

REPORT FOR THE HEARING

delivered in Joined Cases 106 to 120/87 *

I — Facts and Procedure

1. Council Regulation No 1152/78 of 30 May 1978 (Official Journal 1978, L 144, p. 1), amending Council Regulation No 516/77 of 14 March 1977 (Official Journal 1977, L 73, p. 1) on the common organization of the market in products processed from fruit and vegetables, established a system of production aid for certain products of particular importance in the Mediterranean regions, including tomato concentrates. The aid is intended to make up the difference between the level of prices of Community products, calculated on the basis mainly of a minimum price to be paid to tomato producers, set by the Commission before each marketing year, and of production costs, and the level of prices of products from non-member countries.

2. Articles 58 and 59 of the Act of Accession of Greece to the European Communities (Official Journal 1979, L 291, p. 17) provide for the gradual alignment of Greek agricultural prices with the common prices. For products processed from tomatoes, falling under Regulation No 516/77, Article 59 (2) provides for the alignment of prices in seven stages. According to paragraphs (1) and (2) of Article 103, on the application in Greece of the aid systems laid down in Regulation No 516/77, the minimum price applicable in Greece is to be aligned with the common price in accordance with the detailed rules laid down in Article 59. Under Article 103 (3) the amount of Community aid granted in Greece is to be fixed in such a fashion as to compensate for the difference between the level of prices of products of

third countries and the level of prices of Greek products established taking into account the minimum price and the processing costs obtaining in Greece.

3. For each marketing year the Commission, under the Management Committee procedure, adopted a regulation setting minimum prices payable to producers and amounts of production aid for Greece and for the other Member States:

— 1981/82 marketing year: Regulation No 1963/81 of 10 July 1981 (Official Journal 1981, L 192, p. 16);

— 1982/83 marketing year: Regulation No 1585/82 of 21 June 1982 (Official Journal 1982, L 178, p. 20);

— 1983/84 marketing year: Regulation No 1618/83 of 15 June 1983 (Official Journal 1983, L 159, p. 52);

— 1984/85, 1985/86 and 1986/87 marketing years: Regulation No 1709/84 of 19 June 1984 (Official Journal 1984, L 162, p. 8).

4. Production aid is fixed per 100 kg of tomato concentrate with a specific dry weight content packed in containers of a specific weight. In order to take into account differences in concentration and in packaging, *inter alia*, the Commission has

* Language of the Case: Greek.

adopted for each marketing year a regulation setting coefficients to be applied to the amount of production aid for tomato concentrates:

- 1981/82 marketing year: Regulation No 1962/81 of 10 July 1981 (Official Journal 1981, L 192, p. 13);
- 1982/83 marketing year: Regulation No 1602/82 of 22 June 1982 (Official Journal 1982, L 179, p. 16);
- 1983/84 marketing year: Regulation No 1615/83 of 15 June 1983 (Official Journal 1983, L 159, p. 48);
- 1984/85, 1985/86 and 1986/87 marketing years: Regulation No 1709/84 of 19 June 1984 (Official Journal 1984, L 162, p. 8).

An annex to each of these regulations fixes coefficients or percentages to be applied to the amount of the aid according to the dry weight content and to sizes of containers smaller than a standard container.

5. By its judgment of 19 September 1985 in an action brought by the Hellenic Republic (Case 192/83 *Hellenic Republic v Commission* [1985] ECR 2791, at p. 2802), the Court annulled Regulation No 1615/83 fixing the coefficients to be applied to production aid for tomato concentrates in so far as the coefficients fixed in that regulation gave rise to unequal treatment as between the Hellenic Republic and the other Member States as regards compensation for the extra costs incurred as a result of the use of packaging smaller than the

standard packaging adopted by Article 1 (2) of Commission Regulation No 1618/83 of 15 June 1983 fixing for the 1983/84 marketing year the minimum price to be paid to producers and the amount of production aid for certain products processed from fruit and vegetables.

In the last paragraph of that judgment, the Court stated that it was the Commission's duty under Article 176 of the EEC Treaty 'to fix new coefficients for Greece, or to devise some other system of compensation taking account of the fact that the aid scheme differentiates between Greece and the other Member States'.

6. An action for damages under Article 178 and the second paragraph of Article 215 of the EEC Treaty, brought by plaintiffs Nos 1, 2, 4 to 13 and 15, was dismissed by the judgment of the Court of 19 September 1985 in Joined Cases 194 to 206/83 *Asteris v Commission* [1985] ECR 2815, at p. 2821, on the ground that the illegality of the coefficient system (according to the judgment of the Court in Case 192/83) could not 'be regarded as constituting a serious breach of a superior rule of law or as manifest and grave disregard by the Commission of the limits on its powers' so as to give rise to liability on the part of the Community.

7. The Commission considered that in Case 192/83 the Court had declared Regulation No 1615/83 void in so far as the coefficients fixed in that regulation gave rise to unequal treatment as between Greece and the other Member States concerning compensation for the extra costs incurred as a result of the use of packings smaller than the standard packing; the Commission therefore adopted Regulation No 381/86 of 20 February 1986 on additional payment of production aid for certain sizes of packings

with tomato concentrates obtained from Greek tomatoes during the 1983/84 marketing year (Official Journal 1986, L 44, p. 10). The regulations fixing the coefficients for the previous and subsequent marketing years were not amended.

8. By applications lodged at the Court Registry on 14 April 1986 (Case 97/86) and 29 July 1986 (Case 193/86), the plaintiffs in the main proceedings brought an action for the annulment of Regulation No 381/86 and the Commission's refusal to comply, in respect of all the marketing years concerned, with the judgments of 19 September 1985.

9. At the same time, the plaintiffs in the main proceedings brought an action before the Polymeles Protodikeio Athinon for a declaration that the Hellenic Republic was liable to them for certain sums corresponding, for the 1981/82, 1982/83 and 1983/84 marketing years, to the difference between the aid in fact received under the applicable coefficients as fixed in the Commission regulations and the aid to which they would have been entitled but for the illegality found in the Court's judgment of 19 September 1985 (Case 192/83, cited above).

10. Since the Polymeles Protodikeio Athinon considered that the case involved the interpretation of certain rules of Community law, in judgments of 31 October 1986 it decided, pursuant to Article 177 of the EEC Treaty, to stay the proceedings until the Court of Justice had given a preliminary ruling on the following questions:

'(1) Do the national courts of a Member State of the European Communities have jurisdiction to hear proceedings concerning claims by individuals against the competent national authorities for the payment of differences of aid due to them by the latter resulting from the incorrect application of Community law and capable of being claimed back by the national authorities from the competent Community organs pursuant, in particular, to Regulation No 729/70 of the Council on the financing of the common agricultural policy?

If so:

(2) Does the dismissal by the Court of Justice of the European Communities of an action brought by the plaintiff in these proceedings against the Commission on the grounds set out in the judgment of the Court of Justice of 19 September 1985 in Joined Cases 194 to 206/83 prevent the same plaintiff from bringing an action against the Greek State for compensation in respect of the loss of benefits which it would have received from the competent Greek authorities had the latter claimed from the EAGGF pursuant to Regulation No 729/70 of the Council?

If not:

(3) In respect of the payment by national authorities of compensation to individual owners of processing under-

takings in receipt of aid pursuant to Council Regulations Nos 729/70 and 516/77, inasmuch as it is intended to compensate for or redress a technical error of the competent Community organs,

(a) is it sufficient for the national authorities simply to inform the competent Community organs in order for the operation to be valid from the point of view of Community law (Article 92 of the EEC Treaty), or

(b) must the prior approval of the Community organs be obtained in accordance with the requirements of Article 93 of the EEC Treaty, as given detailed effect by Council Regulation Nos 729/70 and 516/77?

(c) Is the plaintiffs' claim for compensation, in so far as it relates to the 1983/84 marketing year, contrary to Commission Regulation No 381/86?

11. The judgments of the Polymeles Protodikeio Athinon were lodged at the Court Registry on 7 April 1987.

12. By an order of 17 June 1987 the cases were joined for the purposes of the written and oral procedure and of the judgment.

13. In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were lodged on 23 July 1987 by the Commission of the European Communities, represented by its Legal Adviser Dimitrios

Gouloussis, and on 4 August 1987 by the plaintiffs in the main proceedings, represented by Christos Arvanitis, Nikolaos Tsiokas and Giannis Stamoulis, of the Bar of Athens.

14. Upon hearing the report of the Judge- Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

15. By an order of 24 February 1988, the Court decided, pursuant to Article 95 (1) and (2) of the Rules of Procedure, to assign the case to the Fifth Chamber.

II — Written observations submitted to the Court

1. (a) The plaintiffs in the main proceedings state that they are requesting the Greek State to pay them the difference between the aid received and the aid payable in accordance with the judgment of the Court of 19 September 1985 (*supra*) for the quantities of tomato concentrates produced during the 1981/82, 1982/83 and 1983/84 marketing years. Their claims are not for the payment of damages under Article 105 of the Introductory Law to the Civil Code, as the national court appears to have believed, but for the payment of the aid which the Greek State is bound in law to pay to them. Under the Community rules, each Member State must pay processing undertakings a fixed subsidy intended to compensate for the difference between the cost of products of Community origin and the price at which those products are marketed in non-member countries. The Member State may then claim repayment of the aid from the European Agricultural Guidance and Guarantee Fund (EAGGF). The aid should be calculated so as not to infringe the principle of equal treatment

contained in Article 40 (3) of the EEC Treaty and in Article 4 (1) of the Greek Constitution. In its judgments of 19 September 1985 the Court recognized that Greek manufacturers were not treated in the same way as manufacturers of other Member States, owing to a technical error made by the Commission in determining the coefficients. The Greek court has jurisdiction to grant the plaintiff undertakings the financial aid in issue. The question referred to the Court concerning the jurisdiction of the national court is irrelevant and superfluous, since the Court may not interpret national provisions or rule on the jurisdiction and powers of national courts.

the difference has no connection with an action for damages under Article 215 of the EEC Treaty or with national State aid falling under Articles 92 to 94 of the EEC Treaty. The fact that Regulation No 516/77 notes in its preamble that the expenditure incurred by the Member States is financed by the Community in accordance with Regulation (EEC) No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy (Official Journal, English Special Edition 1970 (I), p. 218) proves that reference to Articles 92 and 93 is not pertinent. Hence the questions referred to the Court concerning Articles 215 and 92 to 94 of the EEC Treaty are mistaken, superfluous and unnecessary.

The answer to the first question should therefore be that

The reply to the second question should therefore be that

'the Court of Justice of the European Communities has no jurisdiction to interpret national provisions in the course of a reference by a national court for a preliminary ruling or to rule on the jurisdiction and the powers of national courts, which are a matter solely for the national court before which the case is pending'.

'the legal means of redress provided to individuals under the second paragraph of Article 215 of the EEC Treaty against unlawful legislative acts of the Community institutions (actions in the nature of a claim for damages) is autonomous and independent of the means of redress against national authorities available under the procedural provisions of the Member States, in particular if, incorrectly applying provisions of Community law which are directly applicable in all the Member States, national authorities prevent individuals from obtaining financial subsidies provided for by those provisions or pay them a reduced amount, contrary to the principle of equal treatment, as confirmed by the Court of Justice of the European Communities, especially when those payments may then be claimed back from the EAGGF under Regulation (EEC) No 729/70 of the Council'.

(b) It follows from the judgments of the Court of 19 September 1985 that the aid in fact granted to the Greek undertakings pursuant to the Community regulations in issue is contrary to the principle of equal treatment. A request for calculation of the aid on a proper basis, free of the technical error of the Commission, and payment of

(c) Regulation No 381/86, adopted following the judgments of 19 September 1985, determined the amount of the difference of aid resulting from the technical error which affected Regulation No 1615/83. The only questions which the national court should examine are whether the difference in aid was calculated exactly as the plaintiffs requested, in view of the need to compensate for higher processing costs, and whether it complies with the provisions of Regulation No 381/86 adopted for the 1983/84 marketing year.

Thus the reply to the third question should be that

‘in the course of proceedings under Article 177 of the EEC Treaty, the Court of Justice of the European Communities may not rule on the substance of proceedings pending before a national court, by reviewing financial data, especially when, in a previous judgment given in the context of other proceedings, the Court has established clear criteria for determining the amount of the difference in aid in issue before the national court’.

2. (a) According to the Commission, the first question is outside the jurisdiction of the Court of Justice; in effect, the jurisdiction of a national court to try a specific case must be determined on the basis of national law even if, in that case, the national court is called upon to apply Community law.

The reply to the first question should be that

‘the decision regarding the jurisdiction of the Polymeles Protodikeio Athinon in the cases to which its Decisions Nos 7085 to 7099/86 relate is outside the jurisdiction of the Court of Justice of the European Communities’.

(b) The second question concerns the admissibility of the action brought by the plaintiffs in the main proceedings and the extent to which the matter is *res judicata* in the light of the Court’s judgment of 19 September 1985 in Joined Cases 194 to 206/83. That judgment is binding as between the Commission and the companies, who could not raise the question before the Court again or claim the sums involved from the Commission. The question whether the Greek companies’ claims before the national court are well founded concerns the liability of a Member State for an allegedly unlawful act, and is outside the jurisdiction of the Court *ratione personae*. The question should be resolved on the basis of the Greek Code of Civil Procedure, although it should be borne in mind that the Court’s judgments are not to be treated as foreign judgments under Greek law.

The reply to the second question should be that

‘the issue whether the dismissal by the Court of Justice of the European Communities in its judgment of 19 September 1985 of the actions brought against the Commission by Asteris and 12 other Greek companies (Joined Cases 194 to 206/83) prevents the plaintiffs from bringing an action against the Greek Government before the Greek courts for payment of the benefits which they

would have received from the competent Greek authorities had the latter claimed from the EAGGF pursuant to Regulation No 729/70 of the Council is not a question of interpretation of Community law.

In the alternative: the Polymeles Protodikeio Athinon must take into account the judgment of the Court of Justice of the European Communities of 19 September 1985 (Joined Cases 194 to 206/83) in determining whether the actions to which its Decisions Nos 7085 to 7099/86 relate are well founded'.

(c) The facts recounted in the decisions of referral do not justify the description of the sums claimed from the Greek Government as 'aid'. Article 92 concerns any aid granted by a Member State which distorts or threatens to distort competition by favouring certain undertakings. If the national court considered the actions to be well founded, the amounts to be awarded would not constitute aid granted by the Greek State but rather the enforcement of a judicial decision. Hence the first two parts of the third question are redundant.

The first and second parts of the third question should receive the following reply:

'Payment by the Greek authorities of compensation, following a court decision, to

individual owners of undertakings producing tomato concentrates which receive aid pursuant to Council Regulations (EEC) Nos 729/70 and 516/77, in so far as it is intended to compensate for or redress a technical error of the competent Community organs, does not fall under Articles 92 and 93 of the EEC Treaty.'

As regards the question whether the actions brought are contrary to Regulation No 381/86, the Commission points out that that regulation is the subject of an action for annulment (Joined Cases 97, 99, 193 and 215/86). The same amounts cannot be paid twice to the applicants in the main proceedings, first on the basis of Community law and secondly on the basis of Greek law.

The reply to the third part of the third question should be:

'In the light of Commission Regulation (EEC) No 381/86, the payment of damages claimed by the abovementioned plaintiff companies from the Greek State for the 1983/84 marketing year may not result in their unjust enrichment.'

F. A. Schockweiler
Judge-Rapporteur