rightly observed in points 103 and 104 of his Opinion. The abovementioned evidence is manifestly insufficient to remove the Commission's doubts as to the quality of the goods.
- 47 Accordingly, by not themselves taking steps to clarify the circumstances in which the cargo of butter loaded in Bilbao for shipment to Skikda and then Kaliningrad via Limassol was exported to a non-member country, in order to justify payment of an export refund the propriety of which was contested by the Commission on the basis of reliable and consistent evidence, the Spanish authorities failed to fulfil the obligations imposed on Member States by Article 8 of Regulation No 729/70.
- 48 It follows that, in clearing the EAGGF accounts, the Commission was entitled to refuse expenditure relating to refunds on the export of butter in the sum of ESP 518 290 080.

## The export refunds for beef and veal

- 49 Regulation (EEC) No 805/68 of the Council of 27 June 1968 (OJ, English Special Edition 1968 (I), p. 187) established a common organisation of the market in beef and veal.
- 50 Article 18(1) of that regulation provides that to the extent necessary to enable the products covered by that regulation to be exported on the basis of quotations or prices for those products on the world market, the difference between those quotations or prices and prices within the Community may be covered by an export refund.
- 51 Article 1 of Commission Regulation (EEC) No 2721/81 of 17 September 1981 on the advance fixing of export refunds for beef and veal (OJ 1981 L 265, p. 17) states that the export refunds provided for in Article 18 of Regulation (EEC) No 805/68 are to be fixed in advance for all products in that sector.
- 52 Under Article 68 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1, hereinafter 'the Community Customs Code'),

'For the verification of declarations which they have accepted, the customs authorities may:

...

(b) examine the goods and take samples for analysis or for detailed examination.’

53 Article 70(1) of the Community Customs Code provides:

‘Where only part of the goods covered by a declaration are examined, the results of the partial examination shall be taken to apply to all the goods covered by that declaration.’

54 Article 71(2) of the Community Customs Code provides that where the declaration is not verified, the provisions governing the customs regime under which the goods have been placed are to be applied on the basis of the particulars contained in the declaration.

55 Under Article 78(3) of the Community Customs Code:

‘Where revision of the declaration or post-clearance examination indicates that the provisions governing the customs procedure concerned have been applied on the basis of incorrect or incomplete information, the customs authorities shall, in accordance with any provisions laid down, take the measures necessary to regularise the situation, taking account of the new information available to them.’

56 It is clear from the file that the adjustment for the export of beef and veal is of ESP 74 468 109 and relates to two consignments.

*The export of beef and veal to Côte d'Ivoire*

- 57 The first consignment was sent to Côte d'Ivoire by Rubiato Paredes SA ('the exporter') which received a payment on account of ESP 20 701 950 in respect of the export of 75 548 kg of beef and veal.
- 58 That payment was based on the exporter's customs declaration that the exported meat was boneless. It is common ground that the customs officials did not examine the goods and simply confirmed the information entered on the declaration.
- 59 A subsequent check disclosed that part of the goods did not correspond with the declaration: the customs authorities discovered 700 kg of offal rather than boneless meat. The Commission then asked the Spanish customs authorities to initiate an investigation. The exporter amended its declaration and therefore had to repay the part of the export refund corresponding to the proportion of goods wrongly declared, plus 15%.
- 60 However, since the goods had already been exported it was no longer possible for the customs authorities to undertake an investigation relating to them.
- 61 The Commission then informed the Spanish authorities that, since the only part of the consignment that had been examined was made up of offal and since the declaration mentioned a uniform consignment, the exported goods had to be deemed to be of uniform composition. However, the Spanish authorities, taking the view that it had not been demonstrated that the goods not inspected were offal, refused to recover the export refund in full.

- 62 In those circumstances, the Commission applied a financial adjustment for the Kingdom of Spain equal to the full amount of the refund paid to the exporter plus 15%.
- 63 The Spanish Government contends that, under Article 71(2) of the Community Customs Code, where there is no customs verification the goods must be deemed to have been correctly declared until the contrary is proved. The exporter's customs declaration can therefore be rectified in its entirety only on the basis of irrefutable evidence to overturn the presumption that the information in the declaration is correct, and not on the basis of mere suspicions.
- 64 The Commission considers, first, that *prima facie* evidence in rebuttal of that presumption was provided by the exporter itself which, following the investigation undertaken at the Commission's request, was obliged to amend its declaration. It contends that, since part of the goods exported did not conform with that document, it was incumbent on the exporter to produce evidence to show that the rest of the goods were in order and on the national administration to proceed with the necessary inquiries.
- 65 The Commission also contends that, pursuant to Article 70(1) of the Community Customs Code, the results of the checks undertaken can reasonably be extended to all the goods covered by the same declaration.
- 66 Finally, the Commission contends that the lack of diligence on the part of the Spanish authorities in seeking the requisite evidence fully justifies the financial adjustment made.

- 67 In view of the division of powers between the Community and the Member States in the domain of the common agricultural policy, where there is evidence such as to give rise to serious suspicions that Community legislation has been circumvented, such matters call for inspection and investigations by the Member States (see, to that effect, Case C-209/96 *Commission v United Kingdom* [1998] ECR I-5655, paragraph 40).
- 68 In this case, it is clear from the documents before the Court that, as the Advocate General rightly observes in points 146 to 155 of his Opinion, by letter of 6 April 1993 the Commission had forwarded to the Spanish authorities precise information such as to justify investigative measures regarding the nature of the goods exported to Côte d'Ivoire and that the Spanish Government has not provided evidence to establish the correct composition of the consignment of goods at issue or proof as to the existence and nature of the measures taken to determine it.
- 69 It must therefore be held that, by failing to undertake such investigations, the Kingdom of Spain failed to fulfil its obligations under Article 8(1) of Regulation No 729/70.
- 70 That provision, which in the field of agriculture constitutes an expression of the obligations imposed on the Member States by Article 5 of the EC Treaty (now Article 10 EC), defines the principles according to which the Community and the Member States are to ensure the implementation of Community decisions on the agricultural intervention financed by the EAGGF and combat fraud and irregularities in relation to those operations (see Joined Cases 146/81, 192/81 and 193/81 *BayWa and Others* [1982] ECR 1503, paragraph 13). It imposes on the Member States the obligation to take the measures necessary to satisfy themselves that the transactions financed by the EAGGF are actually carried out and are executed correctly, even if the specific Community act does not expressly provide for the adoption of particular supervisory measures (see Case C-8/88 *Germany v Commission* [1990] ECR I-2321, paragraphs 16 and 17).

- 71 In view of the foregoing considerations, the Commission was entitled not to charge the expenditure relating to the export of beef and veal to Côte d'Ivoire.

*The export of beef and veal to Benin*

- 72 The second consignment comprised beef and veal exported to Benin by Avícolas El Chico SA ('the exporter'). An export refund was paid in respect of it.

- 73 In light of information notified by the EAGGF, the Spanish customs authorities went to the premises of the exporter where they found that the goods declared as 'boneless frozen beef, boneless pieces, each piece individually wrapped, code 0202 30 90 400' were in fact made up of boneless and frozen neck of beef, in pieces weighing about one kilogram, not wrapped individually.

- 74 Senpa then suspended processing of the applications for refunds from that company.

- 75 The company was called on to repay the sum of ESP 11 162 098.

- 76 The Commission, however, considered that neither the exporter nor the Spanish authorities were able to guarantee that all the goods exported were not the same as those inspected. It therefore considered that the exporter should be required to repay the entire refund paid to it.

- 77 The Spanish administration did not recover the aid and therefore the Commission made a financial adjustment.
- 78 The Spanish Government puts forward the same arguments as those on which it relied in respect of the export of meat to Côte d'Ivoire. It adds that since the Commission accepted the check carried out by the Spanish authorities as evidence of the fact that part of the declaration was incorrect, it cannot refuse to accept that part of the same declaration which could not be proved false. It maintains that the Spanish administration is entitled to claim repayment of the aid only in an amount corresponding to the part of the declaration found to be inaccurate.
- 79 The Commission considers that it was appropriate to require the exporter to repay the entire refund received since neither the latter nor the Spanish authorities were in a position to guarantee that the remainder of the goods exported were not in the same state as the part which had been inspected. On the basis of Article 78(3) of the Community Customs Code, and of Article 8 of Regulation No 729/70, the Commission considers that, since the inaccuracy of the declarations had been disclosed *ex post facto* and the Spanish authorities had no other information or evidence in that regard, they should have rectified the situation by classifying the meat exported under the heading 'other', which carries no entitlement to a refund.
- 80 It must be observed that, in the light of the information available to it, the Commission was entitled to require the Spanish authorities to undertake an investigation in order to resolve the doubts entertained by it as regards the existence and the nature of that consignment as evidenced by that information.
- 81 However, even though the Commission, by letter of 6 April 1993, sent specific information to the Spanish authorities indicating that an investigation regarding the nature of the goods exported to Benin was necessary, the Spanish Government did not provide any information to establish the exact composition of the

consignment of goods at issue or evidence as to the existence and nature of the measures taken to determine it.

- 82 In those circumstances, it must be held that, by failing to undertake such investigations, the Kingdom of Spain failed to fulfil its obligations under Article 8(1) of Regulation No 729/70.
- 83 It follows that the Commission was entitled to refuse the expenditure relating to the consignment of beef and veal exported to Benin.

#### The refunds for the processing of citrus fruit

- 84 Council Regulation (EEC) No 2601/69 of 18 December 1969, as amended *inter alia* by Council Regulation (EEC) No 2483/75 of 29 September 1975 (OJ 1975 L 254, p. 5) and by Council Regulation (EEC) No 1123/89 of 27 April 1989 (OJ 1989 L 118, p. 25), lays down special measures to encourage the processing of mandarins, satsumas, clementines and oranges (OJ, English Special Edition 1969 (II), p. 586; hereinafter 'Regulation No 2601/69'). That regulation established a system of financial compensation to encourage the processing of certain varieties of oranges under contracts ensuring regular supply to the processing industry at a minimum buying-in price to the producer.
- 85 Article 1 of Regulation No 2601/69 provides that measures undertaken in accordance with the rules laid down in Article 2 with a view to ensuring that mandarins, satsumas, clementines and oranges are put to a use more in keeping with their commercial characteristics by having greater recourse to processing are to qualify for assistance from the Guarantee Section of the EAGGF, subject to the conditions and procedures laid down in Article 3.

86 Pursuant to Article 2(1) of Regulation No 2061/69:

‘The measures referred to in Article 1 shall be based on contracts between Community producers and processors. Such contracts shall be concluded before the beginning of each marketing year, shall specify the quantities to which they relate, the intervals between deliveries to processors and the price to be paid to the producers. As soon as they have been concluded, the contracts shall be sent to the competent authorities of the Member States in question who shall be responsible for checking the quality and quantity of deliveries to the processors.’

87 It is clear from Article 2(2) of the same regulation that, for deliveries made under such contracts, the minimum price to be paid to the producers by processors is to be fixed before the beginning of each marketing year.

88 The first and last subparagraphs of Article 3(1) of Regulation No 2601/69 provide:

‘Member States shall grant financial compensation to those processors who have concluded contracts in accordance with the provisions of article 2.

...

The amount of such financial compensation shall be fixed before the beginning of each marketing year.’

- 89 Subsequently, Council Regulation (EC) No 3119/93 of 8 November 1993 laying down special measures to encourage the processing of certain citrus fruits (OJ 1993 L 279, p. 17) repealed Regulations Nos 2601/69 and 1123/89 with effect from 12 November 1993.
- 90 The third adjustment applied to the Kingdom of Spain concerns contracts for the processing of citrus fruit.
- 91 Following an inspection of the processing undertaking Vital Schneider ('the processor'), the EAGGF inspectors determined that 78 contracts concluded with citrus fruit producers had been post-dated by several days.
- 92 Since the date 9 February 1993 had been replaced by 13 February 1993, the transaction in question was subject to the minimum price applicable on the latter date, which was not as high as the price fixed previously.
- 93 The price indicated in the contracts at issue, which had not been changed, was ESP 1 985/100 kg.
- 94 Before 12 February 1993, the minimum price which had to be paid to producers to obtain financial compensation was ECU 12.84/100 kg, that is to say ESP 2 023.62. With effect from that date, the minimum price was raised to ECU 12.56/100 kg, that is to say ESP 1 979.49.

- 95 By letter of 18 July 1994, the Commission informed the Spanish authorities of its suspicions of fraud regarding the change of date in the abovementioned contracts.
- 96 After investigating the case, those authorities concluded that the facts disclosed did not justify repayment of the aid paid. Despite the explanations given to it, the Commission made a financial adjustment relating to all the aid received by the beneficiary in respect of the 78 contracts in which the date had been changed.
- 97 The Kingdom of Spain contends that the contracts concluded between the producers and the processor fulfil the conditions laid down by the Community rules for entitlement to financial compensation, namely a price fixed by the sale contract equal to or greater than the minimum price in force during the marketing year concerned and actual processing of the fruit covered by the contract into fruit juice. It submits that it is the parties, and they alone, who decide the date of their final agreement as to the purchase price of the goods. In the present case they cannot be criticised for having set the date of the contracts according to the legal conditions for the allocation of Community aid, since that date was not later than the time of performance of the contracts and the change was not designed to achieve a result contrary to Community law.
- 98 The Commission contends that a change to the date in a contract made in order to secure an advantage deriving from a change of price fixed by a Community regulation adopted after the conclusion of that contract constitutes fraud since it enables an economic operator to receive aid to which he would not have been entitled on the date initially fixed, the contractual price being at that time lower than the minimum price in force.

- 99 It must be observed, first of all, that the right of parties to amend contracts concluded by them is based on the principle of contractual freedom and cannot, therefore, be limited in the absence of Community rules imposing specific restrictions in that regard.
- 100 It follows that, provided that the purpose of the contractual amendment is not contrary to the objective pursued by the applicable Community rules and does not involve any risk of fraud, such an amendment cannot be regarded as unlawful.
- 101 In this case, it is clear from the first recital in the preamble to Regulation No 2601/69 that its purpose is to resolve the serious difficulties involved in disposing of Community production of oranges, *inter alia* by increasing the number of Community outlets by processing more of such fruit into juice.
- 102 The second recital to the same regulation makes it clear that the system of financial incentives designed to promote the processing of certain varieties of oranges is intended to ensure regular supplies to the processing industry whilst at the same time guaranteeing a minimum purchase price for the producer.
- 103 It follows that the purpose of the regulation is to encourage processors to pay a minimum price to producers of oranges, which is determined in accordance with the reference price fixed on certain dates by the Community legislature.

- 104 In this case, even though a new date was substituted by the parties for the date initially given in the contracts, in which the other clauses were not amended, the contracts remained consistent with the economic objectives of the Community rules. The contracts fulfil the conditions laid down by the relevant legislation in so far as the goods are sold at the minimum price, as fixed by the Community rules, and that price was fixed by agreement between the contracting parties, on the date chosen by them.
- 105 As regards the risks of fraud which such a change of date is liable to entail for the Community budget, it is common ground that, first, the change was made in circumstances reflecting reality, since the marketing year and performance of the contracts at issue had not yet commenced, and, second, that it was open to the contracting parties to cancel the contracts for the sole purpose of concluding new ones, having identical clauses, on a date enabling the processor to receive Community aid.
- 106 Moreover, the Commission has not produced evidence to support its allegations that the assessment made by the Spanish authorities regarding the processor's practices is liable to favour fraud or make the controls less effective.
- 107 Consequently, the financial adjustment applied by the Commission to the 78 contracts concluded on 9 February 1993 and post-dated to 13 February 1993 is not justified. Accordingly, it is appropriate to uphold the claim in the application for annulment of Decision 97/333 in so far as it did not definitively charge to the

EAGGF the sum of ESP 58 804 012 corresponding to financial compensation advanced by the Kingdom of Spain in respect of processing of citrus fruit.

## Costs

108 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if costs have been applied for in the successful party's pleadings. However, the first subparagraph of Article 69(3) provides that the Court may order that the costs be shared or that the parties bear their own costs if each party succeeds on some and fails on other heads. Since the Kingdom of Spain and the Commission have each been unsuccessful on some heads, each party must be ordered to bear its own costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Annuls Commission Decision 97/333/EC of 23 April 1997 on the clearance of the accounts presented by the Member States in respect of the expenditure

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for 1993 of the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) to the extent to which it failed to charge definitively to the EAGGF the sum of ESP 58 804 012 in respect of financial compensation advanced by the Kingdom of Spain in respect of processing of citrus fruit;

2. Dismisses the remainder of the action;
  
3. Orders the parties to bear their own costs.

Kapteyn

Hirsch

Murray

Delivered in open court in Luxembourg on 5 October 1999.

R. Grass

P.J.G. Kapteyn

Registrar

President of the Sixth Chamber