

OPINION OF ADVOCATE GENERAL
DARMON

delivered on 9 June 1992 *

*Mr President,
Members of the Court,*

1. The procedure for the grant of financing by the Guidance Section of the EAGGF (European Agricultural Guidance and Guarantee Fund) as it emerges from Council Regulation (EEC) No 355/77 of 15 February 1977¹ is at the centre of the application for annulment and damages which has been brought by Oleificio Borelli SpA ('Borelli').

2. The European Agricultural Guidance and Guarantee Fund (hereinafter 'the Fund'), which was provided for by in Article 40(4) of the EEC Treaty and created by Council Regulation No 25 of 4 April 1962 on the financing of the common agricultural policy,² forms 'part of the Community budget',³ which covers expenditure incurred as a result of that policy.

3. The Fund, which accounts for between 65 and 70% of the entire general budget of the Community, is in financial terms the most important of the Community's three structural funds.⁴

4. The Guidance Section of the Fund finances 'common measures adopted in order to achieve the objectives set out in Article 39(1)(a) of the Treaty, including structural adaptation necessary for the proper working of the common market ...'.⁵

5. Such *common measures* are decided upon by the Council, which determines *inter alia* the objective to be attained, the nature of the projects to be envisaged, the contribution of the Fund to each common measure, the economic and financial considerations and the applicable procedure.⁶

6. It was pursuant to that article⁷ that the Council, by Regulation No 355/77, established common measures to improve the conditions under which agricultural products are processed and marketed. Provision was made for intervention by the Fund for a five-year period at an estimated cost of 400 million units of account.⁸

7. Whilst the Guarantee Section of the Fund finances all eligible expenditure, the Guidance Section finances only a part, the balance being financed by the beneficiaries and the Member States,⁹ which explains why the

* Original language: French.

1 — 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).

2 — OJ, English Special Edition 1959-1962, p. 126.

3 — Article 1(1) of Regulation 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).

4 — See *Juristatleur Europe*, Vol. 1330, section 2.

5 — Regulation No 729/70 of the Council, Article 1(3).

6 — *Ibid.*, Article 6.

7 — See Article 1(2) of Regulation No 355/77.

8 — *Ibid.*, Article 16(3).

9 — *Ibid.*, Article 17(2).

Member States are closely associated with the procedure for granting financing.¹⁰

8. Accordingly, applications for aid from the Fund must be submitted through the Member State concerned¹¹ and, in order to receive aid from the Fund, projects must have been approved by the Member State on whose territory they are to be carried out.¹²

9. On 16 December 1988, in the context of those common measures, Oleificio Borelli submitted an application to the Fund through the competent Italian ministry for aid of LIT 1.7175 million for an overall investment of LIT 6.87 billion consisting of the construction of an oil mill at Pontedasio.

10. That application,¹³ which had initially been approved by the Italian authorities, was unable to benefit from aid from the Fund in 1989, owing in particular to the lack of sufficient financial resources during that financial year.¹⁴

11. Borelli successfully requested that its application for aid be carried forward to the 1990 financial year.¹⁵

12. The Italian authorities went back on their initial decision and on 19 January 1990 informed the Commission that the

Regional Council of Liguria, by Decree No 109 of 18 January 1990, had issued an *unfavourable* opinion on Borelli's application.¹⁶

13. That decree pointed out, principally, that the project did not fulfil the conditions laid down in Article 9 of Regulation No 355/77, since the supply contracts entered into with olive growers did not afford a sufficient guarantee as to their authenticity.

14. Taking note of that unfavourable opinion, the Commission rejected the application for aid, notifying Borelli by memorandum No 69915 of 21 December 1990.¹⁷

15. By application lodged at the Court Registry on 18 March 1991, Borelli submitted the following 'application':

'Application brought under Article 173 of the Treaty ... and, in the alternative, application for damages for damage for non-contractual liability pursuant to Articles 178 and 215 of the Treaty ... against — the Commission ... — [and] the region of Liguria of the Italian State for *the annulment* of measure No 69915 of the Commission of the European Communities of 21 December 1990, received by the applicant on 10 January 1991, ... noting that the aid from the EAGGF, Guidance Section, for 1990, under Regulation (EEC) No 355/77, referred to in project No 90.41. IT.153.0, could not be granted, since the approval of the State on

10 — See the third recital in the preamble to Regulation No 729/70.

11 — Article 13(1) of Regulation No 355/77.

12 — *Ibid.*, Article 13(3).

13 — Lodged under No 90.41. IT.153.0.

14 — Annex I to the defence.

15 — *Ibid.*, Annex II.

16 — *Ibid.*, Annexes II, III and IV, and document No 14 annexed to the application.

17 — Document No 4 annexed to the application.

whose territory it was proposed to implement it had been revoked; and also for the annulment of all the procedural acts which led to the adoption of that measure, *and, consequently, for a declaration* that the applicant *is entitled* to the grant of the aid specified above *or, in the alternative*, for an order that the Commission of the European Communities pay damages for contractual¹⁸ liability, subject to any recourse against the region of Liguria of the Italian State, and/or, on the same basis, for an order that the region of Liguria pay a share of the damages *and in any event for an order* that the institutions mentioned pay the costs.'

16. By order of 25 February 1992 the Court declared that it had no jurisdiction to hear the application in so far as it was brought against the region of Liguria and sought the annulment of the national procedural measures which led to the decision adopted by the Commission. The Court also reserved the costs.

17. I shall therefore define the scope of the application as it is before the Court today. Apart from annulment of the Commission's Decision of 21 December 1990 and recognition that Borelli is entitled to the aid, the application seeks, in the alternative, to invoke the Commission's non-contractual liability.

18. With regard to the application for annulment, Borelli claims that Article 9 of Regulation No 355/77 has been infringed and misapplied and relies on 'abuse of power by misuse' (*sic*) and also, for the first time in the reply, on infringement and misapplication of

the combined provisions of Articles 13 and 21 of Regulation No 355/77. I shall examine those pleas in turn.

19. Article 9 of Regulation No 355/77 provides that:

'1. Projects must contribute to improving the situation of the basic agricultural production sector in question; in particular they must guarantee the producers of the basic agricultural product an adequate and lasting share in the resulting economic benefits.

2. Aid from the Fund may be granted only if the beneficiary provides sufficient evidence that the conditions defined in Article 7 and in paragraph 1 of this Article are fulfilled. Account may be taken *inter alia* of long-term supply contracts concluded with the producers of the basic agricultural product, on reasonable terms for such producers.'

20. Borelli claims that its project fulfilled the requirements laid down by that provision and should have received the approval of the Regional Council of Liguria if that authority had taken account of a number of indisputable supply contracts concluded with olive growers which were added to the file during the procedure.¹⁹

21. Borelli also alleges misuse of powers in so far as the Regional Council of Liguria wrongly considered that supply contracts which were valid for five years and subject to annual confirmation did not guarantee the

¹⁸ — Read 'non-contractual'.

¹⁹ — See the application, p. 5 of the French translation.

producers a lasting share in the economic benefits deriving from the project within the meaning of Article 9 of Regulation No 355/77.

22. It will be seen that those complaints refer solely to the grounds of the opinion delivered by the Italian authorities, to such an extent that the measure which Borelli describes on several occasions in its application as the contested measure is not the Commission's decision but the national opinion.

23. As the Court held in its order of 25 February 1992, it has no jurisdiction to review the intrinsic qualities or the legality of the opinion delivered by the national authorities.²⁰

24. Let me say right away that in any event the complaints relied upon cannot apply to the decision adopted by the Commission. The Commission did not adopt the reasoning of the Regional Council of Liguria when it rejected the application on its merits after examining the substantive conditions laid down in Article 9; it relied in order to reject the application *exclusively* on the fact that the Italian State had not approved the application as provided for in Article 13(3) of Regulation No 355/77.²¹

25. Borelli claims for the first time in the reply that an application for aid which has received the approval of the State concerned fulfils the conditions laid down in Article 13(3) of Regulation No 355/77 even if an unfavourable opinion is subsequently delivered after that application has been carried forward.²² In the case of projects carried

forward under Article 21 of Regulation No 335/77, the initial approval given by the Member State concerned cannot, according to Borelli, be called in question by a subsequent opinion of that Member State. The Commission should at the very most take account of that new opinion when it assesses the substantive conditions relating to the validity of the application; it should not, however, consider it in the light of Article 13(3), the requirements of which were definitively fulfilled by the initial opinion. Article 21, moreover, does not require a new opinion from the Member State concerned once the application has been carried forward.

26. Without prejudice to the admissibility of that plea, regard being had to the stage of the procedure at which it was introduced, I would point out that such an interpretation of Articles 13 and 21 of Regulation No 355/77, which, as the Commission has observed,²³ amounts to subjecting applications for aid to two different procedures according to whether or not a decision to carry them forward has been adopted, is in my view irrelevant.

27. The approval of the Member State concerned is a condition for the grant of aid from the EAGGF whether or not it has been decided to carry the application forward. A Member State's refusal to approve an application for aid indicates that it refuses to participate in the financing of the planned operation. However, the contribution of the Member State to the financing of the project is an essential condition for the aid. As the State concerned is closely associated with the Commission in the establishment, financing

20 — See, to that effect, the orders in Case 46/81 *Benvenuto* [1981] ECR 809 and Case 142/83 *Nevas v Social Welfare Fund for Lawyers, Athens* [1983] ECR 2969.

21 — See document No 4 annexed to the application.

22 — See the reply, pp. 6 and 7 of the French translation.

23 — Rejoinder, p. 3 of the French translation.

and proper operation²⁴ of the *common* measures provided for by Regulation No 355/77, an unfavourable opinion on its part cannot be disregarded.

28. Moreover, the opinion delivered by the Member State concerned pursuant to Article 13(3) may apparently, like any administrative measure, be amended or revoked at any time, provided that elements of fact or law require it. In that respect the unfavourable opinion of 18 January 1990 specifically mentions information which the Regional Council received during the procedure, and in particular, following new contracts produced by Borelli, in the course of an investigation carried out by the Servizio Provinciale Agroalimentare di Imperia (Provincial Agri-food Department of Imperia).

29. That opinion therefore clearly had the effect of revoking the approval initially given by the Regional Council of Liguria.

30. Lastly, Borelli claims that the opinion delivered pursuant to Article 13(3) of Regulation No 355/77 is a preparatory measure or an intermediate measure against which an action will lie in Italian law only if the action is also brought against the final measure of the procedure for the grant of aid, which 'itself encapsulates all the decisions of the institutions and bodies involved in the procedure'.²⁵ Review of the legality of the final measure — the decision adopted by the Commission — should therefore also be concerned with the legality of the intermediate measures — in particular the national opinion — as otherwise applicants for aid would be deprived of any recourse against such measures.

31. Although that argument does not persuade me, it does raise a number of questions. I refer to requirements of the principle of the 'right to an effective judicial remedy', which the case-law of the Court²⁶ has recognized as being of fundamental importance in the Community legal order. An individual who considers himself wronged by a measure which deprives him of a right or advantage under Community rules must be able to have access to a remedy against that measure and obtain complete judicial protection.

32. In my view, however, the opinion provided for in Article 13(3) — which, as we have seen, is binding on the Commission when it is unfavourable — cannot be construed as an intermediate measure against which redress is available only in an action brought against the final measure. *It is a measure which definitively has an adverse effect* on the undertaking applying for aid from the Fund, since it prevents the Commission from granting the aid. Therefore it must as such be susceptible of judicial review.

33. As it was a *national* measure, the national courts alone were in a position to review it. It was therefore for Borelli to bring proceedings in the national courts. It would then have been open to such a court to make a reference under Article 177 of the EEC Treaty to the Court of Justice for a preliminary ruling on questions concerning the interpretation or validity of rules of Community law to the extent to which it considered that a decision on such a point was

24 — See in particular Articles 19(2), 20(1) and 22(1) of Regulation No 355/77. See also Article 8(1) of Regulation No 729/70, which provides that the Member States are to satisfy themselves that transactions financed by the Fund are actually carried out and are executed correctly.

25 — Reply, p. 9 of the French translation.

26 — Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651 and Case 222/86 *UNECTEF V Heylens* [1987] ECR 4097.

necessary to enable it to give judgment.²⁷ It would also be for Borelli, if its action should be declared inadmissible in the light of national procedural rules, to raise before the national court the question that the principle of the 'right to an effective judicial remedy' may have been infringed.

34. Clearly, Borelli's application for annulment cannot even indirectly cover the opinion delivered by the Regional Council of Liguria.

35. Since the Commission's decision is not in itself in any way defective, the application for annulment must be dismissed.

36. In its claim for damages, Borelli is seeking compensation for the damage which it sustained as a result of the decision not to grant it aid from the Fund.

37. The prior annulment of the measure causing the damage is not a precondition for an application for damages, for, if it were, this would render any compensation impossible where the limitation period for bringing

41. I therefore conclude that the application should be dismissed in its entirety and that the applicant should be ordered to pay the whole of the costs.

an application for annulment had expired. The Court has therefore held that

'... the action provided for by Article 178 and the second paragraph of Article 215 of the Treaty was introduced as an autonomous form of action with a particular purpose to fulfil. It differs from an action for annulment in particular in that its purpose is not to set aside a specific measure but to repair the damage caused by an institution. *It follows that the existence of an individual decision which has become definitive cannot act as a bar to the admissibility of such an action*'.²⁸

38. The action for compensation is independent of the action for annulment.²⁹ It follows that the fact that the application for annulment is dismissed in this case does not *ipso facto* make the application for compensation inadmissible.

39. Be that as it may, the applicant cannot rely, as against the Commission, on any fault which might cause it to incur liability, since the aid cannot be granted if the national opinion is unfavourable.

40. The application for compensation must therefore be declared unfounded.

27 — See the order in the *Benvenuto* case, cited in footnote 20.

28 — Judgment of 26 February 1986 in Case 175/84 *Krohn v Commission* [1986] ECR 753, paragraph 32, emphasis added.

29 — See also Case 5/71 *Aktien-Zuckerfabrik Schöppenstedt v Council* [1971] ECR 975, paragraph 3, and Case 43/72 *Mercur v Commission* [1973] ECR 1055, paragraph 4.