JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
11 December 2003 *

In Case T-305/00,

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 by L. Visaggio, acting as Agent, assisted by M. Moretto, lawyer, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment of Commission Decision C (2000) 1751 of 11 July 2000 discontinuing aid from the EAGGF for Project No 88.41.IT.003.0, entitled 'Modernisation of an establishment processing products in the fruit and vegetable sector at Portomaggiore (Ferrara)',

* Language of the case: Italian.

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. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 3 June 2003,

gives the following

Judgment

Legal background

Council Regulation (EEC) 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

(EAGGF) projects which are included in the specific programmes drawn up in advance 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 The second recital in Regulation No 355/77 states that 'the measures to be taken in this field are... intended to achieve the objectives set out in [Article 39(1)(a) of the EC Treaty (now Article 33 EC)]'. The fourth recital states that 'to be eligible for Community financing, projects must permit in particular the achievement of improvement and rationalisation of processing and marketing structures in respect of agricultural products and of a lasting beneficial effect on agriculture'. Lastly, the seventh recital states that 'in order to ensure that beneficiaries observe the conditions imposed at the time aid from the [EAGGF] is granted, a procedure should be laid down for an effective check and for the possible suspension, reduction or discontinuation of aid from the [EAGGF].'

3 Article 3(1) of Regulation No 355/77, as amended by Council Regulation (EEC) No 1932/84 of 19 June 1984 (OJ 1984 L 180, p. 1), states that 'the programmes must show clearly that they contribute towards achieving the objectives of the common agricultural policy and, in particular, towards the proper functioning of the markets in agricultural... products'.

4 Furthermore, Article 9(1) of Regulation No 355/77, in accordance with the instructions contained in the fourth recital in that regulation, provides that 'projects must contribute to improving the situation of the basic agricultural production sector in question' and that 'they must guarantee the producers of the basic agricultural product an adequate and lasting share in the resulting economic benefits'.

5 Lastly, Article 10(1)(c) of Regulation No 355/77 states that 'projects must contribute to the lasting economic effect of the structural improvement aimed at by the programmes'.

6 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 Articles 9 and 10, which continued to apply on a temporary basis until 3 August 1993 for projects introduced before 1 January 1990.

The 1983 information document from the Commission on the criteria for the choice of projects to be financed under Regulation No 355/77

7 On 10 June 1983 the Commission published information on the criteria for the choice of projects to be financed under Regulation No 355/77 (OJ 1983 C 152, p. 2, 'the 1983 Information Document'), in which it set out the selection and eligibility criteria that projects had to fulfil in order to qualify for aid from the EAGGF, and the sectors and products subject to restrictions.

8 As regards fruit and vegetables, Title III, point B.5, paragraph 21, of the 1983 Information Document provides that 'investments which are ineligible are those involving an increase in processing capacity for tomatoes' and that 'however, in entirely exceptional cases it is possible to finance investments effected in regions where the income of farmers is significantly lower than the national average and where processing capacities are insufficient and outdated'.

Council Regulation (EEC) No 4253/88

9 On 19 December 1988 the Council adopted Regulation (EEC) No 4253/88 laying down provisions for implementing Regulation (EEC) 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.

10 Article 24 of Regulation No 4253/88, entitled 'Reduction, suspension and cancellation of assistance', as amended by Council Regulation (EEC) No 2082/93 of 20 July 1993 (OJ 1993 L 193, p. 20), provides:

'1. If an operation or measure appears to justify neither part nor the whole 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 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 a measure concerned if the examination reveals an irregularity or a significant change affecting the nature or conditions for the implementation 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....'

Facts

11 On 17 July 1987 the Commission received an application for aid from the EAGGF, dated 22 May 1987, from Colombani Lusuco SpA ('Colombani'), a company controlled by the Federazione italiana dei consorzi agrari (Federconsorzi), a major grouping of Italian agricultural cooperatives. That application was lodged by the Italian Government under Regulation No 355/77.

12 The aid was intended to support project No 88.41.IT.003.0 for the 'modernisation of an establishment processing products in the fruit and vegetable sector at Portomaggiore (Ferrara)'. The aim of the project was in particular to modernise and replace certain installations which had become technologically obsolete in the departments producing fruit juices and semi-processed fruit products and also to bring installations up to current hygiene, health and environmental standards.

13 In its application of 22 May 1987 Colombani declared that it 'undertook not to use the machines and other equipment installed in the complex in question for purposes other than that specified for at least five years from the date of the inspection to ensure they are operating properly'.

14 The Commission approved project No 88.41.IT.003.0 by Decision C (88) 1005/275 of 30 June 1988 ('the decision to grant aid') and granted Colombani aid amounting to 697 836 871 Italian lire (ITL) towards a total investment of

ITL 2 832 123 766. The Commission informed the beneficiary of this by a letter sent on the same date, the sixth paragraph of which expressly stated:

'If any amendments are made to the project as described in the Commission decision granting aid from the Fund, please note that such amendments must be submitted to the Commission... before the new work proposed is carried out. The Commission will inform you as soon as possible of the outcome as regards the amendment proposal(s) and, if accepted, the relevant conditions. Failure to comply with the above-mentioned procedure... or the Commission's rejection of the amendments may result in discontinuation or reduction of the aid.'

15 In December 1989 Colombani acquired an establishment at Massa Lombarda, giving rise to the new company Massalombarda Colombani SpA, which thereby became the beneficiary of the aid ('the beneficiary' or 'Massalombarda').

16 In the spring of 1992, after Federconsorzi had been taken into receivership in 1991, the beneficiary embarked upon a major programme to reorganise and restructure its activities and its staff, which included inter alia concentrating production of fruit-based jam at the Portomaggiore establishment and concentrating production of juices and nectars from fruits at the Massa Lombarda establishment.

17 In 1994 the Commission decided to check on certain projects for which the beneficiary had obtained Community aid, including project No 88.41.IT.003.0 concerning the Portomaggiore establishment. To that end, on 12 September 1994 the Commission requested, by fax addressed to the Ministero delle Risorse agricole, alimentari e forestali ('the Italian Ministry of Agriculture') and the beneficiary, to prepare certain supporting documents and other documents in order to enable it to check during a forthcoming on-the-spot inspection whether the investment that had been made was in accordance with the project as

approved and whether the conditions laid down when the project was approved had been met. The request mentioned in particular the originals of all the supporting documents listed in the application for payment of the aid (point 5 of the fax) and the delivery notes and transport documents relating to certain invoices listed in point 5 (point 9 of the fax).

18 The Commission carried out the inspection from 26 to 30 September 1994, in the course of which certain irregularities were found. Those irregularities were recorded in the inspection report of 30 September 1994 ('the report') signed by all the parties, including the representatives of the beneficiary, as follows:

'...

(8) The invoices indicated on the attached list (Annex 6) contain several irregularities, both as regards tax (delivery notes bear dates earlier than those of the corresponding invoices) and as regards compliance with Regulations No 355/77 and No 2515/85 (notes with dates earlier than those on which the application for the Commission's contribution was received, missing notes, etc).

...

(10) "Line 700" at the Portomaggiore establishment, for the production of juices and nectars, to which improvements were made that were accounted for in the above-mentioned project No 88.41.IT.003.0 was, from August 1992 onwards, mainly used for the packaging of tomato-based products. This followed the acquisition of the [Massa Lombarda] establishment. Such processing (of tomatoes) is excluded from any financing by the Guidance Section of the EAGGF.

(11) Installations for the above-mentioned "Line 125" at the Portomaggiore establishment, financed under the project referred to in the preceding paragraph, were not being used at the time of the inspection. At the request of the officials conducting the inspection evidence was supplied that the idle line was operational. In essence, Messrs Malagoni and Rasi, who were in charge of the establishment, and Mr Giuseppe Piazzi stated that it had not been in use since August 1992 and that this was connected with the project to transfer the line in question to the production unit at Massa Lombarda, Via Selice, which was totally dedicated to the production of juices and drinks. Mr Malagoni, the Production Director, also stated that: "This project, which was approved in the 1994 investment plan, continues to be on hold, as are the relevant administrative formalities, due to the imminent transfer of the company's ownership. Suitable premises at Via Silice have already been prepared in order to carry out this project".

...'

19 Point 2 of Annex 6 to the report lists the disputed invoices concerning the Portomaggiore establishment. They are the following seven invoices: invoice No 745 of 16 May 1988 from NIMAX, invoice No 1256 of 31 May 1990 from OCME, invoice No 17380 of 31 May 1988 from ATLAS COPCO, invoice No 87 of 20 February 1990 from Bronzoni, invoice No 44098 of 31 December 1989 from ATLAS COPCO, invoice No 650 of 2 November 1990 from Gairsa and invoice No 107 of 1 October 1987 from MIT Mantovani.

20 In October 1994 Massalombarda was acquired, and ultimately in 1997 taken over, by Frabi SpA (which subsequently became Finconserve SpA), the finance company within the group Conserve Italia Soc. coop. rl., which is the applicant in this case and which constitutes the main network of agricultural cooperatives in Italy and one of the largest in Europe.

21 By fax sent to the Commission on 3 November 1994 the Italian authorities stated that they were in favour of initiating the procedure to discontinue the aid granted to the beneficiary in view of the serious irregularities that had been found.

22 By letter of 22 May 1995 the Commission informed the beneficiary and the Italian authorities of the infringements that had been found and of its intention to initiate such a procedure in order to recover the incorrect payments. It requested them to submit their observations in that regard. The irregularities alleged against the beneficiary in relation to the present case are set out in the third, fourth, fifth and ninth recitals in that letter:

'Whereas in the course of that investigation it was established that certain invoices charged to the Portomaggiore establishment concern another installation or relate to a jam production line unconnected with the project;

whereas one line producing juices and nectars from fruits (Line 700) was mainly used from August 1992 onwards for the packaging of tomato-based products, a product excluded from financing by the Guidance Section of the EAGGF;

whereas one production line (Line 125), financed almost entirely under the present project, has been completely abandoned since August 1992;

...

whereas therefore, following the on-the-spot inspection, it has become apparent that Article 9(1) and (2), Article 10, Article 19(2), second paragraph, Article 20(1) and (2) [of Regulation No 355/77] are not being complied with'.

23 On 3 August 1995 and 22 September 1995 the beneficiary submitted its observations to the Commission, stating that the irregularities reported were minor and did not justify discontinuance of the aid. Following talks with officials of the competent services of the Commission on 19 January 1996 and 22 October 1996, the beneficiary lodged further statements on 27 February 1996 and 11 November 1996.

24 On 11 July 2000 the Commission adopted Decision C (2000) 1751, based on Article 24(2) of Regulation No 4253/88, discontinuing the aid granted ('the contested decision'), considering that the observations submitted by the applicant provided no evidence to refute the irregularities found during the 1994 inspection and that the extent and seriousness of those irregularities justified discontinuance of the aid.

25 The main grounds of the contested decision are as follows:

'Whereas:

...

(6) ... it has been found that certain invoices, although charged to the Portomaggiore establishment, did not in fact concern that establishment;

(7) It was found that one line producing juices and nectars from fruits ("Line 125", financed almost entirely under this project, has been completely abandoned since August 1992;

(8) It was also found that one line producing juices and nectars from fruits ("Line 700") included in the project was mainly used from August 1992 onwards for the packaging of tomato-based products, which were not provided for in the application for aid; under point B.5 No 21 of the [1983 Information Document] projects to increase capacity for processing tomatoes are excluded from financing by [the Guidance Section of] the EAGGF.

...

(22) In the light of the information given above, the irregularities found affect the conditions for implementing the project in question.

...

(24) Under Article 24(2) of Regulation (EEC) No 4253/88, the Commission may reduce or suspend assistance in respect of the operation or measure concerned if the examination reveals an irregularity or a significant change

affecting the nature or conditions... for which the Commission's approval has not been sought.

(25) In the light of the information given above, it is necessary to discontinue the aid granted.

(26) The beneficiary is required to repay the amount of ITL 697 836 871, payment of which has become devoid of purpose.'

Procedure and forms of order sought

26 By application lodged at the Court Registry on 21 September 2000 the applicant brought the present action.

27 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 Commission to reply to a question. The Commission complied with that request within the time-limit laid down.

28 The parties presented oral argument and their replies to the questions from the Court at the hearing on 3 June 2003.

29 The applicant claims that the Court should:

— annul Commission Decision C (2000) 1751 of 11 July 2000;

— order the Commission to pay the costs.

30 The Commission contends that the Court should:

— dismiss the application in its entirety;

— order the applicant to pay the costs.

Law

31 The applicant puts forward six pleas in law in support of its application for annulment of the contested decision. The first plea alleges that there is an inadequate statement of reasons in the sixth recital in the contested decision; the second plea alleges incorrect assessment of the facts referred to in the sixth recital in the contested decision; the third plea alleges misinterpretation of the obligations assumed by the beneficiary and infringement of the Community rules relating to the proper functioning of the market, concerning Production

Line 125 in recital 7 in the contested decision; the fourth plea alleges infringement and misinterpretation of the 1983 Information Document concerning Production Line 700 in recital 8 in the contested decision; the fifth plea alleges infringement of Article 24(2) of Regulation No 4253/88; the sixth plea alleges infringement of the principle of proportionality.

The first and second pleas: inadequate statement of reasons and an incorrect assessment of the facts in recital 6 in the contested decision

Arguments of the parties

32 The applicant considers that recital 6 in the contested decision, which states that certain invoices, although charged to the Portomaggiore establishment, did not in fact concern that establishment, is vitiated, first, by an inadequate statement of reasons and, second, by an incorrect assessment of the facts found by the Commission.

— The statement of reasons

33 The applicant claims that the circumstances described in recital 6 by no means provide an adequate statement of reasons as required by the settled case-law of the Court of Justice and the Court of First Instance. In that regard, it contends that the wording of that recital makes it impossible to determine which invoices the Commission considered as not being in order because they were charged to another establishment.

34 The applicant also contends that even with reference to their context the reasons stated for the contested decision are inadequate. Annex 6, point 2, of the report listed a total of seven invoices, whilst the letter of 22 May 1995 initiating the infringement proceedings contains no details in this regard, referring merely to 'certain invoices'. The Commission acknowledged for the first time in the defence (paragraph 36) that the invoices disputed in the contested decision were not all of the invoices listed in Annex 6, point 2, but only three of them, namely invoice No 1256/90 of 31 May 1990 from OCME, invoice No 44098 of 3 December 1989 from ATLAS COPCO, and invoice No 107 of 1 October 1987 from MIT Mantovani, which shows that the reasons stated for the contested measure lack certainty.

35 The Commission disputes those arguments as being groundless. In its view it is clear from the wording of recital 6 that the invoices referred to in that complaint were those listed in Annex 6, point 2, that is to say, the ones where the delivery note confirms that the equipment was delivered to another establishment, or those where the applicant has been unable to show that the place of delivery was indeed the Portomaggiore establishment, namely invoice No 1256/90 from OCME, invoice No 44098 from ATLAS COPCO and invoice No 107 from MIT Mantovani. At any event it is clear that the applicant could identify, from the context in which the contested decision was adopted, the three invoices referred to in connection with this complaint, since the applicant was present at the inspection and took an active part in the administrative procedure by disputing this complaint in detail several times.

— The assessment of the facts

36 The applicant contends that the Commission was wrong to consider that the invoices referred to in recital 6 in the contested decision were not in order because they related to an establishment other than Portomaggiore and that that fact constituted a ground for discontinuing aid. The applicant attaches as an annex to

the reply, with regard to the three invoices in question identified by the Commission in the defence, delivery notes and other supporting documents which, in its opinion, prove that the place where the equipment was delivered and the work carried out was indeed the Portomaggiore establishment.

37 Thus, the applicant submits, first, that invoice No 1256/90 of 31 May 1990 from OCME, concerning modification of the programme for the pallet loader, is in order and that the fact that the delivery note was not addressed to the Portomaggiore establishment but to the Codigoro establishment was merely due to a clerical error on the part of the supplier. The invoice, the purchase order of 14 May 1990 and the technical report from OCME's support department of 30 May 1990 prove that the work was indeed carried out at the Portomaggiore establishment.

38 Second, with regard to invoice No 44098 of 31 December 1989 from ATLAS COPCO, for the purchase of a selector, the applicant admits that the delivery note for that purchase was not found during the inspection and states that a copy was subsequently requested from the supplier. It produces the invoice, the purchase order and the delivery note in that connection in order to show that the selector was only for the Portomaggiore establishment.

39 Third, with regard to invoice No 107 of 1 October 1987 from MIT Mantovani, for the delivery and installation of hydraulic equipment, the applicant states that this invoice is in order and that it is for work under local authority control undertaken on the building site at the Portomaggiore establishment. This is clear from the two delivery notes from the supplier and the purchase order which were produced.

40 Furthermore, the applicant points out that at any event the total amount for the three invoices disputed by the Commission of ITL 4 143 120 is derisory in relation to the total amount of investment under the project (ITL 2 794 000 000) and the amount of the Community aid approved by the Commission (ITL 697 836 871).

41 The Commission claims, on the basis of Article 48(1) of the Rules of Procedure, that the additional evidence in the form of invoices and delivery notes produced by the applicant at the reply stage is inadmissible because it was produced late without any reasons being given, and requests that it be excluded from the file.

42 The Commission submits that at any event recital 6 in the contested decision is not vitiated by any error of assessment of the facts. In its fax of 12 September 1994 it had formally asked the applicant for the originals of the documents supporting the expenditure and the relevant delivery notes (points 5 and 9 of the fax), as those documents were not produced either during the inspection or during the administrative procedure, although the applicant had mentioned them on several occasions. The contested decision is therefore not vitiated by any incorrect assessment, since the Commission was not able to take those documents into account when it adopted the contested decision, for reasons attributable solely to the beneficiary's negligence.

43 At the hearing the Commission admitted that, subject to their admissibility, the documents produced by the applicant in its reply did demonstrate that the place where the equipment was delivered and the work carried out was indeed the Portomaggiore establishment.

Findings of the Court

44 It is appropriate to consider first of all the reasons stated for that recital, then the admissibility of the evidence produced by the applicant at the reply stage and, lastly, the applicant's argument alleging incorrect assessment by the Commission of the factual circumstances referred to in the context of that complaint.

— The statement of reasons

45 It is clear from settled case-law, first, that under 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; Case T-216/96 *Conserve Italia* v *Commission* [1999] ECR II-3139, '*Conserve Italia I*', paragraph 117, and Case T-186/00 *Conserve Italia* v *Commission* [2003] ECR II-719, '*Conserve Italia II*', paragraph 95).

46 Recital 6 in the contested decision, which alleges that certain invoices, although charged to the Portomaggiore establishment, did not in fact concern that establishment, does not list the invoices to which the complaint refers. It is clear, however, from the file and from the context in which the contested decision was taken, that the applicant was in a position to identify the three invoices in question, to deny they were not in order and to understand the reasoning on which the Commission's complaint was based.

47 On the one hand the applicant has sufficient evidence to identify which of the invoices that were not in order provided the basis for the contested decision. The applicant was fully aware which seven invoices were originally disputed by the Commission during the inspection conducted in September 1994, on the basis of Annex 6, point 2, of the report, where each invoice is listed.

48 Also, from its observations submitted on 3 August 1995 it is clear that the applicant understood the reasons for which the seven invoices originally disputed were regarded as not being in order, and the fact that three of them (invoice No 1256 of 31 May 1990 from OCME, invoice No 44098 of 31 December 1989 from ATLAS COPCO, and invoice No 107 of 1 October 1987 from MIT Mantovani) were disputed, either because another consignee was named on the delivery note or because there were no delivery notes. In those observations the applicant acknowledged that the delivery note for invoice No 1256 from OCME was addressed to the Codigoro establishment and, as regards the two other invoices, it admitted that the delivery notes showing the actual place where the goods concerned were delivered or the work concerned carried out were not found, although it had mentioned several times that it would produce copies of them.

49 Lastly, it should be noted that the applicant had subsequently played an active part in the administrative procedure, having had talks with the relevant Commission services and also having submitted additional statements on two occasions.

50 On the other hand, it must be observed that although the applicant might still have had doubts regarding the invoices referred to in the context of that complaint, during the administrative procedure and in its application it denied that the seven invoices listed in Annex 6, point 2, to the report, including the three invoices identified by the Commission in its defence, were not in order. Thus the fact that the contested decision was based on only three of them, and not the seven originally disputed during the inspection, is irrelevant, since the applicant has been able to defend its interests and deny at any time that the invoices in question were not in order.

51 It is clear therefore that there is an adequate statement of reasons for recital 6 in the contested decision within the meaning of Article 253 EC and the case-law cited above and that therefore the plea alleging an inadequate statement of reasons must be dismissed as unfounded.

— Admissibility of the additional evidence

52 Article 48(1) and (2) of the Rules of Procedure allows a party to offer further evidence in the reply and the rejoinder, provided that the evidence is based on matters of law or of fact which come to light in the course of the procedure.

53 In the present case the applicant submitted in its application that the seven invoices originally disputed by the Commission were in order, in the defence the Commission limited the number of invoices which it considered were not in order to three and the applicant, at the reply stage and after the Commission had precisely identified the invoices concerned in its statement, produced the supporting documents which it considered relevant in order to support its contention that the three controversial invoices were in order. The documents produced thus relate to facts which came to light during the procedure before the Court and therefore they cannot be regarded as inadmissible for the purposes of Article 48(1) of the Rules of Procedure.

54 Those documents should therefore be declared admissible and hence the Commission's request that they should be excluded from the file should be rejected.

— Assessment of the facts

55 It is clear from the file and from the Commission's statements in the context of the procedure before the Court that the Commission's complaint against the applicant is that the three invoices in question did not relate to the Portomaggiore establishment, based on the fact that the relevant delivery notes contained the name of another consignee (invoice No 1256/90 of 31 May 1990 from OCME) or were not found during the inspection (invoice No 44098 of 31 December 1989 from ATLAS COPCO and invoice No 107 of 1 October 1987 from MIT Mantovani).

56 It should be pointed out straightaway that invoice No 44098 of 31 December 1989 from ATLAS COPCO and invoice No 107 of 1 October 1987 from MIT Mantovani clearly state that the place where the goods were delivered or the work carried out was the Portomaggiore establishment. It is important to note that the Commission's assessment that those invoices were not in order is based exclusively on the fact that the relevant delivery notes were missing.

57 Contrary to what the Commission asserts, it cannot be inferred simply from the fact that the delivery notes were missing that the place where the goods and the work to which those invoices related was provided was somewhere else and not the Portomaggiore establishment. This fact does not provide adequate evidence in support of the Commission's contention, in the absence of any other evidence showing that the destination was not the one stated on the invoices. Furthermore, the documents produced by the applicant — the purchase orders and delivery notes — confirm that the place where those goods and work were provided was indeed the Portomaggiore establishment.

58 It should therefore be held that the Commission was wrong to consider that invoice No 44098 from ATLAS COPCO and invoice No 107 from MIT Mantovani did not relate to the Portomaggiore establishment.

59 As regards invoice No 1256/90 from OCME, the relevant delivery note found during the inspection indicated a different consignee (the Codigoro establishment) from that indicated on the invoice (the Portomaggiore establishment), and the applicant acknowledged that discrepancy, stating that it was merely due to a clerical error on the part of the supplier. Therefore, in view of the discrepancy between those supporting documents and in view of the decisive significance of the indication given on the delivery note of where the work was to be carried out, in the absence of any other evidence offered by the applicant, the Commission had grounds for considering that that work did not relate to the Portomaggiore establishment.

60 The applicant produced before the Court the purchase order of 14 May 1990 and the technical report by OCME's support department of 30 May 1990 in order to show that the goods and work were actually for the Portomaggiore establishment.

61 Those documents show that the only place the work was to be carried out was the Portomaggiore establishment. However, those documents are not such as to call into question the validity of recital 6 in the contested decision. In the light of the discrepancy between the invoice and the relevant delivery note, it was incumbent upon the applicant to produce those documents during the administrative procedure in order to dispute the Commission's assessment.

62 Since those documents were not produced at the administrative stage it was legitimate for the Commission to state in the contested decision, on the basis of the documents at its disposal during the inspection, that that invoice did not relate to the Portomaggiore establishment. It cannot therefore be alleged that the Commission acted improperly with regard to the OCME invoice.

63 It is clear from the foregoing that the plea alleging incorrect assessment of the facts referred to in recital 6 of the contested decision is partially well founded.

Third plea: misinterpretation of the obligations assumed by the beneficiary and infringement of the Community rules for the proper functioning of the market, concerning Production Line 125, in recital 7 in the contested decision

Arguments of the parties

64 The applicant considers that recital 7 in the contested decision, which alleged that the line producing juices and nectars from fruits (Line 125) had been completely abandoned since August 1992, is unfounded.

65 The applicant points out that Massalombarda had experienced various difficulties after Federconsorzi was taken into receivership in 1991, leading to major restructuring of the group, which resulted at the Portomaggiore establishment in the temporary stoppage of installations on Line 125 in order to concentrate production of juices and nectars from fruits at the Massalombarda plant. Moreover, a change in market trends also required concentration of the undertaking's production strategy with regard to nectars from fruits in order to maintain its competitiveness on the market.

66 The applicant also contends that the complaint is not grounded in fact, since the installations on Line 125 were not 'completely abandoned': activity was merely suspended, because the line returned to significant use following the financing, it continued to be available to the undertaking concerned and only temporary constraints required its suspension.

67 The applicant submits that that temporary stoppage does not infringe the undertaking made by the beneficiary when it applied for the aid not to use the equipment concerned for other purposes. According to the applicant, a different

interpretation of the undertaking, to the effect that that obligation infers that no suspension is possible, is illogical since it would mean that a drastic cutback in production could be regarded as allowable under the Community provisions, whilst a temporary stoppage justified by market requirements could not.

68 The applicant also submits that temporary stoppage of the installations is fully in accordance with the principle of the proper functioning of the market which underlies the Community rules and the general principles of Community law. In that regard, the terms of Article 3 of Regulation No 355/77 allow for relaxation of the conditions in respect of operations being financed in order to take account of the functioning of the market and market trends; moreover, if activity had continued it would have resulted in losses not only for the undertaking concerned but also for the producers, which would have been in breach of Article 9 of Regulation No 355/77.

69 Lastly, in its reply the applicant contends that the argument the Commission raised at the defence stage, that an alleged obligation to submit changes to the project for prior authorisation had been infringed, is inadmissible because the contested decision contained no reference, or any complaint against the beneficiary, to that effect.

70 The Commission contends that the plea raised by the applicant is groundless in fact and also that it is based on a totally incorrect interpretation of Regulation No 355/77 and of the undertakings formally entered into by the beneficiary. The Commission considers that both suspension of the production line and the decision to transfer it to another establishment are circumstances that totally alter the project approved by the Commission; they constitute a breach of the provisions of Regulation No 355/77, in particular Article 10(c) thereof — as it explained at the hearing —, a breach of the obligation not to use the installations for other purposes and a breach of the obligation to give notice and seek prior authorisation. In that regard the Commission contends that relying on the

obligation to give prior notice does not constitute a new complaint against the applicant but is merely intended as a response to the applicant's arguments that stopping activity and transferring the production line are in accordance with the Community provisions.

Findings of the Court

71 The applicant contends in particular that the complaint referred to in recital 7 is unfounded because the line was not abandoned, and also that suspension of Line 125 fully complies with the objectives of the EC Treaty and Regulation No 355/77 and with the obligations assumed by the beneficiary when the aid was granted.

72 First of all, the applicant's argument that the complaint is vitiated by an incorrect assessment of the facts because stopping the line did not mean that the installation was 'completely abandoned' cannot be accepted.

73 It is clear from paragraph 11 of the report that the line had not been used since August 1992 according to the statements made by the persons in charge of the establishment. Nor did the applicant in its application deny the fact that the line was indeed suspended for over two years. Lastly, as the Commission correctly contends, the applicant did not produce any evidence, such as statistics or production data, to show that the line was used at all during those two years.

74 Therefore, the fact that the installation in question was kept available for the undertaking concerned and in good operating order and that an operating check was made on the line during the inspection is irrelevant, since those circumstances

do not alter the fact that the line was not used at all for over two years. Therefore, irrespective of the words used by the Commission in the contested decision, the Commission did not make any incorrect assessment of the facts referred to in recital 7 in the contested decision.

75 Second, it is appropriate to consider the merits of the applicant's contention that suspension of the line, which was a business decision justified by market trends and by the situation of the undertaking concerned that came within the sphere of autonomy enjoyed by an undertaking as regards organising its production, is in accordance with the objectives of the EC Treaty and of Regulation No 355/77 and the obligations assumed by the beneficiary when the aid was granted.

76 It should be observed first of all that as the production line was not in fact transferred there is no need for the Court to rule on this question.

77 Article 10(c) of Regulation No 355/77 provides that projects must 'contribute to the lasting economic effect of the structural improvement aimed at by the programmes'. Article 9(1) provides that 'projects must contribute to improving the situation of the basic agricultural production sector in question'. The fourth recital in Regulation No 355/77 states that to be eligible for Community financing, projects must permit 'in particular the achievement of improvement and rationalisation of processing and marketing structures in respect of agricultural products and of lasting beneficial effect on agriculture'. It is clear therefore that the implementation of the project in question and its contribution to a lasting beneficial effect on the processing and marketing of juices and nectars from fruits constitute a fundamental obligation which is incumbent upon the applicant as a result of the award of the aid.

78 In addition, under the obligation assumed in the letter applying for aid submitted by the beneficiary, the applicant is required, first, 'not to use the machines and other equipment installed in the complex in question for purposes other than the use specified for at least five years from the date of the inspection to ensure they were operating properly' and, second, to submit amendments of the approved project to the Commission for prior authorisation, in accordance with the decision granting aid. In that regard, the applicant cannot validly maintain that the Commission's argument relating to infringement of the latter obligation is inadmissible, since that obligation is one of the conditions linked to the award of the aid and underlies the EAGGF system, as is shown by Article 24(2) of Regulation No 4253/88; this is pointed out in the contested decision, which explains clearly in recital 22 that the irregularities found affect the conditions for implementing the project in question and, in recital 24, that in such cases failure to notify and obtain prior authorisation from the Commission may lead to suspension or reduction of the aid.

79 The Court considers that suspending Line 125, which constitutes 97% of the overall investment under the approved project, for over two years constitutes a breach of the abovementioned regulations and obligations.

80 First of all, a trader is of course free to determine the industrial policy of his undertaking and how his installations are going to be used, and in particular to decide to halt production when the market or the constraints being experienced by the undertaking so require. However, when a trader applies for Community aid for a specific operation he assumes, under the provisions of Regulation No 355/77, cited above, and in the present case Article 10(c), the obligation to carry out correctly the operation being financed and to obtain the planned results. If the main line being financed under the project is idle for over two years this means in principle that the project will not have the lasting economic effect sought or obtain the anticipated results as provided for in Regulation No 355/77. It was therefore reasonable for the Commission to consider that such suspension constituted a breach of Article 10(c) of Regulation No 355/77.

81 It is also appropriate to state that the temporary constraints due to market trends and rationalisation of the undertaking which the applicant had to face are inherent in the normal commercial risks which any reasonably well-informed trader should have been able to foresee. Hence, those factors cannot be relied upon in order to avoid the application of Regulation No 355/77.

82 Also, in view of the extent and significance of investment under the project that was affected by the stoppage of activity (97%), it should be pointed out that, contrary to what the applicant contends, it was legitimate for the Commission to consider that that fact constituted a 'change' to the project which should have been notified and received prior authorisation, as stated in the letter accompanying the decision granting the aid. However, the applicant did not send the Commission any information regarding either the reorganisation it had undertaken or the decision to suspend the production line in question.

83 As the Commission rightly stated, it alone has the power to examine whether projects meet the conditions of the operation and the Community regulations, under Article 1(3) of Regulation No 355/77 and Article 14(3) of Regulation No 4253/88. Therefore, the applicant cannot legitimately claim that suspension of the line was in accordance with the criterion of the proper functioning of the market, referred to in Article 3 of Regulation No 355/77, and that to continue its activities would have been in breach of Article 9 of Regulation No 355/77, in the absence of any communication or confirmation on the part of the Commission.

84 Lastly, the obligation assumed by the beneficiary not to use the installations for other purposes is designed to prohibit for a period of five years any unrelated use of items for which finance has been received. The object of that condition must therefore be interpreted as being to ensure that the project approved and execution of the operation being financed are not undermined as a result of the installations being used for a purpose other than that originally established. In the

present case, the fact that Line 125 had been idle since August 1992 constitutes improper use of the installation, which occurred during that period of five years, and hence an infringement of the obligation not to use the installations for other purposes.

85 In the light of the above the conclusion must be drawn that the Commission did not misinterpret the obligations assumed by the beneficiary or infringe the Community rules relating to the proper functioning of the common market as regards Production Line 125.

86 The third plea must therefore be rejected.

The fourth plea: infringement and misinterpretation of the Community rules relating to the 1983 Information Document, concerning Production Line 700, in recital 8 in the contested decision

Arguments of the parties

87 The applicant submits that recital 8 in the contested decision, which states that Line 700 was 'mainly' used for the packaging of tomato-based products, in breach of point B.5, paragraph 21, of the 1983 Information Document is groundless, since the alleged facts do not correspond to reality and there was no breach of that document.

88 First, the applicant contends that Line 700 was not used 'mainly' for such packaging, it was used 'exceptionally' for such packaging. In that regard it states that the tomato season lasts for only approximately 40 days, during the months of August and September, and that therefore it is only during that very short period and since it is impossible to absorb that production in other establishments of the beneficiary that that line has on occasions been used for packaging tomato juice. Outside that period of exceptional use the line has been used in accordance with the project for producing juices and nectars from fruits.

89 Second, the applicant argues that it is not possible to speak of 'using installations for other purposes' in the case of multipurpose installations such as Line 700. Where a line is intrinsically multipurpose the Community provisions should not be considered to have been infringed where it is used for the purpose stated in the project, and only exceptionally for seasonal work.

90 At any event, the applicant states that the investment made in Line 700 in order to adapt it technologically to Line 125 amounts to only 3% (ITL 88 358 690) of the total amount of the investment project (ITL 2 822 619 947), which is a very modest amount.

91 In the reply the applicant disputes the evidential value of the report relied upon by the Commission. First, it disputes the terms of the report, since an inspection lasting four days, only one of which was spent at the Portomaggiore establishment, could not have sufficed to enable Commission staff to establish that the line had been improperly used 'since' August 1992. Second, the applicant contends that that finding does not constitute good evidence of the beneficiary's actions and lacks evidential value since the document was drawn up by Commission staff and the beneficiary did no more than countersign it merely to acknowledge formal receipt of the document and not to approve its content.

92 The Commission considers that this plea is totally groundless. It is clear from the file and from the report that the Portomaggiore establishment had engaged in the packaging of tomato-based products since August 1992. Moreover, the report accurately recorded what was actually found during the inspection, which the applicant did not dispute until the reply stage. The applicant's argument that the document cannot be relied upon is therefore irrelevant.

Findings of the Court

93 As regards the applicant's argument that Line 700 was used for tomato-based products only 'exceptionally' and not 'mainly', it should be stated first of all that point 10 of the report makes clear that from August 1992 onwards the applicant used that line 'mainly' for the processing of tomato-based products. The applicant, however, disputes the terms of the report on the grounds that it has no evidential value.

94 In order to assess the evidential value of a document, it is necessary to determine whether the information it contains is credible, to take into account the origin of the document and the circumstances in which it was drawn up, and to consider whether it seems, on the basis of its content, sensible and reliable (see Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II- 491, paragraph 1838). In the present case, as the report was drawn up immediately after the inspection and was duly signed by all the beneficiary's representatives, and also the officials from the Commission and from the Italian administration who were present at the inspection, the evidential value of that report and the plausibility of the irregularity established cannot reasonably be called into question.

95 Nor is it apparent from that document that during the inspection the applicant disputed the report or made any comments with regard to the facts alleged in the report. Indeed, it is clear from the reservation expressed by the applicant in the last paragraph of the report with regard to sending 'further information concerning the statements made therein' that it was merely ensuring that it would be possible to supply further information and that it was not denying the findings made, as the Commission rightly contends. Therefore, the applicant's contention that that finding did not constitute good evidence of the beneficiary's actions, since its signature did not constitute approval of the document's content, and that it maintained during the administrative procedure that the line was used exceptionally for the packaging of tomatoes does not alter the evidential value of that document.

96 Second, it is clear from the trade union agreement signed in May 1992 and produced by the beneficiary in its observations submitted on 3 August 1995 that it was decided at that time that the Portomaggiore establishment would carry on producing tomato-based products following the restructuring of the group. That document constitutes relevant evidence in support of the Commission's contention, although it does not show that this did in fact take place.

97 Third, the applicant did not adduce any evidence, such as production reports or statistics relating to the products processed on the line in respect of the period after August 1992, to show that, with the exception of the short period of the tomato season, Line 700 was mainly used during the remainder of the year for the packaging of fruit juices.

98 Therefore, the applicant's argument that the tomato season is short and hence the line was only used occasionally for such packaging cannot be accepted. The conclusion must therefore be that the Commission did not make an incorrect assessment of the facts in the eighth recital in the contested decision.

99 As regards the applicant's argument that the 1983 Information Document was not infringed and, even if it had been, any irregularity would not have had any effect on the project and the aid granted, it should be pointed out that point B.5, paragraph 21, of the 1983 Information Document provides that 'investments which are ineligible are those involving an increase in processing capacity for tomatoes' and that 'however, in entirely exceptional cases it is possible to finance investments effected in regions where the income of farmers is significantly lower than the national average and where processing capacities are insufficient and outdated'.

100 In the present case, the applicant relies on the multipurpose nature of the line in order to contend that the installation was not used for other purposes and, hence, that the prohibition contained in point B.5, paragraph 21, of the 1983 Information Document was not infringed. However, although there is no need to adjudicate on whether Line 700 was in fact used for other purposes, it is sufficient to point out that, as stated above, the applicant has adduced no evidence to support its contention that the line was used only exceptionally for the packaging of tomatoes, nor has it even shown that the installation was used mainly for anything but the processing of tomatoes. That argument cannot therefore be accepted.

101 At any event, even if the applicant used the line in question only 'exceptionally' and not 'mainly', since it was used for the only product in the fruit and vegetables sector whose processing is excluded from Community financing, that use also constituted a breach of the condition to which the beneficiary was subject under the 1983 Information Document. Indeed, as the only exception provided for in respect of that provision was not relied upon in the present case it cannot be taken to apply.

102 As regards the applicant's argument that the effect of that irregularity is small in view of the limited amount of investment for that installation, it should be noted that the prohibition laid down in the 1983 Information Document makes no provision for possible off-setting or exceptions based on the amount of the investment.

103 The Commission cannot therefore be criticised for considering that point B.5, paragraph 21, of the 1983 Information Document had been infringed in the present case.

104 In the light of the above the conclusion must be drawn that the Commission did not make an incorrect assessment of the circumstances of fact and of law in recital 8 in the contested decision and that the fourth plea must therefore be rejected.

The fifth and sixth pleas: infringement of Article 24(2) of Regulation No 4253/88 and infringement of the principle of proportionality

Arguments of the parties

105 The applicant contends first of all that the contested decision infringes Article 24(2) of Regulation No 4253/88 since there was no 'significant change' in the project within the meaning of that provision which might give rise to discontinuance of the aid. It adds that the irregularities allegedly found, even if they did take place, were not very serious and were of very little financial significance in relation to the total amount of the investment, nor would they have affected the proper implementation or conditions of the operation, since the project had been fully executed and the planned benefits obtained.

106 The applicant contends, secondly, that at any event the contested decision infringes the principle of proportionality.

107 First, the contested decision breaches that principle because, despite the fact that the irregularities allegedly found were not very serious, the Commission discontinued aid rather than merely reducing it. Furthermore, the case-law of the Court requires that where there is a choice of appropriate measures institutions should choose the least onerous.

108 Second, the applicant contends that the Commission did not take into account the fact that the infringements were committed by a company other than the one to which the contested decision is addressed, so that the measure affects a person unconnected with the facts in question. On that ground the contested decision itself is neither effective nor dissuasive, as it should be within the terms of the case-law of the Court of Justice and of the Court of First Instance, and is clearly disproportionate in relation to the company to which the contested measure is addressed.

109 The Commission disputes the arguments put forward by the applicant as being manifestly unfounded. On the one hand, Article 24(2) of Regulation No 4253/88 is fully applicable in the present case. On the other hand, with regard to the alleged infringement of the principle of proportionality, the applicant did not commit mere irregularities, it committed serious infringements of essential undertakings linked to the granting of the aid. Hence discontinuance was fully justified.

Findings of the Court

110 First it should be noted that the system of subsidies introduced under the Community rules relies in particular on the performance by beneficiaries of a number of obligations which entitles them to receive the financial aid envisaged. If the beneficiary does not comply with all those obligations Article 24(2) of Regulation No 4253/88 authorises the Commission to reconsider the extent of

the obligations it assumes under the decision to grant aid. In the present case, as was held above, the applicant did not comply with its obligations under the decision to grant aid. The irregularities established in recitals 7 and 8 of the contested decision therefore constitute significant changes affecting the conditions of the operation for which the Commission's prior approval was not sought. Hence, the conditions under which Article 24(2) applies are met in full.

111 Second, as regards the principle of proportionality, it should be noted that it is settled case-law that by virtue of that principle, as 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 (see in particular Case 15/83 *Denkavit Nederland* [1984] ECR 2171, paragraph 25, and Case T-260/94 *Air Inter* v *Commission* [1997] ECR II-997, paragraph 144, and *Conserve Italia I*, paragraph 101).

112 It is settled case-law that 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 (Case 21/85 *Maas* [1986] ECR 3537, paragraph 15, Case C-104/94 *Cereol Italia* [1995] ECR I-2983, paragraph 24, *Conserve Italia I*, paragraph 103, and *Conserve Italia II*, paragraph 84). Moreover, the Court has confirmed 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' (Case C-500/99P *Conserve Italia* v *Commission* [2002] ECR I-867, paragraph 101).

113 It is clear therefore that discontinuance of EAGGF aid is not, in principle, disproportionate where it is established that the beneficiary of that aid has infringed an obligation that is fundamental for the proper operation of the EAGGF. The contested decision should be considered in the light of those principles.

114 In the present case, as was established above, the applicant suspended activity for over two years on the line mainly financed by Community aid (Line 125), in breach of Article 10(c) of Regulation No 355/77 and the applicant's obligations to give prior notification and not to use machines for purposes other than those specified. The applicant also used the other line to which the project being financed related (Line 700) for processing the only product excluded from aid.

115 It must be observed, first, that the objective of contributing to the lasting economic effect of the structural improvement of processing of juices and nectars from fruits, as provided for in Article 10 of Regulation No 355/77, constitutes a fundamental obligation under the EAGGF rules (see to that effect Joined Cases T-61/00 and T-62/00 *APOL and AIPO* v *Commission* [2003] ECR II-635, paragraph 102). The Court of Justice also stated very recently that it was important for the proper functioning of the system of controls set up to ensure proper use of Community funds that 'applicants for aid provide the Commission with information which is reliable and not liable to mislead it' (*Conserve Italia* v *Commission*, cited above, paragraph 100). Lastly, since compliance with the obligation not to use the installations for other purposes was an express undertaking made by the beneficiary when the application for aid was made, it constitutes an essential means of ensuring that the operation being financed is properly carried out, which was not complied with either.

116 Secondly, use of Line 700 for the only product in the fruit and vegetable sector whose processing is totally excluded from Community financing, an exclusion which applied to the applicant, also constitutes an infringement of the essential conditions for the aid granted.

117 Moreover, it should be noted that, according to the applicant's assertions (application, paragraph 40), the irregularities referred to in recitals 7 and 8 in the contested decision concerned 100% of the total amount of the approved investment and of the Community aid granted (97% for the modernisation of Line 125 and 3% for Line 700). Those irregularities therefore concern all of the Community aid granted.

118 Such actions therefore infringe obligations which must be complied with in order to ensure that the EAGGF operates properly, and the Commission did not exceed the limits of what is appropriate and necessary in order to ensure the proper operation of the system in considering that such infringements justified discontinuance of the aid.

119 Lastly, the applicant's argument that discontinuance of the aid is disproportionate since it was not the undertaking responsible for the irregularities established cannot be accepted. As the Court of First Instance pointed out in *Conserve Italia I* (paragraph 107), the applicant assumed the beneficiary's rights and obligations following the purchase referred to in paragraph 20 above.

120 Consequently, the principle of proportionality has not been infringed.

121 In those circumstances, the pleas alleging infringement of Article 24(2) of Regulation No 4253/88 and infringement of the principle of proportionality must be rejected.

Conclusion

122 Although the plea alleging incorrect assessment of the facts referred to in recital 6 of the contested decision is partly justified as regards invoice No 44098 from ATLAS COPCO and invoice No 107 from MIT Mantovani, the irregularities referred to in recitals 7 and 8 of the contested decision are so serious that they alone justify the Commission's decision to discontinue the aid.

123 In the light of all the foregoing considerations, the action must be dismissed.

Costs

124 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied 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 those incurred by 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 those of the Commission.**

García-Valdecasas Lindh Cooke

Delivered in open court in Luxembourg on 11 December 2003.

H. Jung P. Lindh

Registrar President