

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

11 March 2003 *

In Case T-186/00,

Conserve Italia Soc. Coop. rl, established in San Lazzaro di Savena (Italy), represented by M. Averani, A. Pisaneschi and S. Zunarelli, lawyers, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented initially by L. Visaggio and subsequently by C. Cattabriga, acting as Agents, assisted by M. Moretto, lawyer, with an address for service in Luxembourg,

defendant,

* Language of the case: Italian.

APPLICATION for annulment of Commission Decision C (2000) 1099 of 3 May 2000 discontinuing aid from the Guidance Section of the European Agricultural Guidance and Guarantee Fund for Project No 9 (beneficiary: Massalombarda Colombani SpA) in the context of operational programme No 91.CT.IT.01, approved by Commission Decision C (91) 2255/6 of 28 October 1991,

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

composed of: R. García-Valdecasas, President, P. Lindh and J.D. Cooke, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 12 November 2002,

gives the following

Judgment

Legal background

Council Regulation No 355/77

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

- 2 Article 19(2) of that regulation provides:

‘Throughout the period during which aid is granted from the Fund, the authority or agency appointed for that purpose by the Member State concerned shall, at the

request of the Commission, forward to it all supporting documents which are of relevance in proving that the financial or other conditions laid down for each project have been fulfilled. The Commission may, if necessary, carry out an on-the-spot check.

...’

- 3 Regulation No 355/77 was repealed on 1 January 1990 by Council Regulation (EEC) No 4256/88 of 19 December 1988 (OJ 1988 L 374, p. 25), and by Council Regulation (EEC) No 866/90 of 29 March 1990 (OJ 1990 L 91, p. 1), apart from certain provisions, such as Article 19(2) of Regulation No 355/77, which remained applicable temporarily to projects introduced before 1 January 1990 until 3 August 1993.

Commission Regulation No 2515/85

- 4 Under Commission Regulation (EEC) No 2515/85 of 23 July 1985 on applications for aid from the Guidance Section of the EAGGF for projects to improve the conditions under which agricultural and fish products are processed and marketed (OJ 1985 L 243, p. 1), applications for aid must contain the information and documents specified in the annexes to that regulation. Those annexes include, firstly, models of forms to be completed by applicants for Community aid and, secondly, explanatory notes to assist applicants in submitting their applications.
- 5 Point 5.3 of the ‘explanatory notes for each heading’, the first part of Annex A to Regulation No 2515/85 (‘the explanatory notes’), states: ‘projects begun before the application reaches the Commission cannot qualify for aid’. The explanatory

notes relate to an undertaking which the applicant must enter into under point 5.3 of the aid application form, where he must put a cross in the box next to the following statement to indicate his agreement: 'We undertake not to start work on the project before receipt of the application for aid by the EAGGF Guidance Section' (see point 5.3 of the form in Annex A, first part, of Regulation No 2515/85, OJ 1985 L 243, p. 11).

The 1986 working document

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

'...

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

...'

- 7 Point B.1, paragraph 5, of the working document also states that the operations referred to under (b) are eligible for aid from the EAGGF.

Council Regulation No 4253/88

- 8 On 19 December 1988 the Council adopted Regulation (EEC) No 4253/88 laying down provisions for implementing Regulation No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 374, p. 1). That regulation entered into force on 1 January 1989 and was amended on several occasions.
- 9 The first subparagraph of Article 15(2) of Regulation No 4253/88, in the original version applying in the circumstances of the present case, provides: ‘expenditure may not be considered eligible for assistance from the Funds if incurred before the date on which the corresponding application reaches the Commission’.
- 10 Article 24 of Regulation No 4253/88, entitled ‘Reduction, suspension and cancellation of assistance’, in the version as amended by Council Regulation (EEC) No 2082/93 of 20 July 1993 (OJ 1993 L 193, p. 20), applicable from 3 May 2000 to the time when the Commission decided to discontinue the aid, provides:

‘1. If an operation or measure appears to justify only part of the assistance allocated, the Commission shall conduct a suitable examination of the case in the framework of the partnership, in particular requesting that the Member State or other authorities designated by it to implement the operation submit their comments within a specified period of time.

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

3. Any sum received unduly and to be recovered shall be repaid to the Commission. Interest on account of late payment may be charged on sums not repaid in compliance with the provisions of the Financial Regulation and in accordance with the arrangements to be drawn up by the Commission pursuant to the procedures referred to in Title VIII hereof.⁷

Council Regulation No 866/90

11 On 29 March 1990 the Council adopted Regulation (EEC) No 866/90 on improving the processing and marketing conditions for agricultural products (OJ 1990 L 91, p. 1). That regulation entered into force on 1 January 1990.

12 Article 10 of Regulation No 866/90 provides for the possibility of submitting, through the Member State concerned, applications for aid in the form of operational programmes or global grants. In order to allow a smooth passage from the system of financing previously provided under Regulation No 355/77 to that introduced by the new provisions contained in Regulation No 866/90, Article 20 of Regulation No 866/90 lays down certain transitional measures, including in particular the possibility that projects submitted on or after 1 May 1988 in accordance with Regulation (EEC) No 355/77 which are not selected for aid may be included in operational programmes to be financed in 1990 and 1991.

Background to the dispute

- 13 On 22 April 1989 Colombani Lusuco SpA, which following the acquisition of an establishment at Massa Lombarda became Massalombarda Colombani SpA ('the beneficiary' or 'Massalombarda'), submitted an application for aid to the EAGGF under Regulation No 355/77 in order to finance the technical modernisation and rationalisation of the facilities at its fruit- and vegetable-processing establishment at Alseno (Italy) ('the application for aid'). Subsequently, Massalombarda was acquired in 1994 by Conserve Italia Soc. Coop. arl ('Conserve Italia'), which took over the company in 1997. The present dispute does not therefore relate to the conduct or actions of Conserve Italia but of a company which it took over.
- 14 On 7 July 1989 the Commission received the application for aid, which was submitted to it through the Italian Republic under Article 13 of Regulation No 355/77. The Commission informed the beneficiary of the date for receipt of the application for aid in a letter sent to it by Commission staff on 25 January 1990, which it received on 12 February 1990.
- 15 On 20 December 1990 the Commission replied that it would not be possible to finance the application for aid in view of the limited resources available and the fact that the application had not been considered to be a priority.
- 16 On 17 April 1991 the Italian Republic again submitted the application for aid under Article 20 of Regulation No 866/90, in the context of operational programme No 91.CT.IT.01 for the improvement of processing and marketing

conditions for agricultural products. In the context of that programme, Project No 9 provided for EAGGF aid of ITL 423 175 000 for Massalombarda. The investment was described as follows:

‘The present project for improving the production facilities of an establishment processing fruit and vegetables at Alseno — Piacenza is required:

- in order to improve strategic facilities for the establishment’s specific activity, including:
 - sterilisation facilities (Cooker-Cooler and pivoting autoclave)
 - preparation lines for fresh vegetables
 - lines for filling and for vacuum-sealing vegetables.

...’

According to the timetable for implementing that project the work was to begin on 14 July 1989 and be completed by 31 December 1991 at the latest.

- 17 By Decision C (91) 2255/6 of 28 October 1991 the Commission approved operational programme No 91.CT.IT.01, following which the beneficiary received ITL 338 540 000 by way of aid from the EAGGF for Project No 9.
- 18 At the end of 1992 the competent Italian authorities asked the beneficiary to send a photocopy of all the invoices relating to the project concerned in order to carry out an initial documentary analysis.
- 19 In 1993 the Ministero del Tesoro — Ragioneria Generale dello Stato — Ispettorato Generale per l'Amministrazione del Fondo di Rotazione per l'Attuazione delle Politiche Comunitarie (Ministry of Finance — General State Accountancy Department — Inspectorate-General for the Administration of the Rolling Fund for the Implementation of Community Policies, 'the Italian Finance Ministry') decided to carry out an inspection on the beneficiary's premises.
- 20 The inspection by the Italian Finance Ministry took place on 29 and 30 March 1993, with the participation of officials from the Commission's Directorate-General for Financial Control. Following the inspection, the Directorate-General for Financial Control drew up a report dated 2 July 1993 ('the inspection report'), which stated that the photocopies of nine invoices, totalling ITL 1 357 690 000, had been tampered with. Thus, whereas on the original invoices the dates of some of the delivery notes and some of the orders were prior to 7 July 1989, the date on which the Commission received the application, on the photocopies those dates had been obliterated or else replaced by later dates.
- 21 Those irregularities were recorded in the report of 30 March 1993, signed by the beneficiary's representative (see Annex 7 to the inspection report), and are not denied by the applicant.

- 22 The inspection report also points out that four original invoices, totalling ITL 1 237 569 808, 'confirm the premature start date [of the work]'.
- 23 At the hearing the applicant acknowledged that some of the work had in fact begun before the date on which the application for aid was received by the Commission, which was 7 July 1989.
- 24 By letter of 28 July 1993 the Commission's Director-General for Financial Control informed the Italian Ministry of Finance of the preliminary conclusions established on the basis of the findings made during the inspection. That letter stated in particular that as a result of the irregularities found, the aid granted for Project No 9 should be discontinued and the sums already paid should be recovered.
- 25 By a note of 2 November 1993 the Italian Ministry of Finance requested the Commission to inform it of its final opinion as to whether the balance owing to the beneficiary (ITL 83 635 000, 20% of the total aid) should be granted.
- 26 In order to give a ruling on that request, the Commission asked the Italian Ministry of Finance, by letter of 10 February 1994, to send it various documents. Having received no reply, the Commission decided, by letter of 8 July 1994, to request the Ministero delle Risorse Agricole, Alimentari e Forestali ('the Italian Ministry of Agriculture') for those documents.
- 27 By letter of 26 October 1994, the Italian Ministry of Agriculture sent the Commission several documents concerning the action taken following the inspection.

- 28 At the same time, the beneficiary on several occasions requested and obtained meetings with the competent services of the Commission concerning the irregularities found during the 1993 inspection. At one of the meetings, which took place in Brussels on 22 October 1996 at the Commission's offices, the beneficiary was requested to provide evidence that the machines purchased and delivered before the date on which the Commission received the application for aid had not been installed until a later date, as mentioned in a Commission internal memorandum of 13 July 1998 concerning the case.
- 29 By letter of 6 January 1997, the Commission decided to initiate the examination procedure provided for in Article 24 of Regulation No 4253/88 by requesting the Italian Ministry of Agriculture to express its opinion and the beneficiary to submit its observations.
- 30 By letters of 4 June 1997 and 11 June 1998, the Italian Ministry of Agriculture made known its objection to the discontinuance of the aid. More precisely, the Italian authorities observed that it was clear from the observations submitted by the beneficiary that the machines had been assembled and installed at a later date than that on which receipt of the application for aid was acknowledged.
- 31 With its abovementioned letter of 4 June 1997 the Italian Ministry of Agriculture also forwarded the observations of the beneficiary and the documents which the beneficiary had assembled. Although the beneficiary acknowledged that the nine invoices in question had been tampered with, it maintained that that had had no effect on the proper implementation of the project. It stated in that connection that all the machines mentioned in the invoices that had been tampered with and those listed on the invoices referring to delivery notes predating the date of the submission of the application for aid had been installed later, although they were delivered to the undertaking before that date. The beneficiary therefore concluded from this that the work on the project had not been started prematurely.

- 32 The beneficiary attached to its observations a notarised statement, issued by Mr Padoin, Director of the establishment at Alseno, concerning invoices Nos 1450, 905, 6736 from FMC, and invoice No 3086 from FMI. In that statement Mr Padoin said, in essence, that the machines and equipment listed in the invoices in question had been installed after the Commission had received the application for aid.
- 33 Considering that the evidence obtained did not disprove the irregularities found during the 1993 inspection and that their significance and gravity justified discontinuance of the aid, the Commission, by Decision C (2000) 1099 of 3 May 2000, on the basis of Article 24(2) of Regulation No 4253/88, decided to discontinue the aid granted to the beneficiary ('the contested decision').
- 34 The ninth recital in the preamble to the contested decision sets out the various irregularities cited in order to justify discontinuance of the aid under Article 24(2) of Regulation No 4253/88.
- 35 First, the decision points out that during the inspection on the beneficiary's premises conducted by the Italian Ministry of Finance with the participation of the Commission in March 1993, it was found that the delivery dates appearing on nine photocopies of invoices submitted by the beneficiary had been altered. Those alterations were duly recorded in the report of 30 March 1993, signed by the beneficiary's representative, among others. The decision also states that the clear intention of those alterations, as stated in the Commission's letter of 6 January 1997, 'was to conceal the fact that work on the project had begun before the project was submitted to the Commission on 7 July 1989, in the case of some of the work three months before that date' and that 'the beneficiary must have realised that the fact that the Commission was aware that that work had begun prematurely would have negative financial consequences for it, following its statement of 22 April 1989 in accordance with point 5.3 of the annex to Commission Regulation (EEC) No 2515/85 that it would not start the work before the application for aid was submitted'.

- 36 Secondly, the decision states that the content of the notarised statement of 24 April 1997, made and signed by the beneficiary's representative, according to which all the work in connection with the project started after 7 July 1989, is not compatible with the content of some of the unaltered invoices (such as Invoice No 89 from Manzini Comaco of 16 August 1989, Invoice No 905 from FMC of 31 July 1989, and Invoice No 3086 from FMI of 31 July 1989), which show that the work started prematurely. According to the decision, that notarised statement constitutes in reality another attempt to mislead the Commission in order to avoid the negative financial consequences of starting the work prematurely.
- 37 Thirdly, the decision points out that the altered invoices and those demonstrating that the work had started prematurely related to a total of ITL 2 595 259 808 (ITL 1 357 690 000 + ITL 1 237 569 808), which represents 60% of the total planned investment.

Procedure and forms of order sought

- 38 By application lodged at the Court Registry on 14 July 2000, the applicant brought the present action before the Court against the contested decision.
- 39 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure under Article 64 of the Rules of Procedure, requested the applicant to reply to a question and the Commission to produce certain documents and also to reply to several questions.
- 40 The parties complied with those requests within the time allowed.

41 The parties presented oral argument and their replies to the questions from the Court at the hearing in open court on 12 November 2002.

42 The applicant claims that the Court should:

- annul the contested decision;

- order the Commission to pay the costs.

43 The Commission contends that the Court should:

- dismiss the application;

- order the applicant to pay the costs.

Substance

44 The applicant puts forward three pleas in law in support of its action for annulment of the contested decision: the first plea alleges infringement of

Article 24(2) of Regulation No 4253/88; the second alleges breach of the principle of proportionality; the third alleges breach of the obligation to state the grounds on which the contested decision is based.

The first plea; infringement of Article 24(2) of Regulation No 4253/88

- 45 The first plea is divided into two parts: the first alleges that the irregularities found do not justify discontinuance of the aid; the second concerns whether the Commission was entitled, under Article 24(2) of Regulation No 4253/88, to discontinue the aid granted rather than merely suspending or reducing it.

(A) — The first part of the plea, alleging that irregularities found do not justify discontinuance of the aid

- 46 The applicant claims that the contested decision infringes Article 24(2) of Regulation No 4253/88 since it justifies discontinuance of the aid on the grounds that alteration of the dates on the delivery notes was intended to conceal the fact that work on the project had started before the project was submitted to the Commission on 7 July 1989.

- 47 It is necessary to distinguish the arguments concerning the submission of information that had been altered by the beneficiary of the aid from the arguments concerning the premature start of the work.

1. Irregularity linked to the submission by the beneficiary of altered information

- 48 The Commission contends that the applicant failed to comply with the obligation to provide information and act in good faith to which it was subject and to which the contested decision refers (see in that regard Case T-216/96 *Conserve Italia v Commission* [1999] ECR II-3139, paragraphs 71 and 72, ‘the judgment of the Court of First Instance in *Conserve Italia*’).
- 49 The applicant points out that the obligation to provide information and act in good faith affirmed in the judgment of the Court of First Instance in *Conserve Italia* is not the basis for the contested decision. Moreover, the reference to that case is inappropriate since the infringement of the obligation to provide information and act in good faith which it envisages concerns dissimulation or the provision of misleading information ‘concerning the date on which work started’, whereas in the present case the documents that had been tampered with merely confirm the dates on which the goods were transported and show nothing regarding the date on which installation and assembly work started.
- 50 The Court notes that it is clear from paragraphs 71 and 72 of the judgment in *Conserve Italia*, upheld on appeal by the judgment of the Court of Justice in Case C-500/99 P *Conserve Italia v Commission* [2002] ECR I-867 (‘the judgment of the Court of Justice in *Conserve Italia*’), that applicants for, and beneficiaries of, EAGGF aid have an obligation towards the Commission to provide information and act in good faith. Thus, ‘[A]pplicants for, and beneficiaries of, aid are required to satisfy themselves that they are submitting to the Commission reliable information which is not liable to mislead it, otherwise the system of controls and evidence set up to determine whether the conditions for granting aid are fulfilled cannot function properly. In the absence of reliable information projects which do not fulfil the conditions required could become the subject of aid. It follows

that the obligation on applicants for, and beneficiaries of, aid to provide information and act in good faith is inherent in the EAGGF aid system and essential for its effective functioning' (paragraph 71). Hence, 'the fact that... the information relating to the date on which work was started was concealed or presented in such a way as to mislead the Commission constitutes breach of that obligation and, consequently, of the applicable rules' (paragraph 72).

51 In the present case the applicant does not deny altering some of the dates on nine photocopied invoices submitted earlier, as shown by its signature to the report of 30 March 1993, which was drawn up during the inspection conducted by the Italian Ministry of Finance together with the Commission (Annex 7 to the inspection report).

52 Thus, whereas on the nine original invoices the dates of some of the orders and several of the delivery notes were before 7 July 1989 (the date on which the Commission received the application for aid) on the contested photocopies those dates had either been replaced by later dates or else removed:

— on the photocopy of Invoice No 381/B/89 from Ecotek, dated 24 July 1989, the date of the delivery note was 19 July 1989, whereas that date was 9 June 1989 on the original invoice;

— on the photocopy of Invoice No 303 from Baraldi, dated 28 July 1989, the date of the order was obscured, whereas that date was 31 March 1989 on the original invoice; also, the dates of the delivery notes relating to that order were obscured or replaced by a reference to 27 July 1989 on the photocopy, whereas those dates were 5 and 19 June 1989 on the original;

- on the photocopy of Invoice No 304 from Baraldi, dated 28 July 1989, the date confirming the sale and the date of the order were obscured, whereas those dates were 28 and 31 March 1989, respectively, on the original invoice; also, the date of the delivery note was 27 July 1989 on the photocopy, whereas that date was 3 July 1989 on the original;

- on the photocopy of Invoice No 37 from Baraldi, dated 31 July 1989, the date of the order was obscured, whereas that date was 31 March 1989 on the original invoice;

- on the photocopy of Invoice No 89 from Uteco, dated 31 July 1989, the date of the order was obscured, whereas that date was 10 May 1989 on the original invoice; also, the dates of the three delivery notes were 19, 22 and 28 July 1989, respectively, on the photocopy, whereas those dates were 19, 22 and 28 June 1989 on the original;

- on the photocopy of Invoice No 184 from Zilli & Bellini, dated 31 July 1989, the date of the delivery note was 22 July 1989, whereas that date was 22 June 1989 on the original invoice;

- on the photocopy of Invoice No 191 from Izoteca, dated 31 July 1989, the dates of two delivery notes were obscured, whereas those dates were 3 and 6 July 1989, respectively, on the original invoice;

- on the photocopy of Invoice No 318 from Baraldi, dated 7 August 1989, the date of the order was obscured, whereas that date was 31 May 1989 on the original invoice;

— on the photocopy of Invoice No 89 from Manzini Comaco, dated 16 August 1989, the dates of the two delivery notes were 9 July 1989, whereas those dates were 5 July 1989 on the original invoice.

53 The fact of deliberately sending the Commission altered documents concerning the implementation of the project is sufficient to establish infringement of the abovementioned obligation to provide information and act in good faith, since those alterations were intended to conceal from the Commission the fact that the ordering and delivery of the materials benefiting from the aid took place before 7 July 1989, the date on which the Commission received the application for the aid, together with the fact that they were likely to mislead the Commission concerning the date on which work started, which, as the contested decision points out, is a ‘significant element’ of the system set up by the EAGGF. The purpose of those alterations is clearly to ensure that the Commission should not become concerned by the possibility of the work having started prematurely following deliveries made before that date.

54 It is clear from the foregoing that the Commission did not infringe Article 24(2) of Regulation No 4253/88 in regarding the submission of altered information relating to the ordering and delivery of materials benefiting from the aid as constituting an irregularity within the meaning of that provision.

2. Irregularity linked to the premature start of the work

55 The applicant points out that under point 5.3 of the explanatory notes, ‘projects begun before the application reaches the Commission cannot qualify for aid’ and states that it undertook, under that provision, not to start work on the project before receipt of the application for aid by the EAGGF. Reference should, however, be made to point B.1, paragraph 5(b) of the working document in order

to determine when the work started, since that provision states that the EAGGF may finance machinery and equipment ‘... provided that assembly, installation, incorporation... have not taken place before the application for aid was submitted’.

56 In that regard, the applicant challenges the Commission’s argument that point 5.3 of the explanatory notes contains a principle which sets the framework for the interpretation of point B.1, paragraph 5(b) of the working document. According to the applicant, point 5.3 of the explanatory notes is nothing more than a clause in the aid application form. It also points out that point B.1, paragraph 5(b) of the working document states that no operation must be started before the application for aid is ‘submitted’, which is contradicted by point 5.3 of the explanatory notes, which states that projects begun before the application ‘reaches’ the Commission cannot qualify for aid. This contradiction precludes the Commission from requiring that operators should act with absolute transparency.

57 The applicant maintains, moreover, that the Commission cannot infer from point 5.3 of the explanatory notes that applicants and beneficiaries of aid who wish to rely on point B.1, paragraph 5(b) of the working document must inform it in good time of purchases which they have made and supply evidence that the condition for application of that point has been complied with, since there is no provision in the working document, or in any other document, which lays down that obligation, and it appears for the first time in the defence.

58 The Court notes that the condition that the project must not be started before the application for aid is received by the Commission comes from point 5.3 of the explanatory notes, which states that ‘projects begun before the application reaches the Commission cannot qualify for aid’. That point is corroborated by point 5.3 of the aid application form (the form in the first part of Annex A to

Regulation No 2515/85), which contains the undertaking by the applicant for aid not to start work on the project before receipt of the application for aid by the Commission. In that regard, it is appropriate to point out, in response to the applicant's argument that point 5.3 of the explanatory notes is nothing more than a clause in the aid application form, that it is clear from paragraph 61 of the judgment of the Court of First Instance in *Conserve Italia* that the instructions contained in the aid application form have binding force identical to that of the regulation to which they are annexed, namely Regulation No 2515/85.

- 59 The abovementioned condition also emerges from the first subparagraph of Article 15(2) of Regulation No 4253/88, the original version of which applying to the circumstances of this case reads: 'expenditure may not be considered eligible for assistance from the Funds if incurred before the date on which the corresponding application reaches the Commission'.
- 60 Those provisions are clarified by the working document, point B.1, paragraph 5 of which states that, in particular, operations or work which are started before the application is submitted are ineligible for aid, with the exception of 'the purchase of machines, equipment and building materials, including metal skeletons and prefabricated components (order and supply), provided that assembly, installation, incorporation and work on site, in so far as building materials are concerned, have not taken place before the application for aid was submitted'.
- 61 Point B.1, paragraph 5 of the working document is to be interpreted as meaning that an applicant for aid from the EAGGF may, as an exception from the abovementioned condition, order and take delivery of equipment before the application for aid is submitted, provided that the equipment is not assembled, installed or incorporated before that date.

- 62 In that context, the reference made in point B.1, paragraph 5(b) of the working document to the date on which 'the application for aid was submitted' does not, as the applicant suggests, contradict the reference made in point 5.3 of the explanatory notes to the date on which 'the application reaches the Commission', or that made in Article 15(2) of Regulation No 4253/88 to 'the date on which the [aid] application reaches the Commission', or that made in point 5.3 of the form to the date of the 'receipt of the application for aid by the EAGGF'. All those references must necessarily be understood as referring to the date on which the Commission receives the application for aid which is forwarded to it by the competent national authorities.
- 63 Moreover, contrary to what the Commission maintains, it is not clear from the terms of point B.1, paragraph 5(b) of the working document that the beneficiary must inform the Commission that those machines have been ordered and delivered in order to be eligible for aid.
- 64 As regards the question of the premature start of the work, it should be pointed out that, although the applicant denied in its pleadings that work had started prematurely, it admitted at the hearing that some of the work had in fact begun before the date on which the Commission received the application for aid, which was 7 July 1989.
- 65 In that regard, examination of the three invoices cited in the contested decision in order to show that the work had started prematurely reveals, first, that a steriliser was delivered to the beneficiary's establishment on 22 June 1989 and work on installing it began on 4 July and, second, that work on installing vacuum-sealing equipment, delivery of which by Manzini Comaco began on 5 July 1989, started on 6 July 1989.

66 The invoices relating to the steriliser cited in the contested decision are as follows:

— Invoice No 905 of 31 July 1989 from FMC, which mentions delivery note No 1942 of 22 June 1989, concerning a steriliser (model 'FMC 742 twin') and related equipment;

— Invoice No 3086 of 31 July 1989 from FMI, which states that various items of equipment relating to the abovementioned steriliser were delivered on 4 July 1989.

67 Those invoices should be compared with Invoice No 6736 of 5 October 1989 from FMC, referring to progress report No P.5726, which states that installation work was carried out at the beneficiary's establishment on 4, 5 and 6 July 1989 to install the abovementioned steriliser ('installation of additional cooker shell for FMC 742 twin'). Also, weekly work record No 51 for Mr Macchi and weekly record No 53 for Mr Rachelli state that installation work on the steriliser was carried out at the beneficiary's establishment on 4, 5 and 6 July 1989.

68 Those documents show that work on the installation of a steriliser, which was financed under the contested aid, did indeed start before 7 July 1989.

69 The third invoice mentioned in the contested decision is Invoice No 89 of 16 August 1989 from Manzini Comaco; it concerns the vacuum-sealing equipment delivered by that company and refers in particular to delivery note No 21773/89 of 5 July 1989, which states that delivery of some of the equipment

in that set took place on 5 July 1989. That invoice and the delivery note referred to in it are to be considered in conjunction with the relevant monthly work records for the Manzini Comaco technicians, which were submitted at the same time as the applicant's observations on the initiation of the procedure for discontinuing the aid and cited by the applicant in support of its case in its application to the Court. Mr Chiesa's and Mr Pelogotti's monthly work records state that they each worked for 8 hours 30 minutes on 6 July 1989 on the 'installation of a set of ASV6 equipment' delivered to the beneficiary's establishment on 5 July 1989.

70 That information also shows that the work on the vacuum-sealing equipment financed under the contested aid began before 7 July 1989.

71 The Commission was therefore right to consider that the work under the aid in question had begun prematurely, which constituted an irregularity within the meaning of Article 24(2) of Regulation No 4253/88.

72 It follows from the foregoing that the first part of the first plea must be rejected.

(B) — The second part of the first plea, alleging that Article 24(2) of Regulation No 4253/88 does not permit the Commission to discontinue the EAGGF aid

73 The applicant maintains that the contested decision infringes Article 24(2) of Regulation No 4253/88, which serves as its legal basis, since that provision does not permit the Commission to discontinue aid but merely to reduce or suspend it.

In that regard, it notes that although Article 24 of the abovementioned regulation is entitled ‘Reduction, suspension and cancellation of assistance’, the term ‘cancellation’ does not refer to Article 24(2) but to Article 24(3), which provides that any sum to be recovered must be repaid to the Commission and applies in cases where the whole sum has been wrongly paid.

74 The Court points out that it is clear from the judgment of the Court of Justice in *Conserve Italia* (paragraphs 81 to 91) that the Commission may, under Article 24(2) of Regulation No 4253/88, discontinue the aid to which the contested decision relates.

75 Thus, despite the fact that Article 24(2) of Regulation No 4253/88 makes no express provision for the discontinuance of aid, although Article 24 of that regulation is entitled ‘Reduction, suspension and cancellation of assistance’, the Court of Justice held that that provision constitutes the legal basis for any claim for recovery by the Commission. That provision would be partly deprived of its effectiveness if the Commission could not cancel the entirety of the assistance, even though the prior examination had revealed the existence of an irregularity (judgment of the Court of Justice in *Conserve Italia*, paragraphs 81 and 88).

76 Furthermore, the Court of Justice held that limiting the possibilities open to the Commission to a reduction of the assistance in proportion exclusively to the amount to which the irregularities found to exist relate would have the effect of encouraging fraud on the part of applicants for aid, since they would then only risk loss of the benefit of the sums unduly paid (judgment of the Court of Justice in *Conserve Italia*, paragraph 89).

77 The Court of Justice also pointed out that in any event, according to its case-law, the administration may withdraw with retroactive effect an advantageous administrative act vitiated by illegality, provided that it does not infringe either

the principle of legal certainty or that of the protection of legitimate expectations (Joined Cases 7/56 and 3/57 to 7/57 *Algera and Others v Common Assembly of the ECSC* [1957] ECR 39, p. 56; Case 14/81 *Alpha Steel v Commission* [1982] ECR 749, paragraphs 10 to 12; Case 15/85 *Consorzio Cooperative d'Abruzzo v Commission* [1987] ECR 1005, paragraphs 12 to 17, and Case C-90/95 *P De Compte v Parliament* [1997] ECR I-1999, paragraph 35; and judgment of the Court of Justice in *Conserve Italia*, paragraph 90). That possibility, which is acknowledged where the beneficiary of the act did not contribute to its illegality, applies *a fortiori* where, as in this case, the illegality is attributable to him (judgment of the Court of Justice in *Conserve Italia*, paragraph 90).

78 Moreover, the Court of Justice pointed out that Article 24(3) of Regulation No 4253/88 relates to recovery from the beneficiary of the aid of sums unduly paid and provides that interest is to be charged on sums not repaid. Contrary to the applicant's contention, it cannot therefore constitute a legal basis for a decision to cancel assistance (judgment of the Court of Justice in *Conserve Italia*, paragraph 87).

79 The second part of the first plea must therefore be rejected.

80 The first plea must therefore be rejected in its entirety.

The second plea, alleging breach of the principle of proportionality

81 The applicant argues that the principle of proportionality requires that where there is a choice of appropriate measures it is necessary to choose the least onerous and that the disadvantages caused must not be disproportionate to the aims pursued (Case C-331/88 *Fedesa and Others* [1990] ECR I-4023). In that regard, it points out that Article 24 of Regulation No 4253/88 lays down a scale

of gravity as between infringements that may be classified as ‘irregularities’ and those that could be classified as ‘significant alterations’ and contends that the Commission infringed the principle of proportionality in deciding to discontinue the aid after it found mere ‘irregularities’, which would justify no more than a reduction in the aid and not its discontinuance.

82 Moreover, the applicant cites in support of its contention paragraph 21 of the judgment in Case 122/78 *Buitoni* [1979] ECR 677, in which the Court of Justice held that ‘[a]lthough, in view of the inconvenience caused by the belated production of proofs, the Commission was entitled to introduce the period laid down in Article 3 of Regulation No 499/76 for the furnishing of proof, it should have sanctioned failure to comply with that period only with a penalty considerably less onerous for those concerned than that prescribing the loss of the whole of the security and more closely allied to the practical effects of such an omission’. It maintains that a parallel should be drawn between the two cases, since, in *Buitoni*, the complaint concerned failure to comply with a period and not infringement by that company of its obligations and that in the present case what the applicant is being accused of is its failure to comply with the period for submitting the application for aid, and no comment has been made as regards the full and satisfactory completion of the work for which the aid was sought.

83 The Court points out that it is settled case-law that by virtue of the principle of proportionality laid down in the third paragraph of Article 5 EC the measures adopted by Community institutions must not exceed what is appropriate and necessary for attaining the objective pursued (judgments of the Court of Justice in Case 15/83 *Denkavit Nederland* [1984] ECR 2171, paragraph 25, and of the Court of First Instance in Case T-260/94 *Air Inter v Commission* [1997] ECR II-997, paragraph 144, and the judgment of the Court of First Instance in *Conserve Italia*, paragraph 101).

84 Furthermore, infringement of obligations whose observance is of fundamental importance to the proper functioning of a Community system may be penalised by forfeiture of a right conferred by Community legislation, such as entitlement to aid (see, to that effect, *Buitoni*, cited above; judgments of the Court of Justice

in Case 21/85 *Maas* [1986] ECR 3537 and Case C-104/94 *Cereol Italia* [1995] ECR I-2983, paragraph 24; and also the judgment of the Court of First Instance in *Conserve Italia*, paragraph 103).

85 In particular, it must be observed that it is essential for the proper functioning of the system for verifying proper use of Community funds that applicants for aid provide the Commission with information which is reliable and not liable to mislead it (judgment of the Court of Justice in *Conserve Italia*, paragraph 100 and judgment of the Court of First Instance in *Conserve Italia*, paragraph 104).

86 Similarly, it should also be pointed out that the condition that work should not start before the date on which the Commission receives the application for aid is fundamental, since it is designed to ensure certainty in legal relationships and equality of treatment as between applicants for aid by ensuring that aid is not granted to undertakings which have already carried out, in whole or in part, the improvements which are the subject of the project to be subsidised. Thus, the fact that the beneficiary of aid failed to comply with its undertaking not to start work on the project before receipt of the application for aid by the Commission constitutes a serious breach of a fundamental obligation (judgment of the Court of Justice in *Conserve Italia*, paragraph 105 *in fine*).

87 As the Commission stated at the hearing, once the applicant for EAGGF aid has sent the aid application form to the competent national authority, that authority must be able to check that the application in question is indeed compatible with the purpose of the system established, as regards in particular whether the work for which financing is sought has not already been carried out by the applicant. That opportunity for checking explains why it is not the date on which the application for aid is signed but the date on which it is submitted to the Commission that is taken into account.

88 In the present case, as found above, the beneficiary of the aid not only altered several of the dates on nine photocopies of invoices in order to conceal or change

the dates on which goods covered by the aid were ordered and delivered, which was likely to mislead the Commission as regards when the work began, but also started the work before the date on which the application for aid was received by the Commission.

89 Actions such as these constitute serious infringements of essential requirements, and the Commission did not exceed the limits of what is appropriate and necessary in order to ensure the proper operation of the Community system established in the context of the EAGGF in considering that such infringements justified discontinuing the aid.

90 On that point it should be noted that only the possibility that an irregularity may be penalised not by reduction of the aid by an amount corresponding to that irregularity but by complete cancellation of the aid can produce the deterrent effect required to ensure the proper management of the resources of the EAGGF (judgment of the Court of Justice in *Conserve Italia*, paragraph 101).

91 As regards *Buitoni*, cited above, the facts which gave rise to that case differ from those in the present case. *Buitoni* concerned a case in which refusal to release a security intended to ensure performance of an obligation was due to failure to submit proof, within the time allowed for that purpose, that that obligation had been met. The Court of Justice then held that it was not possible to infer material failure to comply with the obligation secured from mere failure to comply with a procedural time-limit. In contrast, in the present case the obligation not to start work before the date on which the Commission received the application for aid was the subject of an express and specific undertaking entered into by the beneficiary, failure to comply with which constituted a breach of an essential requirement. The applicant cannot therefore rely on the authority of *Buitoni*, cited above.

92 It follows that the alleged breach of the principle of proportionality has not been proven and that the second plea must be rejected.

The third plea, alleging infringement of Article 253 EC owing to contradictions in the reasons given for the contested decision

- 93 The applicant contends that the contested decision disregards the statement by notarial act, made and signed by the beneficiary's representative on 24 April 1997 ('the notarised statement'), which affirmed that all the work included in the project receiving the aid started after 7 July 1989, on the grounds that three invoices showed that the work had begun prematurely. That is a contradiction in the statement of the reasons for the contested decision and constitutes 'a breach of the obligation laid down in Article 253 of the [EC] Treaty such as to affect the validity of the measure in question if it is established that, as a result of that contradiction, the addressee of the measure is not in a position to ascertain, wholly or in part, the real reasons for the decision and, as a result, the operative part of the decision is, wholly or in part, devoid of any legal justification' (Cases T-5/93 *Tremblay and Others v Commission* [1995] ECR II-185, paragraph 42 and Case T-65/96 *Kish Glass v Commission* [2000] ECR II-1885, paragraph 85).
- 94 In that regard, the applicant maintains in its pleadings that Invoices No 89 of 16 August 1989 from Manzini Comaco, No 905 of 31 July 1989 from FMC and No 3086 of 31 July 1989 from FMI do not in any way show the date on which the work began, but merely the date of the invoice and the date the machines were delivered. The content of those invoices is therefore perfectly compatible with that of the notarised statement.
- 95 The Court points out that it is settled case-law, first, that, by virtue of Article 253 EC, the reasons stated for a measure must disclose clearly and unequivocally the reasoning of the Community authority which adopted it, so as to make the persons concerned aware of the reasons for the measure and thus enable them to defend their rights, and so as to enable the Community Courts to exercise their supervisory jurisdiction, and, second, that the extent of the obligation to state reasons must be assessed in the light of its context (Joined Cases T-551/93 and T-231/94 to T-234/94 *Industrias Pesqueras Campos and Others v Commission* [1996] ECR II-247, paragraph 140, and judgment of the Court of First Instance in *Conserve Italia*, paragraph 117).

- 96 In the present case the Court has already found that the three invoices cited in the contested decision and the work records of the technician which relate to them show that the work was started before 7 July 1989, as the applicant acknowledged at the hearing. Therefore, as is rightly stated in the contested decision, not only was the notarised statement groundless, but it also constituted a further attempt to mislead the Commission as to the actual date on which the work started.
- 97 The grounds of the contested decision therefore show clearly and unequivocally the Commission's reasoning and enabled the party concerned to defend its rights and the Community Court to exercise its power of review.
- 98 It follows from the foregoing that the contested decision contains an adequate statement of the reasons on which it is based for the purposes of Article 253 EC, with the result that the plea must be rejected.
- 99 The application must therefore be dismissed in its entirety.

Costs

- 100 Under Article 87(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 applicant has been unsuccessful and the Commission has applied for costs, the applicant must be ordered to bear its own costs and pay those of the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Dismisses the application;
2. Orders the applicant to bear its own costs and pay those of the Commission.

García-Valdecasas

Lindh

Cooke

Delivered in open court in Luxembourg on 11 March 2003.

H. Jung

R. García-Valdecasas

Registrar

President