In Case 18/76

GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY, represented by Konrad Redeker, Advocate, acting as Agent, with an address for service in Luxembourg at the Embassy of the Federal Republic of Germany, 20-22 Rue de l'Arsenal,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, P. Gilsdorf, and by G. zur Hausen, a member of its Legal Department, acting as Agents, with an address for service in Luxembourg at the office of its Legal Adviser, Mario Cervino, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for the annulment of Commission Decisions 76/141/EEC and 76/147/EEC of 2 December 1975 concerning the discharge of the accounts presented by the Federal Republic of Germany in respect of the European Agricultural Guidance and Guarantee Fund (EAGGF), Guarantee Section, expenditure for 1971 and 1972 (Official Journal L 27 of 2 February 1976, pages 3 and 15), in so far as the Commission failed to recognize as chargeable to the EAGGF sums of DM 26 094 195.99 for the 1971 financial year and DM 13 325 660.12 for the 1972 financial year,

THE COURT

composed of: H. Kutscher, President, J. Mertens de Wilmars and Lord Mackenzie Stuart (Presidents of Chambers), P. Pescatore, M. Sørensen, A. O'Keeffe and G. Bosco, Judges,

Advocate General: F. Capotorti
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The facts of the case, the procedure, the conclusions and the submissions and arguments of the parties may be summarized as follows:

I — Introduction and procedure

A — In the contested decisions, which are based on the provisions of Article 5 (2) (b) of 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) and of Article 8 of Regulation No 1723/72 of the Commission of 26 July 1972 on making up accounts for the European Agricultural Guidance and Guarantee Fund, Guarantee Section (Official Journal, English Special Edition, Second Series (III), p. 109) the Commission refused to recognize as chargeable to the European Agricultural Guidance and Guarantee Fund (hereinafter referred to as "the EAGGF"), Guarantee Section, expenditure incurred by the applicant in implementing legal measures in the context of the common agricultural policy amounting in all to

DM 28 747 840.47 for the 1971 financial year and

DM 16 556 544.12 for the 1972 financial year.

The reason given for those decisions was that the expenditure had not been authorized or incurred by the applicant in accordance with the Community provisions in the context of the common organization of the agricultural markets.

In its application the applicant argues that the Commission's decisions are unlawful and should therefore be annulled in so far as the Commission refused to finance expenditure amounting to

DM 26 094 195.99 for the 1971 financial year and

DM 13 325 660.12 for the 1972 financial year.

B — The application was lodged on 16 February 1976. The written procedure was suspended as from September 1976 to enable the parties to enter into negotiations for a settlement. As those negotiations were unsuccessful the written procedure was reopened in August 1977.

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.

C — The amounts in question are spread over a number of items relating to the different "cases" mentioned below under heading IV.

II — Conclusions of the parties

A — The *applicant* claims that the Court should:

— Annul the decisions of the Commission of the European Communities of 2 December 1975, No 75/33036 and No 75/33038 regarding the discharge of the

accounts of the European Agricultural Guidance and Guarantee Fund, Guarantee Section, for the 1971 and 1972 financial years in so far as expenditure incurred by the Federal Republic of Germany:

(a) amounting to DM 26 094 195.99 for the 1971 financial year; and

(b) amounting to DM 13 325 660.12 for the 1972 financial year,

has not been recognized as chargeable to the European Agricultural Guidance and Guarantee Fund, Guarantee Section;

— Order the Comission to pay the costs.

B — The *Commission* contends that the Court should:

— Dismiss the application

— Order the applicant to bear the costs.

III — Principles governing the financing of intervention measures

A — Provisions to be considered

1 (a) *Regulation No 729/70* of the Council is the basic regulation on the financing of the common agricultural policy. It contains *inter alia* the following provisions:

"Article 1

1. The European Agricultural Guidance and Guarantee Fund (hereinafter called the 'Fund') shall form part of the budget of the Communities.

It shall comprise two sections:

— the Guarantee Section;

— the Guidance Section.

2. The Guarantee Section shall finance:

(a) refunds on exports to third countries;

(b) intervention intended to stabilize the agricultural markets.

...

Article 3

1. Intervention intended to stabilize the agricultural markets, undertaken according to Community rules within the framework of the common organization of agricultural markets, shall be financed under Article 1 (2) (b).

...

Article 4

1. Member States shall designate the authorities and bodies which they shall empower to effect, from the date of application of this Regulation, the expenditure referred to in Articles 2 and 3. They shall communicate to the Commission, as soon as possible after the entry into force of this Regulation, the following particulars concerning those authorities and bodies:

— their name and, where appropriate, their statutes;

— the administrative and accounting conditions in accordance with which payments are made relating to the implementation of Community rules within the framework of the common organization of agricultural markets.

They shall inform the Commission forthwith of any change in those particulars.

2. The Commission shall make available to Member States the necessary credits so that the designated authorities and bodies may, in accordance with Community rules and national legislation, make the payments referred to in paragraph 1.

The Member States shall ensure that those credits are used without delay and solely for the purposes laid down.

...

Article 5

1. Member States shall at regular intervals transmit to the Commission the following documents concerning the authorities and bodies referred to in Article 4 and relating to transactions financed by the Guarantee Section:

(a) statements of cash holdings and estimates of financial needs;

(b) annual accounts, accompanied by the documents required for making up the balance sheets.

2. The Commission, after consulting the Fund Committee referred to in Article 11,

(a) shall decide:

— at the beginning of the year, on the basis of the documents referred to in paragraph 1 (a), on an advance payment for the authorities and bodies not exceeding one third of the credits entered in the budget;

— during the year, on additional payments intended to cover expenditure to be borne by an authority or body;

(b) shall, before the end of the following year, on the basis of the documents referred to in paragraph 1 (b), make up the accounts of the authorities and bodies.

3. Detailed rules for the application of this Article shall be adopted in accordance with the procedure laid down in Article 13.

. . .

Article 8 (English text)

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

— satisfy themselves that transactions financed by the Fund are actually carried out and are executed correctly;

— prevent and deal with irregularities;

— recover sums lost as a result of irregularities or negligence.

The Member State shall inform the Commission of the measures taken for those purposes and in particular of the state of the administrative and judical procedures.

2. In the absence of total recovery, the financial consequences of irregularities or negligence shall be borne by the Community, with the exception of the consequences of irregularities or negligence attributable to administrative authorities or other bodies of the Member States.

The sums recovered shall be paid to the paying authorities or bodies and deducted by them from the expenditure financed by the Fund.

3. The Council, acting by a qualified majority on a proposal from the Commission, shall lay down general rules for the application of this Article.

Article 8 (French text)

. . .

2. A défaut de récupération totale, les conséquences financières des irrégularités ou des négligences sont supportées par la Communauté, sauf celles résultant d'irrégularités ou de négligences imputables aux administrations ou organismes des États membres.

. . .

Article 8 (German text)

. . .

2. Erfolgt keine vollständige Wiedereinziehung, so trägt die Gemeinschaft die finanziellen Folgen der Unregelmäßigkeiten oder Versäumnisse; dies gilt nicht für Unregelmäßigkeiten oder Versäumnisse, die den Verwaltungen oder Einrichtungen der Mitgliedstaaten anzulasten sind.

. . .

Article 8 (Dutch text)

. . .

2. Indien algehele terugvordering uitblijft, draagt de Gemeenschap de financiële gevolgen van de onregelmatigheden of nalatigheden, behalve die welke voortvloeien uit onregelmatigheden of nalatigheden die aan de overheidsdiensten of organen van de Lid-Staten te wijten zijn.

. . .

Article 13

1. Where the procedure laid down in this Article is to be followed, the matter shall be referred to the Committee by the Chairman, either on his own initiative or at the request of the representative of a Member State.

2. The representative of the Commission shall submit a draft of the measures to be adopted. The Committee shall deliver its Opinion on those measures within a time limit set by the Chairman according to the urgency of the matters. An opinion shall be adopted by a majority of twelve votes.

3. The Commission shall adopt measures which shall be immediately applicable. However, if such measures are not in accordance with the Opinion delivered by the Committee, they shall at once be communicated by the Commission to the Council. In that case, the Commission may defer for not more than one month from the date of such communication, application of the measures which it has adopted.

The Council, acting by a qualified majority, may adopt a different decision within one month."

Unlike the system established provisionally by *Regulation No 17/64/EEC* of the Council of 5 February 1964 on the conditions for granting aid from the European Agricultural Guidance and Guarantee Fund (Official Journal, English Special Edition 1963-1964, p. 103), Regulation No 729/70 lays down the principle of direct financing by the Community of the measures in question. The former regulation provided that the measures in question should be financed, in the first instance, by the Member States which were subsequently reimbursed by the EAGGF *(Article 9)*. The Commission decided, after consultation with the Fund Committee, the aid to be granted from the EAGGF *(Article 10)*.

In the Commission's *proposal* for a regulation on the financing of the common agricultural policy which it submitted to the Council on 16 July 1969 (Journal Officiel C 123 of 19 September 1969, p.27), the provision corresponding to Article 8 (2) of Regulation No 729/70 (namely Article 8 (3) of the proposal) was worded as follows:

"Article 8

...

3. The financial consequences of irregular or fraudulent transactions shall be borne by the Community, with the exception of negligence attributable to the administrative authorities or other bodies of the Member States.

...

Article 8 (French text)

...

3. Les conséquences financières des opérations irrégulières ou frauduleuses sont supportées par la Communauté, sauf négligences imputables aux administrations des États membres ou à leurs organismes.

...

Article 8 (German text)

...

3. Die finanziellen Folgen von Unregelmäßigkeiten oder betrügerischen Handlungen werden von der Gemeinschaft getragen sofern nicht Fahrlässigkeit vorliegt, die den Verwaltungen der Mitgliedstaaten oder den von diesen beauftragten Stellen anzulasten ist.

...

Article 8 (Dutch text)

...

3. De Gemeenschap draagt de financiële gevolgen van de onregelmatige verrichtingen of fraudes, behalve in geval van nalatigheid van de overheidsdiensten van de Lid-Staten of van hun organen.

..."

The antepenultimate recital of the preamble to the proposal for a regulation was worded as follows:

"...

Adequate measures must be taken to prevent, repress and make good any irregularity or fraud; however, it is not possible to exclude the possibility that irregular or fraudulent transactions may be discovered subsequent to the intervention by the paying bodies or that all the sums paid may not be recovered; it is therefore appropriate to settle the problem of the determination of financial liability for such losses; the principle most in conformity with the principle of Community financing of the common agricultural policy and which best takes account of the difficulty of localizing in a single Member State the origin of each such transaction consists in charging such losses in the last instance to the Community with the exception of negligence attributable to the administrative authorities or other bodies of the Member States.

. . ."

1 (b) *Article 8 of Regulation No 1723/72* of the Commission is worded as follows:

"The decision to make up the accounts mentioned in Article 5 (2) (b) of Regulation (EEC) No 729/70 shall cover:

(a) the determination of the amount of expenditure incurred in each Member State during the year in question, recognized as chargeable to the EAGGF, Guarantee Section;

(b) the determination of the amount of the financial resources still available in each Member State at the end of the year in question, representing the difference between total Community financial resources available at the beginning of the year or advanced during the year and the amount referred to under (a)."

1 (c) The general rules referred to in Article 8 (3) of Regulation No 729/70 are contained in *Regulation (EEC) No 283/72* of the Council of 7 February 1972 concerning irregularities and the recovery of sums wrongly paid in connexion with the financing of the common agricultural policy and the organization of an information system in this field (Official Journal, English Special Edition 1972 (I), p. 90) which contains, *inter alia*, the following provisions:

"Article 2

1. Member States shall communicate to the Commission within three months of the entry into force of this Regulation:

— the provisions laid down by law, regulation or administrative action for the application of the measures provided for in Article 8 (1) of Regulation (EEC) No 729/70, and

— the list of authorities and bodies responsible for the application of those measures and the main provisions relating to the role and functioning of those authorities and bodies and the procedure which they are responsible for applying.

. . .

Article 3

During the month following the end of each quarter, Member States shall communicate to the Commission a list of irregularities which have been the subject of the primary administrative or judicial findings of fact.

. . .

Article 4

Each Member State shall communicate without delay to the other Member States concerned and to the Commission

any irregularities which are liable to have effects outside its territory very quickly or which show that a new fraudulent practice has been adopted.

Article 5

1. During the month following the end of each quarter, Member States shall inform the Commission of all judicial or administrative procedures instituted with a view to recovering sums wrongly paid and shall supply the Commission with any information which is relevant in this respect.

2. At the same intervals the Commission shall be informed of the progress of the procedure referred to in the preceding paragraph and of the amounts which have been or are expected to be recovered and, where appropriate, of the reasons for abandoning legal proceedings.

3. Furthermore, as far as possible before a decision is given, the Commission shall be informed in detail of the reasons for partial or complete failure to recover sums due.

4. Where a judicial or administrative decision is given at the end of proceedings, Member States shall communicate that decision or the main points thereof to the Commission.

Article 6

1. Where the Commission considers that irregularities or negligence have taken place in one or more Member States, it shall inform the Member State or States concerned thereof, and that State or those States shall hold an administrative inquiry in which servants of the Commission may take part.

The Member State shall communicate to the Commission the report and the inquiry findings. If the Commission does not take part in the inquiry, it shall be kept informed of its progress by means of the quarterly communications provided for in Article 5.

...

3. Where the inquiry shows that there has been an irregularity or negligence, or where this is accepted by the Member State concerned following the procedure referred to in paragraph 2, the Member State shall institute as rapidly as possible an administrative or judicial procedure to establish formally that there has been an irregularity or negligence. It shall keep the Commission informed of the progress of the procedure in accordance with Articles 3, 4 and 5."

Article 14 of the Commission's proposal for a Council regulation concerning irregularities and the recovery of sums wrongly paid in connexion with the financing of the common agricultural policy and the organization of an information system, which it submitted to the Council on 16 October 1970 (Journal Officiel C 130 of 27 October 1970, p. 7), was worded as follows:

"Article 14

1. Before the financial consequences arising from irregularities or negligence are finally charged to the Community the Commission shall ascertain whether responsibility for the irregularities or negligence should be borne by the administrative authorities or other bodies of the Member States.

2. If, following that investigation, the Commission takes the view that the Community has suffered a financial loss as the result of irregularities or negligence attributable to the administrative authorities or other bodies of a Member State, it shall quantify the loss and inform the Member State

concerned, inviting it to submit its comments within one month.

3. After examining the observations submitted to it by the Member State within the said time-limit, the Commission shall, by decision, lay down the amount due to the Communities from the Member State owing to the irregular practice or negligence established, unless evidence is produced that the sums wrongly paid have been recovered in the meantime. The amount fixed by that decision shall be determined taking account of the observations of the Member State concerned.

4. The Member State concerned shall pay the amount due to the Communities within one month from the day of notification of the decision."

At the time of adopting Regulation No 283/72 the Council and Commission made the following statement (Document R/151/72 of 4 February 1972):

"As regards Article 1

(a) Where a Member State is of the opinion that it must finally bear the financial consequences of irregularities or negligence attributable to its administrative authorities or other bodies it shall inform the Commission indicating the amount which it is to bear.

(b) Where a Member State is of the opinion that the irregularities or negligence are not attributable to its administrative authorities or other bodies within the meaning of Article 8 (2) of Regulation No 729/70 and that the Commission must bear the financial consequences thereof it shall submit to the Commission an explanatory memorandum.

If the Commission ... takes the view that the financial consequences of those irregularities or negligence should not be borne by the Community it shall contact the Member State concerned and then initiate an exchange of views within the EAGGF Committee.

(c) In the light of knowledge acquired in this way the Commission shall report to the Council on the manner which it deems most appropriate to clear up the unresolved cases referred to under paragraph (b), which report shall be accompanied, where appropriate, by proposals for solutions to be adopted by the Council in order to resolve differences of that kind.

As regards Article 3

Irregularities within the meaning of this regulation shall include any infringement, whether or not intentional, of a provision of a legal nature."

B — Submissions and arguments of the parties

1. The observations of the *applicant* concerning the principles relating to the financing of intervention measures relate primarily, to case No 10 and, secondarily, to the other cases referred to under IV below.

1 (a) In its opinion, the Commission did not take account of Article 8 (2) of Regulation No 729/70 (hereinafter referred to as "Article 8 (2)"): in the context of that provision and independently of the question whether, in particular cases, expenditure was incurred in accordance with Community provisions the Commission should have examined whether the financial consequences should be borne by the Community.

1 (b) In the applicant's view that provision provides that the Community must bear the consequences of irregularities or negligence where recovery of

the sums paid is no longer possible or must be ruled out for other reasons, unless the irregularities or negligence are attributable to the administrative authorities or other bodies of the Member State concerned. In that case the Member State should bear the burden of the expenditure incurred. That principle is applicable independently of whether the irregularities or negligence are due to infringements of the law committed by third parties (individuals) or to the wrongful conduct of the administration. The Commission expressed the same opinion in a working paper dated 2 December 1974 (Document VI/157/74). While it there defines "mistakes and administrative negligence" as irregularities in the broad sense, it nevertheless recognizes indirectly that infringement of rules of Community law, due to the wrongful conduct of the administration, must form part of the procedure for attributing liability. It was only in its working paper of 16 October 1976 (Document VI/192/75) on the procedure, practice and consequences of the clearance of accounts that the Commission maintained that the scope of Article 8 (2) does not include irregularities and negligence on the part of persons outside the administration.

The Commission's interpretation takes into account neither the wording nor the objectives of Article 8 (2). In view of the fact that the Member States apply Community rules not only in their own interest but also in that of the Community, it would seem to be justified to apportion between the Community and the Member States the risks arising from the application of those rules. That is only possible, however, if the scope of Article 8 (2) is not restricted to irregularities and negligence attributable to third parties only. It is also necessary to take account of difficulties arising from the application of directly applicable Community law. Often it is necessary to take a decision very quickly without its being possible to obtain a statement such as to commit the Commission. In that case mistaken interpretations, made in good faith, should not be excluded. The effect of the Commission's view is that it must decide alone, in the course of the procedure for discharging the accounts, whether Community law has been infringed. When consulting the Fund Committee several governments emphasized, in particular, that it is unacceptable that the Commission should wish to determine finally the expenditure to be borne by the Member States without the States being able to co-operate effectively (they are merely consulted). Furthermore, stress was placed on the considerable difficulties which refusal to recognize expenditure entails for the Member States as they have to ask for corresponding national appropriations from their parliaments and justify the use of such funds to their auditing authorities.

1 (c) In the view of the applicant the procedure for the discharge of accounts and the procedure for attributing liability are two different questions which, as is shown by the rules governing them, must be examined from different points of view. There nevertheless exists a link between the two procedures in so far as in the terms of Article 5 (2) (b) of Regulation No 729/70 discharge of the accounts is not possible while the procedure for attributing liability has still to be applied. By taking its decision without either carrying out an examination, which is here obligatory, as to the attribution of liability or registering a reservation to that effect, the Commission acted wrongfully. Its decisions should therefore be annulled.

1 (d) The fact that the Commission failed to examine the attribution of liability in accordance with Article 8 (2) cannot be justified by the fact that a procedure for attributing liability was not yet applicable. Even though the implementing provisions referred to in Article 8 (3) of Regulation No 729/70 have not been adopted it is in fact possible to apply the procedure for attributing liability by extrapolating on the basis of Article 8 (2) and of the statement made by the Council and the Commission when adopting Regulation No 283/72 (Document R/151/72). Because it was not possible to reach an agreement and because the entry into force of Regulation No 283/72 could no longer be delayed, that statement was made in order to provide at least for provisional rules for the procedure for attributing liability.

According to a statement to be inserted in the minutes, made by the German delegation at the time of the discussion of the draft Regulation No 283/72 and which was not contradicted by the Commission or by any other delegation, any wrongful act on the part of the administration of a Member State must be regarded as negligence. That concept should also extend to negligence within the meaning of Article 8 (2).

In the applicant's opinion the wording of Article 8 (2) gives sufficient indications to enable criteria to be established on the basis of which the financial consequences of irregularities or negligence on the part of a Member State may be attributed to it. If, in accordance with that provision, a distinction were drawn between irregularities and negligence attributable to the Member State and irregularities or negligence which are not so attributable it could be accepted that that attribution requires the existence of some wrongful conduct in the sector falling within the responsibility of an administration. That would mean that all conduct which is merely objectively wrongful cannot lead to the attribution of liability to the Member State concerned. Such apportionment of the financial risks appears to be indispensable, particularly in order to avoid problems with the expenditure incurred in financing the common agricultural policy and to maintain the best possible relations between the Community and the Member States.

In the aforesaid statement the Council and the Commission adopted provisional measures relating to rules for the application of the procedure for attributing liability. In the present instances the Commission did not submit to the Council the report in question therein. Furthermore, the EAGGF Committee was not consulted in relation to the attribution of liability.

1 (e) The decisions of the Commission are invalid because they were adopted without a prior examination relating to the attribution of liability or because the decision as to the discharge of the accounts should have been adopted subject to an examination of the attribution of liability. If the procedure for attributing liability had been applied the result must have been that the Community should bear the expenditure in question, as the Federal Republic of Germany is guilty of no reprehensible conduct in the field subject to the responsibility of its relevant administrative authorities.

2. Before stating its point of view on the matters of principle, the *Commission* observes that it has already defined that point of view in a succinct form in the working paper of 16 October 1975 (Document VI/192/75) on which its decisions of 2 December 1975 are based (see point 1 (b)).

2 (a) The discharge of the accounts consists of a binding decision determining the expenditure of the Member States in the course of a given financial year which is finally to be borne by the Community. Discharge is therefore not a mere internal accounting operation which requires no formal measure by way of decision, as is expressed by Article 8 (a) of Regulation No 1723/72. Such recognition of expenditure is necessary as Community financing is restricted to measures taken in accordance with Community provisions. Regulation No 729/70 defines that point at Article 2 (1) and Article 3 (1). It is that specific definition which, in the view of the Commission, justifies the introduction of those provisions which, for the rest, merely repeat the content of Article 1 (2).

The powers conferred on the Commission in this respect are fully in conformity with the procedure laid down in Article 108 (3) and Article 110 of the Financial Regulation of 25 April 1973 (Official Journal L 116 of 1 May 1973, p. 1).

Moreover, the discharge of accounts is, as regards its effects for the Member States, not fundamentally different from the decision which the Commission had to take concerning aid from the Fund after consulting the Fund Committee under the previous financial arrangements of Article 10 of Regulation No 17/64.

Finally in this context the Commission points out that the procedure for the discharge of accounts gives the Member States a very wide right to voice their opinions. In the Commission's conception the procedure includes a bilateral and a multilateral phase, the latter consisting of consultation with the Fund Committee on draft discharge decisions. The Commission refers in this respect to the aforementioned working paper (Document VI/192/75 of 16 October 1975). Legal protection against decisions taken in the context of that procedure is afforded by Article 173 of the Treaty.

2 (b) Article 8 (2) of Regulation No 729/70 relates only to "irregularities or negligence" attributable to (third party) individuals. That is evident from the position of that provision in the system of the regulation, read in conjunction with Regulation No 283/72, and from its origins and the objective which it pursues. The Commission refers in this respect to the first paragraph of the article in question and to Article 8 and the antepenultimate recital in the preamble to the draft regulation No 729/70, which the Commission submitted to the Council on 16 July 1969. Regulation No 283/72 also has the character of a regulation directed at individuals. This is evident in particular from the recitals in the preamble to the regulation, which refer to intensifying "the campaign against irregularities" and "fraudulent practices", and from Article 3 and Article 6 (3) of the regulation. The idea of undertaking a procedure against an administration acting in a manner which was legally wrong or negligent is rather paradoxical. On the other hand a procedure of that kind could very well be undertaken against officials of the civil service of a Member State.

It is true that at the time of the discussions on the proposal for Regulation No 283/72 within the Committee of Permanent Representatives the German delegation issued a statement to the effect that "any wrongful act on the part of the administration of a Member State" should be considered "an irregularity within the meaning of this regulation". The Commission notes,

however, that that statement was not included in the minutes of the Council.

Regarding the definition of the concept of "irregularity" the Commission refers to the statement made by the Council and the Commission at the time of the adoption of Regulation No 283/72.

The working paper of 2 December 1974 (Document VI/157/74, see point 1 (b)) to which the applicant refers was never approved by the Commission. Furthermore, when that document was discussed the departments of the Commission did not maintain the point of view expressed therein.

If there were a financial loss due exclusively to the wrongful conduct of a Member State it is only logical that the Member State should also bear the financial risk of its acts. However, a financial loss due to the conduct of a third party would constitute a breach in the sphere of responsibility of the Member State and it would be appropriate to release the State from the financial risk assumed by it. In addition there is also the fact that irregular practices often concern the territories of several Member States, thus making it impossible to determine the location of the factors constituting the irregularity. These considerations come to the fore in the antepenultimate recital in the preamble to the draft Regulation No 729/70 referred to above. In that draft the wording of Article 8 (2) was moreover more specific in this regard (Article 8 (3) of the draft).

The Commission further argues that the German text of Article 8 (2) of Regulation No 729/70 has become ambiguous, in particular by virtue of the introduction of the word "Versäumnis", which is rendered in the French text and in the other languages by "negligence", which corresponds rather to the term "Fahrlässigkeit". Examining the German text in isolation one might be tempted, from a purely linguistic point of view, to consider that a case of "Versäumnis" has occurred when a Member State is guilty of an omission in breach of the obligations incumbent upon it. That interpretation however would render incomprehensible the distinction drawn by the provision between attributable and non-attributable negligence; any omission in breach of obligations would clearly be evidence of negligence which constitutes the only reasonable criterion for the attribution of liability.

Examination of the Dutch text, which is in conformity with the French text, reveals that the concept of "nalatigheid" could also apply to the conduct of individuals. This interpretation, however, renders superfluous the concept of "negligence" which is covered by that of "irregularity". If, in this context, "negligence" was intended to signify negligent ("fahrlässig") action on the part of the administration then in the Commission's view one comes up against the same logical requirements as in the German text but to a still greater degree: is is necessary, in fact, to examine whether the negligent ("fahrlässig") conduct of the administration must be attributed to negligence on the part of the administration and must therefore be attributed to it — which is meaningless.

The Commission takes the view that that meaningless situation can be avoided only if, in interpreting the provision in question, reference is made to the original wording of the proposal of the Commission and if the concept of "nalatigheid" or "negligence" at the beginning of Article 8 (2) is disregarded as an addition devoid of meaning. On that interpretation the meaning which the Commission gives to the text must necessarily be accepted, taking account of the logic of the wording and without

distorting the text: the financial consequences of fraudulent transactions or other irregularities committed by third parties must be borne by the Community in so far as they are not attributable to negligent conduct of the part of the Member States.

As the word "negligence" was inserted without explanation into a working paper of the Council of 14 January 1970 (Document R/61/70) and as there is no written evidence that the amendment was discussed, it is impossible to regard it as a substantive amendment to the Commission's proposal. It would, moreover, be surprising to find an attempt to amend the principle laid down by Regulation No 17/64 concerning the power of the Commission to decide on aid from the Fund towards expenditure by the Member States without its being expressed clearly or confirmed in the preparatory documents.

The Commission states that its subsequent submissions concerning the attribution of liability and the procedure for attribution assume particular importance if the fundamental conception of the applicant relating to the interpretation of Article 8 (2) is held to be correct.

As regards the substantive "criteria for attribution" the Commission is basically in agreement with the applicant's view. Derogation from the principle of the charging to the Community of the financial consequences in the factual conditions set out in Article 8 (2) is possible only where "the consequences of irregularities or negligence [are] attributable to administrative authorities or other bodies of the Member States".

Article 8 (2) of Regulation No 729/70 lays down neither the circumstances in which liability must be attributed nor the time at which that must be done, in contrast to the text proposed by the Commission which states that there must be negligence on the part of the Member States. However, even in the absence of that express specification, the current provision could be interpreted in the same sense as the proposal. That would, in essence, produce the same result as the interpretation stating, for example, that a condition for the attribution of liability is "conduct which is open to criticism" for which an administration is to be held responsible.

As the general rules referred to in Article 8 (3) have not yet been adopted the definition of the concept of "conduct which is open to criticism" must be sought in the application of the law by way of interpretation. In defining that concept, on no account may subjective elements appertaining to the official executing the act be taken into consideration.

If an observer has *a priori* reasonable doubts as to the correctness of a given legal interpretation, the national administration should be invited to attempt to dispel those doubts, for example by consulting the Commission. If it does not do so it lays itself open to the charge that it may have misinterpreted a provision and it would also have to bear the financial consequences thereof.

This view is necessary for the actual application of Community law in order to avoid the national administration's being as it were awarded a premium for having applied Community law without due consideration.

2 (c) In the Commission's view there does not exist a procedure for attributing liability in the legal sense. As the Council

was unable to reach agreement on the procedure for which the Commission made provision in Article 14 of its proposal for Regulation No 283/72 the general rules are applicable pursuant to Regulation No 729/70, that is to say the provisions laid down for the discharge of accounts.

The existence of a joint statement by the Council and the Commission made at the time of the adoption of Regulation No 283/72 does not affect that position. By failing to take account of the procedural rules laid down in those minutes the Commission has at the most merely infringed a sort of "gentleman's agreement" and should bear the political responsibility therefor. That statement does not imply that the Commission's powers are affected by the procedure laid down therein. In any event it does not constitute the basis for a power of decision on the part of the Council, even to lay down outline provisions. The report which the Commission was to submit to the Council under paragraph (c) of the statement was intended only to provoke discussion at the highest level, as the Commission was certainly expected to take account in its decision of the views of the Council. The fact that the report should, "where appropriate", be accompanied by proposals relating to solutions to be adopted by the Council can only constitute a reference to the ever-present possibility of resolving a problem arising in a particular case in general terms and for the future, by means of a legal measure adopted under the normal legislative procedure.

The possibility for the Council to intervene in such individual cases is, moreover, capable of having a detrimental effect on the institutional balance of the Treaty. Furthermore, the Council has a tendency to impose "political" solutions on cases submitted to it. The prospect of such a political compromise might encourage the Member States to oppose, in the first instance, the attribution to them of the financial burden of "irregularities", to submit the matter to the Council and to find, once Community law is applied, a solution which is in their national interest. Finally, in contrast to the Commission, the Council is not in a position from an administrative point of view to deal with numerous individual cases.

The Commission associates itself without reservation with the statement proposed by the French delegation for the minutes drawn up at the time of the adoption of Regulation No 283/72 by the Council, which does not seek to make the Council a conciliatory body but to implement conciliation procedures within the EAGGF Committee, that is to say within an agency of the Commission.

2 (d) The Commission does not believe that the considerations of principle relating to the apportionment of the financial risk between the Community and the Member States put forward by the applicant can have the effect of creating a fundamental derogation from its conclusions. In its opinion all thoughts on this matter must be based on the principle that the Community finances only measures which are adopted in accordance with Community provisions.

It appears difficult to reconcile the applicant's view with the wording of Articles 2 and 3 of Regulation No 729/70, unless one gives a quite general significance to the words "refunds ... granted in accordance with the Community rules ... shall be financed ..." which, from the point of view of linguistic usage, is ruled out by the fact that Article 8 (2) contains an exception to that view and therefore suggests a conclusion *a contrario.*

In particular, it is not possible to reconcile such a view with the fact that the Member States apply the Community provisions in question upon their own responsibility and not "at the request of" the Community or as a "subordinate institution" of a higher Community authority. The administrative authorities of the Member States are not bound by instructions of the Community executive and furthermore the Commission does not possess a supervisory power within the usual meaning of administrative law. The Commission is merely able to call attention to infringements recorded by it, by means of opinions which are not binding, in the context of its bilateral contacts or in existing committees. The counterpart of the application of Community law by Member States upon their own responsibility is precisely the obligation to bear the financial risk of an incorrect application of that law.

This conclusion cannot be affected by the fact that the application and interpretation of Community law sometimes raise practical difficulties: such difficulties can often be resolved when the measure is being prepared by consultation with the Commission or in the context of numerous committees and so on; the remaining instances should be extremely rare; where necessary, payments could either be delayed or made subject to reservation.

Nevertheless, some exceptions do exist to the principle put forward by the Commission, for example in cases of irregularities on the part of third parties — Article 8 (2) of Regulation No 729/70 — where the Commission has itself occasioned the incorrect application or where it may be held responsible for the incorrect application for another reason: see in this respect the situation resulting from the judgment of the Court of Justice delivered on 12 November 1974 in Case 34/74 *(Roquette* v *France* [1974] ECR 1217).

The Commission is not convinced by the applicant's argument that the Commission's refusal to recognize certain expenditure could lead to budgetary consequences for the Member States. In the opinion of the Commission, the Member States must take budgetary measures in advance to deal with additional charges. Moreover, the Member State should not undertake those additional charges so suddenly as to give rise to difficulties in payment; in fact the mandatory procedure makes it possible to foresee a decision of refusal on the part of the Commission in good time. Nevertheless, if a Member State were faced with real fiscal obstacles, it would be possible to find, with the co-operation of the Commission, practical means of overcoming the problem.

3. The *applicant* replies that the Commission's opinion that the EAGGF finances only measures which are in accordance with the Community provisions is not in conformity with the terms of Article 2 (1) and Article 3 (1) and, furthermore, does not comply with the system of Regulation No 729/70. In the applicant's view the wording of Articles 2 and 3 of that regulation does not lend itself to a restrictive interpretation but, on the contrary, intentionally leaves great latitude: those provisions refer to all the refunds and interventions laid down by Community law which occur in the context of the common organization of the market and in the performance of tasks assigned to the Community; the fundamental rules are decisive; formal requirements on the other hand are of merely secondary importance.

The applicant emphasizes that it shares the Commission's point of view on the concept of "irregularities" as defined in the declaration made by the Council and the Commission at the time of the adoption of Regulation No 283/72 (Document R/151/72). That is not the case with the concept of "negligence" which, in the applicant's view, has a particular significance which is quite distinct from that of "irregularities", as the latter term refers to the acts of third parties. The fact that "negligence" cannot be a mere confusing interpolation or an unsuccessful attempt at improving the wording is evident, in the applicant's view, from the following facts: at the time of the discussions preceding the proposal for Regulation No 729/70, which originally referred only to "irregular" or "fraudulent transactions" ("agissements frauduleux", "betrügerischen Handlungen"), agreement was reached on the idea that the field of administrative action which is contrary to the law is covered only imperfectly by the concept of "irregularities", both as regards the legal rules and as regards the concept; it was agreed, therefore, to include the administrative field in the procedure for attributing liability; at the time all those participating in the session were unanimous in considering that irregularities on the part of individuals may frequently be coupled with negligent conduct on the part of the national administrations; this idea was, for the first time, at the origin of the use of the concept of "negligence" in the text of 15 January 1970 (Document R/61/70). The fact that the regulation finally adopted differs in this respect from the original proposal of the Commission shows that the proposal, in the version submitted by the Commission, was not accepted by the Member States. No conclusion of a binding nature can therefore be derived from the version which was not adopted. Consequently, the Commission cannot contend that "negligence" merely constitutes an omission in breach of obligations. On the contrary, negligence may also consist of a wrongful act.

As regards the interpretation of the concept of conduct which is open to criticism the applicant shares the Commission's view that not only the subjective factors appertaining to the official executing the measure but rather the opinion of an objective observer who is well versed in the matter must be taken into account.

Regulation No 729/70 does not indicate in a precise and concrete way how liability is to be attributed. However, Article 8 draws a distinction between conduct which is attributable and conduct which is not. According to the applicant the origin of that distinction can only be as follows: a Member State must not be liable for the financial consequences of wrongful conduct by its officials unless the wrongful conduct is also reprehensible ("vorwerfbar"). In this respect decisive importance should be attached to the external circumstances which are at the origin of the wrongful conduct by the administration, for example, the degree of causality and the extent of the infringement having regard to the aims of the rules infringed. All these points are in conformity with the opinion of the Commission.

The question of the point at which objectively wrongful conduct or an error may be said to be reprehensible may remain open in view of the fact that in the cases in question there was neither conduct of a reprehensible or indefensible nature which was contrary to obligations nor an error on the part of the officials who executed the measure. However, it follows from the Commission's opinion that reprehensible

conduct cannot be said to exist *prima facie* even in cases of simple negligence ("Fahrlässigkeit"). On the contrary, its officials took their decisions after much thought and with the necessary care.

The Commission's opinion that "Versäumnis" means an omission in breach of obligations and that the omission is clear evidence of negligence is not relevant, for two reasons: first, the Commission overlooks the fact that "Versäumnis" may consist not only of an omission but also of a wrongful act; secondly, a distinction should be drawn between conduct which contrary to given obligations and the ensuing consequences regarding liability ("Zurechnung"). Conduct contrary to obligations as such gives no indication as to the extent of liability or its reprehensible nature.

Under Regulation No 729/70, consequently, it is necessary to verify successively in the following order the points set out below:

— Are the payments made by the Member State in question provided for by Community law as refunds or intervention and do they fall within the context of the common organization of the agricultural markets?

— Have the said payments given rise to "irregularities" or "negligence" in the widest meaning of the term?

— Are the "irregularities" or the "negligence" the act of the Member State concerned and, therefore, must they be attributed to it?

In the cases in issue the Commission reduced those three stages to a single examination; it reduced the applicant's legal protection. This became evident from an examination of the individual cases in dispute.

As regards the procedure for attributing liability the applicant replies that the statement made by the Council and Commission at the time of the adoption of Regulation No 283/72 (Document R/151/72) assigned a specific role to the Council, with the agreement of the Commission. The mere facts of its composition and its other functions mean that the participation of the Council may lead more easily to a reconciliation of interests in relations between the Commission and the Member States than is possible in the case of a unilateral determination by the Commission.

Even if it was only a "gentleman's agreement" the Commission thereby created a legitimate expectation which has to be respected, as all measures of administrative authorities are subject to compliance with the principle of good faith. By the very aim which it embodies the verbal statement is conceived as a legally binding rule. It is on the very subject of the attribution of liability that a conflict of interests between the Community and the Member States is inescapable and co-operation between the Member States, the Commission and the Council is necessary, the latter in particular being given in this respect the task of reconciling those interests. Without its participation the risk would arise of an interminable series of cases before the Court of Justice. The objective of the implementation of the Council's task of integration could not be achieved otherwise than by giving the said declaration a mandatory nature.

4. In its rejoinder the *Commission* observes, with regard to the interpretation of Article 2 (1) and Article 3 (1) of Regulation No 729/70, that the words "in accordance with the Community rules" would be a merely superfluous and incomprehensible addition if the applicant's interpretation was correct. In that case it would have been sufficient to state that "refunds (or intervention) . . ., granted within the framework of the common organization of the agricultural markets, shall be financed".

The Commission dismisses the idea that the effect of the point of view supported by it would be that any infringement of a given formal provision would effectively mean that the refund or intervention measure would, on that ground, be adopted in infringement of the Community provisions. In its view in this field also a distinction must be drawn between essential and non-essential procedural requirements. It also takes the view that an infringement of the latter cannot mean that the refund or intervention should be denied Community financing. Furthermore, this corresponds with the Commission's practice as is shown by the attitude which it adopted in case No 4 and in Case 15/76, *French Government* v *Commission.*

The explanations submitted by the applicant on the origins of Article 8 (2) of Regulation No 729/70 establish, according to the Commission, only that from the very beginning the applicant advocated a different interpretation but that that interpretation was not adopted by the other delegations.

The Commission does not believe that the processes leading up to the adoption of that provision enable the conclusion to be drawn that, by modifying the text of the provision, the Council wished to introduce therein an entirely different concept regarding the apportioning of financial charges; if that was indeed the intention of the Council it should at the very least have been expressed in a clear form in the final version.

The Commission rejects the applicant's assertion that it was agreed to include administrative matters in the attribution procedure. It is none the less undeniable, in the Commission's view, that all the parties concerned accepted that irregularities on the part of individuals are often coupled with negligent conduct on the part of the national administration; it is that factor which probably led to the introduction of the concept of negligence; however, it is precisely that factor which shows that originally the starting point for the application of that provision was irregularities on the part of third parties.

As regards the concept of conduct which is open to criticism the Commission states that the problem is comparable to that arising in the law concerning the liability of the State and its officials: in this field comparative studies show that in practice any conduct on the part of the administration which is contrary to its duties creates a presumption of liability or that the conduct is open to criticism.

Similarly, the concept of simple negligence in contrast to that of gross negligence is of little value in the present instance as it was elaborated in the field of civil law with regard to wrongful conduct by individuals. Thus in the field of Community liability under Article 215 of the Treaty the Court of Justice rejected as irrelevant the objection advanced by the Commission to the effect that supervisory organizations

cannot, under a general legal principle, be rendered liable, except in the case of gross malfeasance; the Court on the contrary merely referred to the principle that the Commission, like the governments of the Member States, has, in applying Community law, a general duty of care and vigilance (judgment delivered on 14 July 1967 in Joined Cases 5, 7 and 13 to 24/66 *Kampffmeyer and Others* v *Commission* [1967] ECR 245 at p. 262). The Commission argues that those considerations are equally valid in relation to the "liability" of the Member States at issue in the present case regarding the apportionment of the financial burden. In the Commission's view, in order to determine the degree of care required account must be taken of the possibility of eliminating that doubt by requesting the Community administration for further details.

The Commission does not understand the criticism made by the applicant with regard to requests for further details sent to the Commission. In its view it is absurd to claim that the obligation to request further details in itself leads to unacceptable legal uncertainty in trade or a type of barrier to the application of Community law: on the contrary, such requests for further details have increasingly appeared to be the best means of eliminating continuing legal uncertainty and of contributing to the effective and uniform application of Community law; if nevertheless the national administration is obliged to take decisions which do not allow it the time to make such a request for further details other possibilities for avoiding a conflict exist; however, if, in exceptional circumstances, no such possibility exists the conclusion may perhaps be reached at this stage that the Member State in question is not guilty of conduct which is open to criticism.

The Commission emphasizes that the procedure provided for in the statement made at the time of the adoption of Regulation No 283/72 cannot have the effect of leading to the adoption of a decision relating to individual cases. The Commission does not see from what the applicant deduces the legally binding nature of that rule: it is clear from the decided cases of the Court of Justice that even Council resolutions do not have such binding force; the same is true *a fortiori* for mere statements contained in the minutes. Even if that statement gave rise to an expectation it could have no effect on the question of the apportionment of financial burdens. The protection given against any breach of the principle of the legitimate expectation of the persons concerned can in fact only protect the latter against losses which they may suffer by virtue of steps taken by them on the basis of that expectation.

The Commission can certainly not accept the view that differences of opinion concerning the correct application of Community law and raised by the question of the standard of care which the national administrative authorities must show in this field must primarily be regulated by the Council in the context of a compromise between the interests at stake. The present instance specifically concerns not the search for a political compromise but the regulation of individual cases with the aid of legal criteria. In the opinion of the Commission the course to be followed should be the implementation in the context of the EAGGF of all conciliatory

procedures in order to settle amicably any differences of opinion. The procedure within the Council would entail the risk that the Member States might be little inclined to accept an amicable settlement by way of a preliminary procedure because they might hope none the less to impose their views by way of a political compromise. The danger would exist therefore that the Council might be blocked on the question of the discharge of the accounts. The risk would also exist that such cases would be regulated not on the basis of the legal criteria defined in the provisions of the regulations on the organization of the markets and the financial regulations but by way of a general political compromise; that would be incompatible with those provisions and consequently contrary to the Treaty.

IV — The individual cases

A — *Transport costs occasioned by the termination of contracts (case No 2)*

This problem, which relates to an amount of DM 63 841.15 for the 1971 financial year and of DM 243 992.66 for the 1972 financial year, has already formed the subject-matter of Case 47/75 *Federal Republic of Germany* v *Commission*. In its judgment of 4 May 1976 ([1976] 1 ECR 569), the Court of Justice interpreted the relevant provisions in the sense advocated by the applicant, that is to say to the effect that the storage costs in issue were not necessarily covered by the flat rate amount laid down to cover the costs of storage.

In its reply the applicant states that the present action seeks, in accordance with that decision, to obtain rectification of the discharge of the accounts for 1971 and 1972 and consequently to credit the applicant with the corresponding amounts. In its rejoinder the Commission states that it will take the necessary steps to amend the contested decisions accordingly. By Decision 78/710/EEC of 28 July 1978 — that is, after the end of the procedure — amending Decisions 76/141/EEC and 76/147/EEC concerning the discharge of the accounts presented by the Federal Republic of Germany in respect of the European Agricultural Guidance and Guarantee Fund, Guarantee Section, expenditure for 1971 and 1972 (Official Journal L 238 of 30 August 1978, p. 25) the Commission made the amendments rendered necessary by the aforesaid judgment of the Court of Justice. By letter of 2 October 1978 the applicant declared that in view of the adoption of Commission Decision 78/710/EEC the dispute in case No 2 is settled.

B — *Aid for skimmed-milk powder used for animal feedingstuffs (cases Nos 4 & 5)*

1. Facts

1. Article 2 of Regulation No 986/68 of the Council of 15 July 1968 laying down general rules for granting aid for skimmed milk and skimmed-milk powder for use as feed (Official Journal, English Special Edition 1968 (I), p. 260) provides that aid may be granted for "skimmed-milk powder which has been denatured according to methods to be determined" and for "skimmed-milk powder and skimmed milk produced and processed in the dairy and used in the manufacture of compound feedingstuffs".

2. Article 3 of that regulation provides that "The aid shall be paid by the intervention agency of the Member State within whose territory is situated . . . the farm or other concern which denatured the skimmed-milk powder or used it in the manufacture of compound feedingstuffs".

However, a transitional derogation from the scheme described above is provided by Article 3 of Regulation No 986/68 as amended by Regulation No 673/71 of 30 March 1971 (Official Journal, English Special Edition 1971 (I) p. 185). The latter regulation authorized, until 30 June 1971, the Member State in which the skimmed-milk powder was produced to pay the aid even if the milk was denatured or used in the manufacture of compound feeding-stuffs within the territory of another Member State.

3. Where use was made of the authorization thus laid down the system for the granting of aid had to comply with the rules laid down by Article 7 of Regulation No 1106/68 of the Commission of 27 July 1968 on detailed rules for granting aid for skimmed-milk powder for use as feed (Journal Officiel L 184 of 29 July 1968, p. 26) as amended by Article 1 of Regulation No 332/70 of the Commission of 23 February 1970 (Official Journal, English Special Edition 1970 (I), p. 117). That article provides that:

"...

1. Aid shall be given by the forwarding Member State only when the skimmed-milk powder has been placed by the importing Member State under customs control or equivalent administrative control involving the lodging of a deposit equal in amount to the aid granted under Community provisions in the forwarding Member State.
2. Proof of control by the importing Member State shall be the control copy provided for in Regulation (EEC) No 2315/69."

Regulation (EEC) No 2315/69 of the Commission of 19 November 1969 on the use of Community transit documents for the purpose of applying Community measures for verifying the use and/or destination of goods (Official Journal, English Special Edition 1969 (II), p. 515) introduced the control copy referred to in Article 7 (2) of Regulation No 1106/68. The consignor makes out the original and at least one copy of the document and the customs office of departure returns the original to him. The customs office of departure retains one copy while the original accompanies the goods. The information on the control copy enables the customs office of the Member State of destination to establish that a control must be effected on the goods.

The customs office of destination subsequently marks on the original control copy that the control has been effected; the document is returned to the customs office of departure which then has the proof required by the provisions of Article 7 (2) of Regulation No 1106/68 which alone justifies payment of the aid by the exporting Member State. The security is released only for those quantities of skimmed-milk powder in respect of which proof of denaturing or processing in accordance with the provisions in question is submitted by the processor.

4. In answer to a question from the Federal Ministry of Food the Commission, by telex message of 12 October 1971, replied that:

"In cases where the time of the placing of the goods under control can no longer be established clearly and where the competent Italian authorities have finally refused to pay the aid, payment of that

aid by the Federal Government gives rise to no objection as in that case any risk of double payment is excluded . . ."

In the course of the preparation of the decisions relating to the discharge of the accounts the Commission extended that notice to all cases in which the goods had been placed under control after 30 June 1971.

5. In 1971 the competent authority in the Federal Republic of Germany paid aid amounting in all to DM 885 701.70 for skimmed-milk powder intended for denaturing in Italy although the control copy mentioned, as the date of placing under control, a date subsequent to 30 June 1971 or it was not possible to establish clearly that the placing under control had been carried out by 30 June 1971 at the latest (case No 4).

Before paying the aid the competent German authority asked the Italian State agency for intervention on the agricultural market (AIMA) to carry out a check. By a letter of 14 March 1972 the AIMA replied that:

"After a close examination of the situation and although it has not been possible to examine all the cases referred to us by the Bundesamt it can nevertheless be confirmed that it was legally impossible that the consignments in question, which are eligible for Community aid in the Federal Republic of Germany, were also able to obtain that aid in Italy, by virtue of the instructions given in Circular No 141 of 8 July 1971, a copy of which is attached, relating to the application of the second subparagraph of Article 3 (1) of Regulation No 986/68, which was issued by the Directorate General for Customs of the Ministry for Finance and by the Ministry for Agriculture and Forestry, Directorate General for the Economic Protection of Agricultural Products.

Even if such consignments obtained customs clearance in Italy after 30 June 1971 the procedure established by the Italian customs offices on the basis of Circular No 141 referred to above excludes the possibility that any of the said consignments of skimmed-milk powder might have been regarded by this agency as being eligible for aid pursuant to the Community rules which entered into force on 1 July 1971.

This legal situation will remain unchanged in the future even in respect of future applications for aid which may be addressed to this agency in respect of consignments notified by the Bundesamt.

It was in fact provided in the last paragraph of the said Circular No 141 that as regards consignments of skimmed-milk powder still accompanied by the transit receipt for control copy T1/T2 No 5 after 30 June 1971, the previous provisions, which specifically make provision for the aid to be granted by the exporting Member State, should continue to be applied."

In an addendum to Document VI/145/75 the Commission stated as the ground for its refusal to recognize that the said amount was chargeable to the EAGGF that proof that there was no double payment must relate to specific and individual cases and cannot consist merely of the affirmation that double payment was not possible under the provisions in force.

6. The applicant also paid the aid laid down for 140 tonnes of skimmed-milk powder without the originals of the T1/T2 control copies having been supplied. That aid amounted to DM 62 267.00 (case No 5).

The Commission refused to recognize that that amount was chargeable to the EAGGF on the ground that production

of the original T1/T2 control copy is the only evidence which may be accepted in justification of payment of the aid.

2. Submissions and arguments of the parties

(a) Aid for skimmed-milk powder used for animal feedingstuffs: presumption of double payment (case No 4)

1. The *applicant* takes the view that by producing the letter from the AIMA of 14 March 1972 it has supplied the proof required by the Commission relating to the exclusion of the possibility of double payment of aid in cases where the exact date of control in Italy before 1 July 1972 could not be clearly established. By requiring proof in relation to each individual case the Commission was acting contrary to the stance adopted by it when the problem was discussed within the Management Committee for Milk and Milk Products. This contradiction is clearly evident in the text of the addendum to Document VI/145/75: "... one must seriously doubt the practical possibility of establishing the necessary facts correctly so long after the operation in question."

2. The *Commission* observes that taking account of the wording of its telex message of 12 October 1971 the question whether it did not require the submission of proof for each individual case is, at the very least, open to doubt. That text refers in fact to certain "cases". The letter from the AIMA of 14 March 1972 shows that the Italian agency was not in a position to check the cases submitted to it and consequently it merely gave a general answer unrelated to the individual cases in question and setting out the legal situation then applicable.

The applicant is wrong to allege that the Commission has adopted a contradictory course of conduct: in cases where the date of control was doubtful the Commission asked for proof in each individual case; in cases where it appeared that the goods were placed under control after 30 June 1971 it was not able, logically, at the time of the discussion within the management committee, to require such proof, since at that time it was still proposing a strict conception of the amendment of powers relating to payment; the position finally adopted by it for those cases cannot be more liberal than the attitude adopted in cases where the date was in doubt.

The Commission argues, finally, that even on the basis of the applicant's view the objection must be raised that it applied Community law incorrectly: the applicant did not proceed in accordance with the information given at its request by the Commission in cases where the date when the goods were placed under control was in doubt; in referring to the letter of the AIMA the applicant cannot rely on the premise that its application of the law was correct.

3. The *applicant* replies that in the addendum to Document VI/145/75 Commission bases its refusal on the presumption of double payment; verification of such a presumption is impossible and is of no importance from a legal point of view. It is moreover for the Commission to prove that double payment was made.

It is evident from all the circumstances of the case that when the Commission replied in its telex message: "in cases ..." it was to be interpreted as meaning that it was in agreement with all the information submitted by the Member State concerned in so far as the

latter had not displayed negligence. It is in that sense that the initial effort of the applicant to produce proof in each individual case must be regarded, as showing that the applicant did all in its power not to lay itself open to criticism. It is for the Commission to express another point of view more clearly, for example by using an expression such as "in each individual case".

The letter from the AIMA refers to a certain procedure which was in fact implemented by the Italian customs and which excludes double payment. It is therefore not merely an argument relating to legal assessment. The applicant was bound and entitled to presume that that letter was correct. Had the Commission followed the procedure laid down in the statement made by the Council and the Commission at the time of the adoption of Regulation No 283/72 then if the Commission was in a position to prove that a double payment had been made it would have been possible to charge the expenditure only to Italy.

4. In its rejoinder the *Commission* emphasizes that the applicant, by its argument that the Commission should produce proof of double payment and that it was possible to charge the expenditure only to Italy, is effectively saying that in spite of the fact that the goods were placed under control after 30 June 1971 the applicant remained competent to pay the aid and that, consequently, any payments made by the Italian authorities were contrary to the provisions in force. In so saying the applicant takes no account of the amendment to the powers in question which has taken place in the meantime.

The proof required by the Commission could have been contained in a general letter if such a letter had confirmed that the consigments referred to by the German authorities in the request had not received and would not receive any aid in Italy. Although the letter from the AIMA referred to a certain procedure that means only that if the rules in force were correctly applied it was impossible for the aid to be paid.

(b) Inadequacy of the proof on the basis of which payment of the aid for skimmed-milk powder was authorized (case No 5)

1. The *applicant* explains that the control copies in question were lost in transit between the Italian authorities and the German customs offices.

None the less, the aids were paid and the security released only after the accompanying documents, customs clearance declarations and declarations by representatives of the firms seeking the aid had been submitted. Those documents constitute the requisite proof that the skimmed-milk powder was despatched to Italy and was there subject to control in good time. Furthermore, the risk of double payment is excluded, as witness the letter from the AIMA of 14 March 1972. In those circumstances the applicant took the view that it was not legally possible to refuse to pay the aid sought to the consignors.

2. The *Commission* emphasizes that the control copy is the only acceptable proof under Article 7 (1) of Regulation No 1106/68. A certain regard for formalities is inherent in the very nature of the control procedure appertaining to the payment of aids. If, in a particular case, a national administration held that proof

other than the specified documents was acceptable or necessary the value of the procedure would be diminished. The requirement of a strict and correct application od that procedure is also justified by reasons relating to the agricultural policy: the grant of financial benefits is justified only if it is guaranteed that the milk powder cannot re-enter the normal ambit of the market. In this respect the Commission refers to the judgment of the Court of Justice delivered on 22 October 1970 in Case 12/70 *(Craeynest* v *Belgian State* [1970]2 ECR 905). The letter from the AIMA is of no importance in the present instance where it has not even been established that entitlement to the aid existed. It is therefore not essentially a matter of merely avoiding the risk of double payment.

The Commission states finally that even if the view of the applicant relating to the applicability of Article 8 (2) of Regulation No 729/70 is accepted it must be held in the present instances that the applicant applied the law incorrectly: the applicant paid the aid although it was clearly established that the only proof accepted by Community law was lacking.

3. The *applicant* replies that the objective assigned to the payment of the aid by the regulations in question must be taken as the starting point: as the processing of skimmed-milk powder was carried out in the present instances in accordance with the provisions of Regulation No 1106/68 the mere absence of the control copy cannot be decisive.

The applicant states, in the alternative, that if the procedure laid down in the statement made by the Council and the Commission at the time of the adoption of Regulation No 283/72 had been followed it would have become evident that the difficulty of providing proof as to the processing of the milk powder is due to negligence on the part of the Commission: the control stamp of the Member State of destination is only affixed on a single document, whereas the general custom in commercial dealings is that documents of any importance should be drawn up in several copies. The provisions in question are therefore incomplete: they fail to cover the situation where a control copy is lost. The result of the investigation into the attribution of liability is therefore that the payments in question should be charged to the EAGGF.

In this instance the Commission is paying too much attention to formalities. The Community transit arrangements should not constitute an end in themselves. Certainly the grant of financial benefits is justified only if it is guaranteed that the milk powder in question cannot re-enter the normal ambit of the market. Precisely that point was taken into account by the applicant: the substitute proof accepted by it affords such a guarantee.

The applicant states finally that refusal to make the payments in the present case would have been penalized by its national courts. That shows that its national administrative authorities are not guilty of any irregularity or negligence, as there is no infringement of a rule of law.

4. The *Commission* emphasizes in its rejoinder that failure to comply with rules regarding essential procedural requirements entails consequences of a legal nature. The provision relating to the transfer of powers which is at the heart of case No 4 does not constitute such a rule. On the other hand, taking account of the clear and concise wording of Article 7 of Regulation No 1106/68 and of the objective of those arrangements, the binding nature of the

rule relating to the requirement of the control copy is evident. If the Member States were given discretion to assess the requirements which must be satisfied by the proof of entitlement to the aid, divergent practices would be adopted which would be incompatible with a uniform application of Community law.

The Commission recalls that, taking account of the provisions of Community law and the case-law of the Court of Justice, it is unlikely that the applicant would have been unsuccessful in cases brought against it before the national courts.

In the Commission's view the proofs accepted by the applicant enable it to be shown that the goods in question arrived in Italy but not that they were placed under control there.

In the Commission's view the arguments presented by the applicant in the alternative regarding the question of the attribution of liability are of little relevance: all the facts relied on fall outside the scope of Article 8 (2) of Regulation No 729/70; similarly, they do not constitute any of the exceptional cases in which the Community may be held responsible for the incorrect application of Community law by a Member State.

The Commission maintains that to allow the establishment of certain proofs by a single document is a widespread practice in Community trade; the movement certificate DD 4 at issue in Case 12/70 *(Craeynest)* is a good example. Furthermore, the Commission cannot permit a Member State to refrain from applying a Community provision which it regards as inadequate; otherwise the indispensable uniformity of application of Community law would be disrupted.

C — Aid for the purchase of butter by persons in receipt of social assistance (case No 8)

1. Facts

Regulation No 414/70 of the Council of 3 March 1970 laying down general rules relating to measures intended to increase the use of butter by certain categories of consumers (Journal Officiel L 52 of 6 March 1970, p. 2) as amended by Regulation No 2550/70 of the Council of 15 December 1970 (Journal Officiel L 275 of 19 December 1970, p. 1) authorized the Commission to decide that the Member States "may grant aids to permit the purchase of butter at reduced prices by persons in receipt of social assistance". The measure was to be applicable until 31 December 1971.

In application of that authorization the Commission adopted Decision 70/228 EEC of 24 March 1970 relating to the disposal of butter to certain categories of consumers in receipt of social assistance (Journal Officiel L 77 of 7 April 1970, p. 15). That decision authorized the Member States to pay to butter suppliers aid not exceeding. 1.45 units of account per kg on the purchase of a quantity of butter not exceeding 0.5 kg per month (Article 1, Article 2 and the second paragraph of Article 3). The butter could only be supplied to consumers in exchange for an individualized voucher (first paragraph of Article 3). The Member States were to take all necessary measures to ensure that the aid was granted exclusively for deliveries for which it was provided (Article 4).

That decision was repealed with effect from 1 May 1971 by Decision 71/166 of the Commission of 30 March 1971 (Journal Officiel L 88 of 20 April 1971, p. 14). At the 212th meeting of the Management Committee for Milk and Milk products on 17 March 1971 the

German delegation abstained from the vote on that measure.

In the Federal Republic of Germany voucher cards were distributed to recipients through the local social security authorities. The cards consisted of counterfoils each with two monthly vouchers. The Federal Republic issued the vouchers at the beginning of 1970 and 1971, on each occasion in one single operation in order to avoid excessive management and distribution costs.

The German Government acted on the premise that Decision 71/166 prohibited only the distribution of vouchers after 30 April 1971. It therefore honoured after 30 April 1971 vouchers distributed before that date.

The Commission refused to recognize the aid paid in the Federal Republic of Germany after 30 April 1971 as being chargeable to the EAGGF. The expenditure in question amounted to DM 17 930 880.40 in 1971 and DM 12 051 258.00 in 1972.

2. Submissions and arguments of the parties

1. The *applicant* states that even under the procedure applied by it the administrative costs amounted to around DM 6 million annually. To have issued the vouchers for shorter periods would have doubled the cost.

The Community rules in question make provision for neither the right nor the obligation for the Member States to make the vouchers subject to conditions or limits; nor does it contain any clause relating to adaptation. Until March 1971, therefore, the applicant was able to and had to take the view that the measures would be maintained at least until 31 December 1971. Consequently, it issued the vouchers for the period laid down in the regulations. That procedure was adopted for the administrative and economic reasons referred to above.

Decision 71/166 could not affect the validity of vouchers which had already been distributed, having regard in particular to the procedure followed in the Federal Republic of Germany, of which the Commission was aware. Persons who had received the voucher cards before 30 April 1971 had moreover thereby acquired legal rights which were so certain that they could rely on them until the end of 1971. Account must be taken, in this context, of the special nature of the persons benefiting from the scheme.

2. The *Commission* observes that Regulation No 414/70, as amended by Regulation No 2550/70, merely authorized it to take certain measures. The validity of that authorization and not the validity of measures adopted on the basis of the authorization was restricted to 31 December 1971. Furthermore, Decision 71/166 not only revoked the authorization to issue vouchers but also abrogated Decision 70/228, that is to say, the authorization for the Member States to grant those aids. It was therefore no longer possible to issue vouchers valid after 1 May 1971.

The measure in question was introduced in order to use up existing stocks of butter. It should, therefore, have followed developments on the market and have been abrogated when it was no longer justified from an economic point of view. That was also the reason why the validity of Decision 70/228 was not originally limited in time. A measure of abrogation confined to the distribution of vouchers would have been of no effect taking account, at the very least, of the procedure followed by the applicant for distributing the vouchers.

Holders of vouchers have no legal guarantees: primarily because the matter involves relations between individuals and the Member State in question which

are of no relevance for financing in the context of relations between the Community and the Member State; none the less, if such a right has arisen it merely shows that the applicant wrongly failed to prevent its creation. Furthermore, there was no reason to insert in Decision 70/228 a provision to the effect that the validity of the vouchers was to depend on the continuance of the measure decided on at a Community level; the organization of the voucher system was in fact entrusted in its entirety to the Member States.

The Commission states finally that even if the applicant's view as to the applicability of Article 8 (2) of Regulation No 729/70 is adopted it must be held that the applicant applied Community law wrongly in view of the fact that to an objective observer that application appears to be clearly contrary to the letter and the spirit of the Community provisions. The applicant's conduct must at the very least be regarded as extremely negligent, particularly having regard to the circumstances in which Decision 71/166 was adopted.

3. The *applicant* replies that even if it is accepted that the Commission's interpretation is well-founded the conditions for attribution are not fulfilled. The Commission is in fact guilty of negligence: Decision 70/228 makes no reservation as to the possibility of making subsequent amendments and fixes no time-limit; Article 4 of the decision provides solely that the butter shall be granted only to persons in receipt of social assistance and does not refer to any other obligation or to the possibility of withdrawal or the fixing of time-limits. It is even doubtful whether the applicant had the power to impose such a restriction. Article 1 of the said decision merely empowered it in fact to grant the aid in question in accordance with the conditions laid down in Articles 2 to 4. In general, the Member States cannot have the power to adopt restrictions which are not expressly provided for by Community rules without jeopardizing the achievement of uniformity of legal rules within the Member States. It is not, moreover, in the present case a question of details relating to the "organization of the voucher system", as the Commission believes. The Commission could have given notice, simply by means of a reservation relating to the possibility of amendment, that the measure was to be made dependent on the market situation, as it did in Article 5 of the decision of 17 December 1968 (COM(68)991 final) authorizing the Federal Republic of Germany to sell butter from public stocks at a reduced price in the form of concentrated butter.

The *a posteriori* invalidation or the withdrawal of the vouchers was impossible as, under German law, the persons holding the vouchers had acquired certain legal rights.

4. The *Commission* states, in its rejoinder, that it did not cause the applicant to apply Community law incorrectly. Under both national law and Community law it is neither necessary nor even customary to include in every legislative measure a provision recalling the obvious fact that the measure in question may subsequently be abrogated or amended; a time-limit need be fixed only in certain exceptional cases, for example where it is known in advance that rules are necessary only for a specific period; the decision of the Commission of 17 December 1968 nevertheless had to make provision for the possibility of amendments as otherwise sales contracts which had already been concluded could no longer have been made subject to the new rules.

The fact that Regulation No 414/70 did not specify a minimum duration is a consequence of the legal nature of the authorizations; the Council had drawn up a framework within which the Commission had the possibility but not the obligation to act. It could equally have confined itself to making partial use of the authorization. It is therefore incorrect to regard the partial exercise of an authorization as an infringement of its substance. The same applies to the authorization granted to the Member States by the Commission.

D — Sale of butter from intervention stocks at reduced prices (case No 9)

1. Facts

In order to take action to dispose of intervention stocks of butter during the 1968/69 milk year the Commission adopted Regulation No 1308/68 of 28 August 1968 on the sale of butter from public stocks for exportation (Journal Officiel L 214 of 29 August 1968, p. 10). That regulation laid down the obligation for the intervention agency to sell, subject to specified conditions, to all interested persons, butter which had been stored for at least four months (Article 1). The butter was to be sold at a price which was 5.5 units of account per 100 kg less than the intervention price (Article 2). The butter was to be exported within 30 days after "sale" by the intervention agency (Article 3).

Although the regulation was repealed by Article 5 of Regulation No 1893/70 of the Commission of 18 September 1970 on the sale of butter from public stocks (Journal Officiel L 208 of 19 September 1970, p. 13) it remained applicable to butter which had been sold in accordance with the repealed regulation. Regulation No 1893/70 entered into force on the third day after the day on which it was published, that is to say 22 September 1970 (Article 6).

During the 1971 financial year the applicant applied Regulation No 1308/68 interpreting the word "sale" contained in Article 3 thereof in the sense of "delivery". Consequently it sold butter ar reduced prices under the sales contracts which had been concluded before 22 September 1970 and it repaid the securities lodged where the butter was exported within 30 days of its removal from storage. The Commission took the view that the term "sale" relates to the conclusion of the agreement between the intervention agency and the person concerned and that the applicant was therefore not able to grant a reduction for all intervention butter exported after 21 October 1970 and it therefore refused to recognize the sum of DM 7 274 690.12 as being chargeable to the EAGGF for that financial year.

2. Submissions and arguments of the parties

1. The *applicant* argues that in order to take account of Article 3 of Regulation No 1308/68 it is necessary, when calculating the period, to take into consideration the date when the butter in fact leaves the warehouse of the intervention agency for export. The risk that the purchaser may use the butter otherwise than is laid down by the regulation is in fact avoided so long as the butter is stored with the intervention agency. The disposal of large quantities is economically and materially possible only if the contracts can be spread over relatively long periods and if the refund is fixed in advance.

2. The *Commission* argues that in common parlance the concept of sale refers to an agreement for the transfer of the property in goods in return for payment. Regulation No 1308/68 does

not define the term in detail. Nevertheless, in various articles and various recitals in the preamble indications may be found to support an interpretation in accordance with general usage. The Commission refers in this respect to Articles 1 and 2, Article 4 (1) and Article 5.

The applicant had no valid reason for applying the regulation in the way that it did. The Commission explained the point of view set out above at the 195th meeting of the Management Committee for Milk and Milk Products on 13 August 1970; the Commission notified that point of view to the applicant by letter of 14 December 1970; the latter stated its point of view in a telex message of 9 February 1971 and it was then informed that although the Commission still took a different view it had decided not to open proceedings under Article 169 of the Treaty as the infringement had ceased.

3. The *applicant* replies that only in Article 4 (1) does Regulation No 1308/68 expressly mention the date of the conclusion of the contract of sale. If Article 3 had referred to that date it would have been expressly indicated.

The applicant's opinion is not contrary to the provisions of the said regulation relied on by the Commission. Article 1 does not exclude the conclusion of the sales contract after less than four months' storage as it stipulates that the goods may be removed from store only after four months; the obligation imposed on the Member States by Article 5 to notify the Commission each week of the quantities sold assumes its real practical significance only if the Commission is informed of the stocks available, that is to say if the date of removal from store is regarded as decisive.

The applicant further states that even if it was guilty of negligence it cannot be held liable therefor. Under the criteria for attribution of liability laid down by the Commission liability is not incurred where the interpretation of Community law adopted by the national administration may be justified from the point of view of a competent and objective observer. In this respect account should be taken of the fact that the interpretation advocated by the applicant is also approved by other Member States. Furthermore, because of the imprecise wording of Regulation No 1308/68 the Commission is at the origin of any misinterpretations. It would have been a simple matter for the Commission to indicate clearly, as it did in Article 4, that the date of the sales contract was to be regarded as decisive in Article 3 as well.

The Commission cannot avoid its obligation to ensure that there is no linguistic ambiguity in the legal measures promulgated by it by relying on the fact that the national authorities are free to ask it for further information. That possibility is only of limited value and cannot be used in connexion with economic relations requiring rapid decisions. That is evident from the working paper of the Commission of 5 December 1977 (VI/241/77) which fixes a period of at least six weeks for an official opinion. It emphasizes that "the Community only becomes financially liable on formal notification of the particular problem ...". Such a margin of legal uncertainty is unacceptable in economic relations. The Commission should be required to avoid such difficulties from the beginning by drafting its legal measures clearly.

4. The *Commission,* in its rejoinder, recalls that the term "sale" in Article 4 (1) of Regulation No 1308/68 is used in exactly the same sense as that of "conclusion of the contract of sale". Comparison with other provisions, in particular with Article 3 of that regulation, does not support an argument *a contrario.* The four months laid down in Article 1 of Regulation No 1308/68 represent, in the Commission's view, the minimum period for which butter must have been stored when the contract of sale is concluded. Operations of this type are in fact intended to dispose first of butter which has been in store for the longest period as the quality of the butter deteriorates the longer it is stored. If the applicant's view were correct the provision would have stated that butter sold had to have been stored for at least four months at the time of delivery. As regards Article 5 of the said regulation the Commission states that the determining factor is not the volume of storage space available at a given moment; rather, it is necessary to be able to assess the general outcome of the measure applied. On the one hand such disposal constitutes a substantial burden on the Community budget and is justified only if it is economically indispensable; on the other the termination of the measure cannot affect contracts already concluded. In order to be able to choose the time when the operation undertaken should be terminated the Commission must have information regarding the quantities which have formed the subject-matter of contracts of sale and not just regarding quantities which have been delivered. If the applicant's view were correct the Member States would have been able to determine the duration and thus the extent of the operation undertaken; they could thus have concluded contracts of sale under which the purchasers could have covered needs which would, in fact, only have become evident subsequently. The Community would not have been in a position to terminate the operation when it wished.

E — Repurchase of butter sold at reduced prices and intended for processing into concentrated butter (case No 10)

1. Facts

In the context of the special measures referred to in Article 6 (3) of Regulation No 804/68 of 27 June 1968 on the common organization of the market in milk and milk products (Official Journal, English Special Edition 1968 (I), p. 176) the Commission, in several decisions, authorized *inter alia* the Federal Republic of Germany to sell butter from intervention stocks at reduced prices after it had been processed into concentrated butter. Under the provisions of Article 6 (1) of the Commission decision of 17 December 1968 authorizing the Federal Republic to sell butter from public stocks in the form of concentrated butter at a reduced price (COM(68)991), as amended by the decision of 29 July 1970 (COM(70)865), the applicant was to ensure that, within its territory, the concentrated butter was consumed directly without being further processed.

In view of the fact that, despite the safeguards against abuses laid down, it was impossible to guarantee that the concentrated butter would be used for the prescribed purposes, the Commission adopted the decision of 19 August 1971 (COM(71)986) authorizing the applicant to reach an agreement with the pur-

chasers to terminate the sales contracts which had been concluded and to make provision for a refund. The purchasers were then to place the product at the disposal of the intervention agency and to obtain reimbursement of the purchase price and a fixed sum by way of compensation to cover the costs of storage which they had incurred.

As regards the system for financing the intervention reference should be made in the present case to the provisions of Article 4 (1) (f) of Regulation No 2306/70 of the Council of 10 November 1970 on the financing of intervention expenditure in respect of the domestic market in milk and milk products (Official Journal, English Special Edition, 1966-1972, p. 44) which made provision for debiting the account established by the intervention agency with the storage costs; Article 4 (1) (h) of the regulation provides that the account may also be debited with the processing costs incurred by the intervention agency as a result of the application of special measures for the disposal of the butter. The latter costs are to be determined by decision of the Commission as a fixed amount for each type of processing. The costs of processing butter into concentrated butter were fixed, for the period 29 July to 31 December 1972, by Commission decision of 30 November 1973 (COM(73)1988).

The applicant repurchased the butter and the concentrated butter at a market price which was higher than that for which it had sold the product. The price was intended to cover the risk that transfer would no longer be possible and the resultant rights to compensation. It also had to cover the costs resulting from the loss of interest caused by the storage of the repurchased goods and the costs of processing the butter into concentrated butter. The applicant believes that the EAGGF should finance that expenditure.

The Commission takes the view that the product should be repurchased at the price for which the intervention agency sold it. The costs which it recognized as being chargeable to the EAGGF are the processing costs referred to in Article 4 (1) (h) of Regulation No 2306/70, as those costs were determined on the basis of the fixed amount laid down by the decision of 30 November, and the storage costs referred to in the decision of 19 August 1971.

It therefore refused to recognize that an amount of DM 1 212 135.12 was chargeable to the EAGGF.

2. Submissions and arguments of the parties

1. The *applicant* refers in this connexion primarily to its arguments relating to the principles governing the financing of intervention measures.

It adds that before adopting the decision of 30 November 1973 relating to the fixed amount laid down for processing costs, the Commission was aware of the procedure followed by the intervention agency, and in particular of the supply of butter intended for processing into concentrated butter by the purchasers and the costs arising from the repurchase. Neither Regulation No 804/68 nor Regulation No 2306/70 refers to the need to reduce the burden of finance borne by the Commission. In the applicant's view the Commission was aware that it was possible to prevent misuse of the product sold only by repurchasing it and that that repurchase could only be effected at the market price obtaining at the time.

2. The *Commission* states first that the decisive factor in the present case is not to establish whether the decision of 19

August 1971 was applied correctly but whether the operation should be financed by the Community. The arguments therefore do not relate to the substance of the matter even if they are regarded as valid.

The Commission further states, with regard to the processing costs, that Article 4 (1) (h) of Regulation No 2306/70 provides only for a uniform fixed amount determined for the whole of the Community; it makes no provision for taking account of the costs actually incurred in connexion with the processing operations.

The fact that the Commission approved the cancellation of the measures taken in order to dispose of the product does not affect that conclusion. The applicant alone was responsible for implementing those measures. It was therefore for the applicant to enact the implementing and supervisory provisions required and to ensure that Community law was applied correctly. It was also the applicant which, as a general rule, was to bear the financial risk of an incorrect application of Community provisions. Consequently, if the steps taken had not been cancelled the applicant would have run the risk of having to bear all the consequences of an incorrect implementation of the selling operation. Howbeit, neither the existence of certain interests nor the Commission's decision authorizing the annulment could have permitted financing by the EAGGF in derogation from the provisions of Regulation No 2306/70 then in force. As the decision of 30 November 1973 (COM(73)1988) determined only a single fixed amount for the costs of processing butter into concentrated butter, only that amount could be taken into consideration whatever the particular circumstances of the individual case.

The Commission states with regard to the storage costs referred to in its decision of 19 August 1971 that if the sale had not taken place the intervention agency would have had to continue to store the butter itself. There would therefore have been storage costs financed by the Community. The amounts laid down in that respect by the decision of 19 August 1971 correspond almost exactly to the fixed amounts; the situation was thus restored to what it would have been if the butter had not been sold.

3. The *applicant* replies that in order to achieve the objectives of the Commission decision of 17 December 1968 it was obliged to repurchase the stocks which had been sold at the market price obtaining at the time, since otherwise the organization of the market in butter and the price structure for that product would have been disrupted. The situation was comparable to a case of management without mandate in a case of urgency ("Notgeschäftsführung ohne Auftrag"). The applicant adds that the maximum repurchase price determined by the decision of 19 August 1971 was economically inapplicable; private traders could not be presumed to be satisfied with reselling at the low price for which they had purchased even if their storage costs were reimbursed. As the Commission did not take account of all these factors the costs incurred by the applicant could not be charged to it. The fact that the provisions relating to Community financing lay down only a fixed amount for processing costs does not alter the position; the repurchase of the butter at the market price obtaining at the time was an emergency measure which is not normally laid down by such

provisions. However, in the present instance the legal basis of Community financing is contained in the first sentence of Article 8 (2) of Regulation No 729/70 as, in the light of what has been set out above, it is not possible to charge the costs to the applicant.

In the opinion of the applicant the result would be the same even if the Commission's criteria relating to the apportionment of the financial risk between the Community and the Member States was applied. The Commission recognizes that exceptions exist to the view that it is for the Member States to bear the financial risks, since the Community may be declared liable for the incorrect application of provisions. In the applicant's contention that is the case in this instance. The Commission authorized the repurchase in order to avoid effects detrimental to the Community; those considerations dictated to the applicant its course of conduct; as the objective of the measure for the repurchase of the butter could not be achieved at a lower price and as, furthermore, the repurchase was necessary for the reasons set out above it was necessary therefore to increase the repurchase price accordingly. The Commission failed to take sufficient account of these factors in its decision of 19 August 1971 and it must therefore bear the financing of the measures in its entirety.

4. The *Commission* observes in its rejoinder that if the applicant's view were accepted Article 8 (2) of Regulation No 729/70 would become as it were a general provision governing Community financing which would render any other rules concerning the extent of and detailed rules for such financing nugatory as the Community would in practice be obliged to finance all expenditure which was economically justified.

Management without mandate in a case of urgency is a concept of civil law which cannot simply be applied to relations between the Community and the Member States and, furthermore, it is incompatible with the institutional structure of the Community. It is the Community which determines the law within the context of the powers conferred on it; the Member States apply that law to individual cases. The point of view advocated by the applicant overturns that system.

The applicant was not caused to act as it did by the Community. The fact that the present case does not correspond to any of the exceptions from the principle of financing by the Member States relied on by the Commission is evident from its observations on case No 5. The fact that the Commission authorized the applicant to cancel the operation which had been commenced does not affect the situation. The applicant went beyond that authorization, which was primarily granted in the interests of the applicant which, if the operation had not been cancelled, would have had to bear far greater financial consequences.

F — Costs of crushing and reconditioning sugar (case No 12)

1. Facts

As in other sectors, the financing of intervention expenditure with regard to sugar is effected by means of an account managed by the intervention agency which enables net losses to be ascertained (Articles 3 and 4 of Regulation No 2334/69 of the Council of 25 November 1969 on the financing of intervention expenditure in respect of the domestic market in sugar — Official Journal, English Special Edition 1966-1972, p. 27).

Article 4 (1) and (2) lists the items which are to be debited and credited to the account. Pursuant to Article 4 (2) (a) they include in particular "the total amount of the receipts from sales effected during the sugar marketing year in question".

Pursuant to Article 10 (3) of Regulation No 1009/67/EEC of 18 December 1967 on the common organization of the market in sugar (Official Journal, English Special Edition 1967, p. 304) the Commission adopted Regulation No 822/70 of 4 May concerning a standing invitation to tender for the sale of white sugar intended for animal feeding-stuffs held by the German intervention agency (Journal Officiel L 98 of 5 May 1970, p. 7). Under Article 6 (1) of that regulation the standing invitation to tender related to quantities of "free-running" white sugar. The first paragraph of Article 9 provides that in the event of its being shown that a quantity of sugar which was the subject of an award under the invitation to tender does not correspond to the condition as to quality of the notice of invitation to tender, the successful tenderer may apply for an adjustment of the quantity awarded or the supply of an equivalent quantity which does conform taken from other lots available for tender but not yet awarded. The second paragraph of Article 9 provides that after removal of the goods the successful tenderer concerned may not, on grounds of the difference in quality referred to above, assert contractual or non-contractual rights.

As one consignment of sugar stored in Germany had solidified it was crushed and reconditioned before it left the warehouse in order to satisfy the conditions laid down by Regulation No 822/70. The German intervention agency therefore entered on the credit side of the account which it had to draw up under Article 3 of Regulation No 2334/69 the price which was in fact obtained from the successful tenderers after deduction, for the 1971 financial year, of DM 2 923.77 corresponding to the costs of crushing and reconditioning.

The Commission refuses to recognize that that amount was chargeable to the EAGGF on the ground that it does not appear on the list in Article 4 (1) of Regulation No 2334/69.

2. Submissions and arguments of the parties

1. The *applicant* observes that the procedure followed by it was approved by the Commission's representatives. Use was not made of the possibilities set out in Article 9 of Regulation No 822/70 to forestall actions on a warranty or actions for damages brought by purchasers as, because of their supply obligations, the successful tenderers had insisted on the supply of the quantity awarded in full and no other sugar corresponding to the quality awarded was available. In view of the assurance given at the time of the invitation to tender that the sugar would be "free-running", the product of the sale, in the applicant's view, is not the tender price but that price after deduction of necessary expenditure. The fact that part of the sugar solidified during storage cannot be held against the applicant. The hardening was the necessary consequence of prolonged storage. When the conditions of the invitation to tender were discussed within the Management Committee for Sugar the competent German departments drew the attention of the Commission to that fact and asked that the sugar should be put out to tender "in its existing state".

2. The *Commission* does not regard the processing of the solidified sugar into "free-running" sugar as wrongful: the question is merely whether the

expenditure arising out of those operations must be borne by the EAGGF. Consequently the alternative arguments put forward by the applicant relating to Article 8 (2) of Regulation No 729/70 are of no relevance in this instance.

The German intervention agency acted as though Article 4 (1) of Regulation No 2334/69 made provision for an additional item to be debited under a subparagraph (h). However, like the analagous provisions applying to other sectors, the list of the various factors referred to in Article 4 of the said regulation is exhaustive.

The fact that the invitation to tender provided for the sale of "free-running" white sugar, contrary to the wish of the German delegation to the Management Committee cannot, in the Commission's view, lead to the conclusions drawn by the applicant: first, sugar stored for a long period does not necessarily lose that quality which ensures that it is free-running if it is stored in suitable conditions; furthermore, Regulation No 822/70 provided, in cases where sugar was of defective quality, for a solution which was in conformity with the financing rules applicable.

The Commission states finally that in the absence of other provisions the costs in question are covered by the fixed amount for storage costs referred to in Article 4 (1) (f) of Regulation No 2334/69.

3. The *applicant* replies that it is contrary to Article 8 (2) of Regulation No 729/70 to charge to it costs relating to conduct which even the Commission does not regard as irregular or negligent.

The position remains the same if it is assumed that the expenditure in question was not foreseen by Regulation No 2334/69. At the time when Regulation No 822/70 was adopted not all the sugar which was put out to tender was in fact in a condition enabling "free-running" quality to be guaranteed. That is clear from the recitals in the preamble to that regulation and the Commission was aware of the fact. Nevertheless, by guaranteeing that quality the Commission necessarily exposed the applicant to actions for damages and actions on a warranty by purchasers of the sugar. If the applicant had in fact relied on the provision in the second paragraph of Article 9 of the regulation it would effectively have excluded the warranty, which is not permissible under German law. In the applicant's view the measures laid down in the first paragraph of Article 9 were inapplicable; no purchaser would be satisfied with a small quantity of poor quality sugar when a larger quantity of a better quality had been guaranteed. Supply of substitute sugar was impossible from the beginning as none of the sugar which was put out to tender was of the guaranteed quality. The costs of crushing were therefore due to the fact that the Commission failed to draw up rules appropriate to the quality of the sugar. In those circumstances financing by the Community as provided for by the first subparagraph of Article 8 (2) of Regulation No 729/70 is the only possibility. In view of the fact that the Commission was aware of the poor quality of the sugar which was put out to tender as quality sugar, the Commission cannot escape that consequence by arguing that the applicant was responsible for the poor quality.

In support of this conclusion the applicant further states that it was

primarily in order to limit as much as possible the financial losses caused to the Community by possible actions for damages that the applicant incurred the expenditure in question. It should therefore be paid by the Commission as a sort of reimbursement of costs ("Aufwendungsersatz").

The applicant states finally that the Commission's contention that sugar does not solidify refers to sugar stored in silos. The applicant recalls in this respect that in 1970, because of the Community provisions then applicable, sugar in triple-layered paper sacks was also to be covered by intervention measures. The consequence of that method of storage was that sugar solidified if it was stored for too long a period.

4. As regards its observations concerning the principles of the applicant's arguments the *Commission* refers to the comments made by it in connexion with case No 10. It then emphasizes that even if it is accepted that it acted wrongly in adopting Regulation No 822/70 that cannot justify the financing by the Community of the expenditure incurred by the applicant. In any event, the Commission was by no means at the origin of the applicant's action and the expenditure in question is attributable exclusively to unsuitable storage on the part of the applicant. The Commission accepts that at the time of the adoption of Regulation No 822/70 it was well-known that there was a possibility that some of the sugar put out to tender would not be of the stated quality. It was precisely for that reason that the first paragraph of Article 9 was inserted in the regulation. The applicant is wrong in holding that that article is not applicable. The second paragraph of Article 9 of that regulation is of little relevance as in the present instance the hardening of the sugar had already been noted before its removal from store. It is not true, according to the Commission, that all the sugar put out to tender was not "free-running"; only 9 900 tonnes of sugar out of the total amount put out to tender of 36 370 tonnes had hardened.

The Commission submits finally that the partial hardening of the sugar was due to inadequacies in the storage. The sugar was in paper sacks having five layers, the second of which was coated with bitumen; furthermore, officials of the Commission found that the German store was arranged in such a way that it is not surprising that the sugar solidified even though it was stored in paper sacks having five layers.

V — Oral procedure

The German Government, represented by its Agent, K. Redeker, and the Commission represented by its Legal Advisers, P. Gilsdor and G. Zur Hausen, acting as Agents, presented oral argument at the hearing on 24 October 1978.

The Advocate General delivered his opinion at the hearing on 5 December 1978.

Decision

1 By an application lodged on 16 February 1976 under the first and third paragraphs of Article 173 of the EEC Treaty the Government of the Federal Republic of Germany sought the partial annulment of Commission Decisions 76/141 and 76/147 of 2 December 1975 concerning the discharge of the accounts presented by the Federal Republic of Germany in respect of the European Agricultural Guidance and Guarantee Fund, Guarantee Section, expenditure for 1971 and 1972 (Official Journal L 27 of 2 February 1976, p. 3 and p. 15).

Following the procedure and taking account of the amendments made to those decisions by Commission Decision 78/710 of 28 July 1978 (Official Journal L 238 of 30 August 1978, p. 25), the application was formulated as seeking the annulment of the decisions in so far as expenditure incurred by the Federal Republic of Germany amounting to DM 26 094 195.99 for the 1971 financial year and DM 13 325 660.12 for the 1972 financial year was not recognized as chargeable to the EAGGF.

2 The sums in question are composed of several items, each of which includes amounts paid by the German authorities in connexion with the implementation of Community regulations concerning the common organization of agricultural markets.

3 In contesting the legality of the decisions adopted by the Commission, the applicant Government cites, apart from the provisions of those specific regulations, certain general rules set out in Regulation 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), in particular the first subparagraph of Article 8 (2) which is worded as follows:

"In the absence of total recovery, the financial consequences of irregularities or negligence shall be borne by the Community, with the exception of the consequence of irregularities or negligence attributable to administrative authorities or other bodies of the Member States."

The Government argues that that provision must be interpreted as meaning that the financial consequences of an incorrect application of a Community provision by a national authority must be borne by the Community in all cases where the error committed is not the fault of the administrative authorities or other bodies of the Member State concerned but is the result of an interpretation which, albeit objectively incorrect, was adopted in good faith.

In fact, in the opinion of the applicant Government, by providing that the financial consequences of irregularities or negligence, with the exception of irregularities or negligence attributable to the Member States, shall be borne by the Community, Article 8 (2) signifies that a Member State is obliged to bear the financial consequences only in cases where the incorrect application of a Community provision is the result of wrongful action on the part of a national department or body.

4 The Commission, on the other hand, denies that Article 8 (2) is relevant to the solution of the problems in question, arguing that that provision relates to irregularities and negligence attributable to individuals as persons in receipt of EAGGF expenditure and that it relates to negligence or irregularities which are attributable to the Member States only in the exceptional case of irregularities or negligence on the part of officials in the public service acting in breach of their professional duty.

The Commission nevertheless recognizes that according to general legal principles it is for the Community to bear the financial consequences of an incorrect application of Community law where that application is attributable to an institution of the Community.

5 The text of Article 8 in the different language versions, considered in the light of the origins of the provision and the preparatory documents, on which the parties have based their arguments in the course of the proceedings, contains too many contradictory and ambiguous elements to provide an answer to the questions at issue.

In order to interpret that provision, therefore, it is necessary to consider its context and the objective of the rules in question.

6 In this respect it should be noted, first, that Article 8 defines the principles in accordance with which the Community and the Member States are to organize measures to combat fraud and other irregularities in connexion with the operations financed by the EAGGF.

It makes provision both for measures for the recovery of sums wrongly paid and for administrative and judicial procedures against the persons responsible.

In cases where, viewed objectively, Community law has been incorrectly applied on the basis of an interpretation adopted in good faith by the national authorities it is not possible as a general rule, either under Community law or under most of the national legal systems, to recover sums paid in error from the recipients and it is not possible to undertake administrative or judicial procedures against those responsible.

7 Consequently such a situation cannot fall under Article 8 but must, on the contrary, be examined in the light of the general provisions of Articles 2 and 3 of the same regulation, according to which refunds granted and intervention undertaken "in accordance with the Community rules" within the framework of the common organization of agricultural markets are to be financed by the EAGGF.

Those provisions permit the Commission to charge to the EAGGF only sums paid in accordance with the rules laid down in the various sectors of agricultual production while leaving the Member States to bear the burden of any other sum paid, and in particular any amounts which the national authorities wrongly believed themselves authorized to pay in the context of the common organization of the markets.

8 That strict interpretation of the conditions under which expenditure is to be borne by the EAGGF is necessary, moreover, in view of the objective of Regulation No 729/70.

In fact the management of the common agricultural policy in conditions of equality between traders in the Member States requires that the national authorities of a Member State should not, by the expedient of a wide interpretation of a given provision, favour traders in that State to the detriment of those in other States where a stricter interpretation is applied.

If such distortion of competition between Member States arises despite the means available to ensure the uniform application of Community law throughout the Community it cannot be financed by the EAGGF but must, in any event, be borne by the Member State concerned.

9 It must therefore be conclused that the provisions of Article 8 of Regulation No 729/70 are not applicable to the operations in question.

10 The applicant Government further argues that the expenditure cannot be charged either to the Community or to a Member State on the occasion of the discharge of the accounts of the national authorities and bodies under Article 5 (2) (b) of Regulation No 729/70 but must be attributed by means of a separate procedure.

In this respect the Government refers to a joint statement made by the Council and Commission and recorded in the minutes of the Council meeting held on 8 December 1971.

It appears from that statement that if the Commission takes the view, contrary to that of the Member State concerned, that the financial consequences of irregularities or negligence should not be borne by the Community it must contact that Member State and then initiative an exchange of views within the Fund Committee referred to in Article 11 of Regulation No 729/70.

It further appears from the statement that the Commission is to make a report to the Council in the light of knowledge acquired in that way and, where necessary, is to propose solutions to be adopted by the Council in order to resolve differences of that kind.

11 It should be noted that that statement was issued with regard to a regulation (Regulation No 283/72 of 7 February 1972, Official Journal, English Special Edition 1972 (I), p. 90) which was adopted under Article 8 of Regulation No 729/70 and that its scope is consequently limited to the financial consequences of irregularities and negligence referred to by that article, which is not relevant here.

12 It is moreover established that up to the present no specific procedure for attributing liability has been laid down by Community law for the purpose of settling differences between the Community and the Member States.

The discharge of the accounts by the Commission thus necessarily entails the attribution of expenditure either to the Commission or to the Member State concerned.

13 It is clear from Article 5 (2) of Regulation No 729/70 that the Commission's decision is to be adopted only after the consultation with the Fund Committee referred to in Article 11, but that the special procedure defined in Article 13 is not applicable.

It is established that the Fund Committee was consulted in the present instance after the applicant Government had been informed of the items which the Commission considered itself unable to charge to the EAGGF and after it had had the opportunity of making its position on the matter clear.

It is evident from the foregoing that the argument based on the alleged failure to comply with the prescribed procedure cannot be upheld.

14 It is therefore necessary to examine with regard to each of the items at issue whether the expenditure which the Commission refused to charge to the EAGGF was incurred in accordance with the Community provisions applicable in the sector in question.

Aids for skimmed-milk powder used for animal feeding-stuffs

15 Some of the amounts which the Commission refused to charge to the EAGGF constitute expenditure incurred by the applicant Government by way of aid for skimmed-milk powder for use as feed under Regulation No 986/68 of the Council of 15 July 1968 (Official Journal, English Special Edition 1968 (I), p. 260).

16 Under that regulation, as amended by subsequent Council regulations, and under Commission regulations on detailed rules for the grant of that aid:

— The aid was, in principle, to be paid by the intervention agency of the Member State within whose territory was situated the concern which denatured the skimmed-milk powder or used it in the manufacture of compound feedingstuffs;

— As a temporary measure, valid until 30 June 1971, where skimmed-milk powder produced in one Member State was denatured or used in another Member State, the former Member State was authorized to pay the aid;

— The decisive date for the payment of the aid by the exporting State was the day when each consignment of the product was placed under control in the territory of the importing Member State;

— Proof that the goods had been placed under control in the importing Member State could be adduced only by producing the control copy of the Community transit document, certain sections of which had to be completed in a specific manner.

17 One item in dispute relates to aid paid by the German authorities for quantities of skimmed-milk powder exported to Italy despite the fact that the goods were placed under control, according to the information on the control copy, at a date subsequent to 30 June 1971 or that compliance with that date could not be established clearly.

18 The German authorities accounted for payment of the aid in those cases by referring to a statement made by the competent Italian body to the effect that it was legally impossible, pursuant to the instructions given to the Italian authorities by the Ministries concerned, that aid should have paid in Italy in respect of consignments for which Community aid had been paid in Germany.

The applicant Government further referred to a communication which it received from the Commission stating that the latter would not object to payment of the aid in cases where, in the absence of proof that the goods had been placed under control in Italy by 30 June 1971 at the latest, the competent Italian authorities had finally refused to pay the aid.

19 In this regard the Commission states that while it is prepared to accept that the contested expenditure may, by way of an exception, be borne by the EAGGF if the exporting State can produce irrefutable evidence that the same expenditure has not been paid by the importing State, such evidence, in order to be valid, must refer to specific, individual cases and cannot merely consist in an affirmation that double payment was not possible under the provisions in force.

20 The Community rules in this field are drawn up in terms which do not give the national authorities the option of accepting any other proof that the goods have been placed under control in the importing country than the

formal proof provided by the control copy of the transit document correctly completed and stamped.

As the objective of the regulatory provisions in question is to exclude the possibility of double payment and the possibility of the goods being returned to ordinary commercial channels, the formalities relating to proof must be strictly adhered to for that purpose, and in particular to forestall any fraudulent practice intended to evade the supervisory measures.

To accept, as the German authorities did in this instance, proofs which do not relate case by case to specific consignments but which merely consist of general statements as to the scope of instructions given to the administrative authorities in the importing State is therefore, in any event, incompatible with the requirements of the Community provisions in this field.

The Commission's refusal to charge the expenditure in question to the EAGGF is therefore justified.

21 Another disputed item relates to aid paid by the German authorities in respect of quantities of skimmed-milk powder exported to Italy in cases where the dates when the goods were placed under control in that country are not in dispute but where proof that the goods were placed under control was not adduced by production of the control copy of the Community transit document duly completed and stamped by the Italian authorities.

The German authorities, however, state that as the control copies had been lost, proof that the goods has been placed under control in Italy was furnished by other means, such as the submission of accompanying documents, customs clearance declarations and declarations by undertakings which had applied for aid, and they state that the risk of double payment had, moreover, been excluded by virtue of the instructions given to the competent Italian authorities by the ministries concerned.

22 As has already been stated above the objective of the rules in question requires that the formalities relating to proof must be strictly adhered to in order for traders to receive the financial benefits granted within the framework of the common agricultural policy.

Consequently, the regulatory provisions in question do not allow the proofs required by them to be furnished by other means.

As therefore the expenditure in question was not incurred in accordance with Community law the Commission's refusal to charge it to the EAGGF is justified.

Aid for the purchase of butter by persons in receipt of social assistance

23 The Commission refused to charge to the EAGGF the sums of DM 17 930 880.40 for the 1971 financial year and DM 12 051 258.00 for the 1972 financial year which were paid by the authorities in the Federal Republic of Germany by way of aid for the purchase of butter by persons in receipt of social assistance.

24 Article 1 of Regulation No 414/70 of the Council of 3 March 1970 laying down general rules relating to measures intended to increase the use of butter by certain categories of consumers (Journal Officiel L 52 of 6 March 1970, p. 2) authorized the Commission to decide that Member States may grant aid to permit the purchase of butter at reduced prices by, *inter alia,* persons in receipt of social assistance.

Pursuant to that provision the Commission adopted Decision 70/228 of 24 March 1970 (Journal Officiel L 77 of 7 April 1970, p. 15) authorizing the Member States to grant aid to enable persons in receipt of social assistance to purchase, in exchange for individualized vouchers, 0.5 kg of butter per month at a reduced price.

The period of validity of Regulation No 414/70, which was initially confined to 1970, was extended until 31 December 1971 by Regulation No 2550/70 of the Council of 15 December 1970 (Journal Officiel L 275 of 19 December 1970, p. 1).

Commission Decision 70/228, the period of validity of which was not restricted by any express provision, remained applicable until it was repealed, with effect from 1 May 1971, by Commission Decision 71/166 of 30 March 1971 (Journal Officiel L 88 of 20 April 1971, p. 14).

25 The applicant Government, in implementation of that measure, distributed through the local social security authorities in a single operation at the beginning of 1970 and of 1971 vouchers valid for each month of the whole year, thus seeking to avoid the disproportionate increase in its already considerable administrative costs which would have accompanied the issuing of vouchers valid for shorter periods.

The applicant Government notified its choice of this procedure to the Commission which did not rise any objections.

26 The Commission claims that the German Government, by continuing to pay aid in respect of sales after 30 April 1971, overstepped the limits laid down by the provisions in question.

The Government, for its part, claims that the system of distributing vouchers adopted by it had the effect of creating, for persons holding those vouchers, a legal position which was certain and which the Government could not terminate prematurely.

27 The question arises, therefore, whether the provisions in question must be interpreted as meaning that they permitted the Member States to adopt a distribution system such as that chosen by the applicant Government.

It may be noted in this respect that both Regulation No 414/70 and Decision 70/228 leave the Member States great freedom to choose the methods and administrative procedures for the implementation of the measure in question.

While certain provisions seek to prevent abuses and to guarantee that the aid will be granted only for deliveries for which it was provided, no provision is made for the possibility of terminating the aid before the expiry of the period during which Regulation No 414/70 was applicable.

28 Since Decision 70/228 requires the Member States to use a system of individual vouchers for distributing the aid, since the applicant Government adopted such a system, in the first instance until the end of 1970, and since the Commission decision remained in force without any amendment for an indeterminate period after the enabling regulation was extended to the end of 1971, it cannot be said that the applicant Government, by maintaining the

system initially adopted without making provision for the possibility of terminating the operation in the course of the year and taking into account also the special nature of the measure in question, exceeded what it was lawfully entitled to do to implement the Commission's decision within its national territory.

The contested decisions should therefore be annulled in so far as the Commission refused to charge to the EAGGF the disputed amounts paid by the applicant Government by way of aid for the purchase of butter by persons in receipt of social assistance.

Sale at reduced prices of butter from public stocks for export

29 Certain of the amounts which the Commission refused to charge to the EAGGF constitute expenditure incurred by the applicant Government in respect of the sale of butter from public stocks at reduced prices under Regulation No 1308/68 of the Commission of 28 August 1968 (Journal Officiel L 214 of 29 August 1968, p. 10).

30 Under Article 3 of that regulation butter covered by that operation was to be exported within 30 days "after sale" by the intervention agency, and compliance with that condition was guaranteed by the lodging of a security under Article 4.

Regulation No 1308/68 was repealed by Article 5 of Regulation No 1893/70 of the Commission of 18 September 1970 on the sale of butter from public stocks (Journal Officiel L 208 of 19 September 1970, p. 13) but it remained applicable to butter sold under the regulation which had been repealed.

31 The applicant Government contends that the reduced price is applicable and the condition laid down in Article 3 is satisfied in cases where the contract of sale was concluded pursuant to the regulation which was repealed and where the butter was exported within 30 days of its removal from storage, even if that took place after 22 September 1970, the date on which Regulation No 1893/70 entered into force.

The Commission, on the other hand, takes the view that the period of 30 days referred to in Article 3 must be calculated from the date of the conclusion of the contract of sale and not from that of the removal of the butter from storage.

In support of the interpretation advocated by the applicant Government it is argued in particular, on the one hand, that only that interpretation enables forward sales and sales effected over relatively long periods to benefit from the reduced prices and, on the other, that it does not open the way to abuses, since unauthorized use of the butter is excluded while the butter is still in the intervention agency's store.

32 However, in the context of the regulation in question there is no reason why the term "sale" used in Article 3 should be given a meaning different to that which it has in ordinary legal language and which corresponds, moreover, to that assigned to it in other provisions of the regulation.

The period of 30 days laid down in Article 3 must therefore be calculated from the date of the conclusion of the contract of sale and not from the date when the butter left the store.

As the expenditure considered in this connexion was therefore not incurred in accordance with Community law the Commission's refusal to charge it to the EAGGF is justified.

Repurchase of butter sold at reduced prices and intended for processing into concentrated butter

33 Certain of the amounts which the Commission refused to charge to the EAGGF constitute expenditure incurred by the applicant Government in respect of the repurchase of butter from public storage sold at reduced prices under a decision adopted by the Commission on 17 December 1968.

34 Article 6 (3) of Regulation No 804/68 of the Council of 27 June 1968 on the common organization of the market in milk and milk products (Official Journal, English Special Edition 1968 (I), p. 176) provides that special measures may be taken for the disposal of butter held in public storage which cannot be marketed on normal terms.

Pursuant to that provision, by decision of 17 December 1968, the Commission authorized the Federal Republic of Germany to sell melted and prepared intervention butter at reduced prices subject to the condition, *inter alia,* that the German authorities should take any steps necessary to ensure

that the product would exclusively be used within the national territory for direct consumption without preliminary processing.

35 As the German Government informed the Commission that it was no longer in a position to guarantee complete compliance with that condition in respect of certain quantities of butter sold in 1970 which had not reached the stage of retail sale it was authorized by a Commission decision of 19 August 1971 to reach agreement with the purchasers regarding cancellation of the sales contracts.

In exchange for the return of the butter the intervention agency was to repay to the purchaser the purchase price, together with a fixed amount to cover the storage costs which had been incurred.

The German intervention agency, however, repurchased the butter at a price higher than the initial price and, in addition, reimbursed certain expenditure for which no provision was made in the decision of the Commission, namely loss of interest suffered by the purchasers.

36 The applicant Government claims that the Commission must charge to the EAGGF all expenditure incurred together with the actual costs of the processing of the butter sold, irrespective of the limits of the fixed amounts which, in respect of the storage costs and the processing costs incurred by the intervention agency as a result of the measures taken under Article 6 (3) of Regulation No 804/68, were laid down by Article 4 (1) (f) and (h) of Regulation No 2306/70 of the Council of 10 November 1970 on the financing of intervention expenditure in respect of the domestic market in milk and milk products (Official Journal, English Special Edition 1966-1972, p. 44).

The Government argues, in fact, that having regard to the circumstances of the case, it must be regarded as having acted in the interests of the Community in accordance with principles relating to management without mandate and that furthermore the Commission, before laying down the fixed amounts at a level which failed to take account of the actual costs of the operation, was aware of the procedure followed by the intervention agency.

37 However, none of the arguments put forward by the applicant Government can justify a derogation from the exhaustive provisions of Article 4 (1) (f)

and (h) of Regulation No 2306/70, pursuant to which only the fixed amounts may be charged to the EAGGF, not the actual costs which may be greater.

As the expenditure considered in this connexion was therefore not incurred in accordance with Community law the Commission's refusal to charge it to the EAGGF is justified.

Costs of crushing and reconditioning sugar

38 Certain of the amounts which the Commission refused to charge to the EAGGF constitute expenditure incurred by the applicant Government in respect of the crushing and reconditioning of sugar sold pursuant to Regulation No 822/70 of the Commission of 4 May 1970 concerning a standing invitation to tender for the sale of white sugar intended for animal feedingstuffs held by the German intervention agency (Journal Officiel L 98 of 5 May 1970, p. 7).

39 The crushing of certain quantities of sugar which had hardened in store was undertaken by the German authorities in order to satisfy the condition contained in Article 6 of the regulation that the sugar put out to tender should be free-running.

The costs of that operation were deducted by the applicant Government from the total receipts from the sales which, under Article 4 (2) (a) of Regulation No 2334/69 of the Council of 25 November 1969 on the financing of intervention expenditure in respect of the domestic market in sugar (Official Journal, English Special Edition 1966-1972, p. 27), are to be credited to the account drawn up by the intervention agency in order to calculate the net losses chargeable to the EAGGF under Article 2 of the regulation.

40 Article 4 (1) lists the items to be debited to that account and Article 4 (2) lists those which are to be credited to it.

The item defined in Article 4 (2) as "the total amount of the receipts from sales effected . . ." must be understood as being the gross amount without deduction of the sales costs.

The items with which the account may be debited under Article 4 (1) do not include costs such as those in question.

The list of the items which can thus be charged to the EAGGF must be regarded as exhaustive.

41 In those circumstances it is not necessary to examine whether the solidifying of the sugar which made the crushing necessary was due to defective storage, as the Commission claims, or whether the Community rules were defective in that they made no express provision for the costs in question, as the applicant Government claims.

42 It must therefore be concluded that the Commission's refusal to charge to the EAGGF the expenditure considered in this connexion is justified.

Costs

43 Article 69 (2) of the Rules of Procedure provides that the unsuccessful party shall be ordered to pay the costs if they have been asked for in the successful party's pleading.

Under Article 69 (3), where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court may order that the parties bear their own costs in whole or in part.

44 The Commission failed on one head while the applicant Government failed on the other heads.

The applicant Government should therefore pay its own costs and three quarters of those of the Commission.

On those grounds,

THE COURT

hereby:

1. **Annuls Commission Decisions 76/141 and 76/147 concerning the discharge of the accounts presented by the Federal Republic of Germany in respect of the European Agricultural Guidance and Guarantee Fund, Guarantee Section, expenditure for 1971 and 1972 in so far as the amounts of DM 17 930 880.40 and DM 12 051 258.00 respectively were not charged to the Fund.**

2. **Dismisses the application as regards the other heads of claim.**

3. **Orders the applicant Government to pay its own costs and three quarters of those of the Commission.**

Kutscher Mertens de Wilmars Mackenzie Stuart

Pescatore Sørensen O'Keeffe Bosco

Delivered in open court in Luxembourg on 7 Febraury 1979.

A. Van Houtte
Registrar

H. Kutscher
President

CONTENTS