OPINION OF MR ADVOCATE GENERAL DA CRUZ VILAÇA
delivered on 12 November 1987 *

Mr President,
Members of the Court,

I — The subject-matter of the action

1. In these proceedings, the Kingdom of Denmark seeks the partial annulment, in respect of export refunds in the beef and veal sector, of Commission Decisions 85/450/EEC and 85/451/EEC of 28 August 1985 on the clearance of the accounts presented by that Member State in respect of expenditure financed by the European Agricultural Guidance and Guarantee Fund (EAGGF), Guarantee Section, for 1980 and 1981. [1]

2. What is the central issue in this dispute?

3. Regulation No 805/68 of the Council of 27 June 1968 [2] established the common organization of the market in beef and veal, which includes a system of export refunds designed to cover the difference between the prices of the product on the world market and prices within the Community (Article 18).

4. The general rules for granting export refunds and the criteria for fixing their amount were laid down in Regulation No 885/68 of the Council of 28 June 1968. [3]

5. Pursuant to Article 18 (5) of Regulation No 805/68, the Commission fixed — in particular by Regulation No 187/80 of 29 January 1980 [4] — the export refunds to be granted in that sector in 1980 and 1981. A list of the products covered and the amounts of the refunds appear in the annex to the regulation. It indicates, in particular, the preparations and preserves containing bovine meat classified under subheading 16.02 B III (b) 1 of the Common Customs Tariff, for which the amounts of the refunds payable depend on the percentage of bovine meats which they contain. The annex specifically refers to percentages 'of bovine meats (excluding offal and fat)'.

6. These proceedings are specifically concerned with the interpretation of the expression 'bovine meats (excluding . . . fat)' and that is the essential problem.

7. The basic question to be resolved is whether that expression implies that all fat of any kind must be excluded when the meat content of the finished product is calculated or whether some of the fat may be regarded as forming part of the meat for the purpose of export refunds.

8. Denmark considers that the term 'fat' used here relates only to added fat, not naturally associated with the meat, with the

* Translated from the Portuguese.

1 — Official Journal 1985, L 267, pp. 7 and 10.

2 — Official Journal, English Special Edition (I), p. 187.

3 — Official Journal, English Special Edition 1968 (I), p. 237.

4 — Official Journal 1980, L 23, p. 11.

consequence that the meat in question may contain natural fat not exceeding an amount which the applicant fixes as 30%.

9. The Commission rejects that interpretation, taking the view that for the purpose of calculating the export refunds all kinds of fat, both natural and added, visible and invisible, must be excluded, and that account must be taken only of the meat content, without fat, as determined by analysis.

10. Accordingly, the Commission, by the contested decisions, withheld financing in respect of 1980 and 1981 for export refunds for preparations containing bovine meat in the amounts of DKR 18 175 950.25 and DKR 31 664 013.16 respectively.

11. In support of its application, the Danish Government relies upon two submissions:

(a) The contested decisions are based on an incorrect interpretation of Commission Regulation No 187/80 and of the other regulations fixing export refunds on beef and veal applicable in 1980 and 1981, with the result that the Commission infringed Article 2 of Regulation No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy,[5] according to which financing is to be provided for refunds on exports to third countries, granted in accordance with the Community rules within the framework of the common organization of the agricultural markets;

(b) Having itself failed to observe the time-limit for definitive clearance of the EAGGF accounts laid down in Article 5 of Regulation No 729/70, the Commission is not entitled to rely upon legal reasoning which it did not put forward in due time.

5 — Official Journal, English Special Edition 1970 (I), p. 218.

12. I shall now analyse each of these submissions.

II — First submission: incorrect interpretation of the regulations fixing the export refunds

13. *A* — According to the Danish Government, the term 'bovine meats' must be interpreted, in the absence of specific Community law criteria, according to its ordinary meaning, namely as the musculature of the skeleton with its natural fat content, both visible and intra-muscular.

14. According to the criteria adopted by the Danish authorities, a natural fat content of up to 30% of the meat may be regarded as normal. Since the fat is a natural and inherent part of meat, the only fat which cannot be taken into account for the purpose of determining the export refund is fat added to the meat at the final preparation stage.

15. The United Kingdom, which was allowed to intervene, proposes an interpretation of the regulation which is similar (but not identical) to that advocated by Denmark. In the United Kingdom's opinion, in the absence of specific Community criteria, the expression 'bovine meats' should be interpreted in a reasonable and commonsensical way. It has thus taken the view, according to practice derived from the Meat Products and Spreadable Fish Products Regulation 1984 (SI 1984 No 1566), that that expression is equivalent to the term 'lean beef', that is to say the lean muscle tissue from which all the visible fatty tissue has been separated, but which may

contain up to 10% invisible fat. Accordingly, the United Kingdom interprets the expression 'bovine meats (excluding offal and fat)' as meaning 'lean beef, excluding offal and visible fat'.

16. Should the approach advocated by those two Member States be adopted?

17. *B* — Let us start by considering the *literal interpretation* of the terms involved.

18. It must be acknowledged from the outset that the text of the regulation concerned lends itself to contradictory interpretations.

19. On the one hand, when the annex to Regulation No 187/80 uses the expression 'bovine meats (excluding . . . fat)', it does not make any distinction regarding the nature of the fat to be excluded. *Ubi lex non distinguit nec nos distinguere debemus*: it appears therefore that, in the absence of any other factors conducive to a different conclusion, all fat of any kind, whether added or natural, visible or intramuscular, should be excluded for this purpose from the concept of 'bovine meats'. Since the legislature did not refer specifically to any of those categories of fat and since bovine meats naturally contain fat, it would appear that the parenthesis excluding fat means that, in the particular case of a product classified under subheading 16.02 B III (b) 1 of the Common Customs Tariff, fat, including natural fat, is not a component of bovine meat.

20. This does not mean — contrary to what the applicant government asserts — that the Commission's interpretation, being based on a 'fictitious definition' of meat, amounts to a rejection of the 'natural meaning' or traditional, and perhaps even internationally accepted, concept of 'meat' or 'bovine meat', which includes natural fat, whether visible or intramuscular.

21. What the Commission means is simply that, for the purpose of establishing the percentage of meat contained in a given preparation, in order to determine the amount of the refund, the expression 'bovine meats' cannot, in this particular case, be interpreted in isolation but must be considered in conjunction with the words in brackets which follow it.

22. That also seems to me to be the interpretation which best ensures that the term is given its appropriate meaning.

23. Had the legislature sought only to exclude 'added fat' from the calculation of the meat content of the product, taking the view that 'bovine meat' meant in principle 'bovine meat with its natural fat', then, according to the applicant's own logic, it would not in fact need to say so, since the term 'bovine meats' would of course not include added fat. As the Danish Government itself pointed out, the fat would be substituted for the meat, causing the meat content of the product to diminish and increasing the proportion of the product accounted for by ingredients other than meat.

24. In those circumstances, the fact that the legislature considered it necessary to state that the bovine meat to be taken into account excluded fat gives the impression that it sought to exclude from the calculation of the meat content all the natural fat and not only the added fat (or the latter and the visible natural fat, as advocated by the United Kingdom).

25. It is true that Regulation No 187/80 refers not only to 'fat' but also to 'offal', which is not normally regarded as forming part of meat. According to the United Kingdom this 'appears to indicate that the

type of fat contemplated falls into the same category as offal, i. e. animal matter which is in general readily excisable from the lean meat and does not form an integral part of it'.

26. The same conclusion appears to follow from the fact that, in the Common Customs Tariff, animal fat and offal are separately defined as products distinct from meat or products processed from meat[6] and of course, according to the United Kingdom, only separable animal fat is capable of being traded as a distinct product.

27. That does not mean, however, that, even in works of reference such as that mentioned by the Commission in its Summary Report on the clearance of the EAGGF accounts referred to by Denmark in support of its argument (*Source book for food scientists*), meat (taken to mean 'all the edible parts of the muscle connected to the skeleton') includes 'the tongue, diaphragm, heart and oesophagus', in addition to the 'bones, skin, tendons, nerves and blood vessels normally present in the muscular tissue'. Moreover, other documents referred to by the applicant include within the definition of meat a number of items which differ from those which I have just mentioned.

28. The terminology does not, however, seem to be universal and, depending upon the objectives pursued — scientific, commercial or technical purposes or calculation of export refunds — there is nothing to prevent the same expression being interpreted in different ways, and therefore, in my opinion, no argument can be based on the fact that the regulation at issue refers to 'offal' as well as to 'fat'.

6 — See Chapters 2, 15 and 16 of the Common Customs Tariff.

29. Moreover, it should be noted that the general heading in the annex to Regulation No 187/80 corresponding to Common Customs Tariff subheading 16.02 B III (b) 1 refers to 'Other preparations and preserves containing bovine *meat or offals*' and only further down, under subheadings ex (aa) and ex (bb) is fat, in addition to offal, excluded from meat.

30. In view of the title — which distinguishes between meat and offal — the express exclusion of offal in the parenthesis must be seen either as poor drafting or as the result of a concern to ensure clarity, in view of the differences of definition to which I referred earlier.

31. As regards fat, its inclusion in the parenthesis and not in the title would seem to indicate that, at least in part, the intention was to exclude something which, in principle, falls within the definition of meat.

32. And this view seems to be reinforced by the fact that the text of the corresponding subheading in the Common Customs Tariff does not refer to the exclusion of fat from the meat used for preparations (which, according to the United Kingdom's interpretation, could only be intramuscular fat), by contrast with Regulation No 187/80, which excludes it expressly.

33. The impression to be gained from reading the provision is that the legislature, by having recourse to the parenthesis, wished to make it clear that certain ingredients of animal origin whose characteristics make them similar to bovine meat, to the point where they may be confused for meat in the finished product, must not be taken

into account in calculating the meat content. For that reason, it mentioned offal which, normally, is distinguished from meat but, on occasion, appears to be included within the definition of meat; for that reason it also mentioned fat which, at least when intramuscular, may be regarded as forming part of the meat but, in the final product, cannot be distinguished from added fat.

34. In a word, the impression given is that the legislature wished to make it clear that the percentages mentioned, for the purpose of determining the refunds, are of meat and of meat alone.

35. It should nevertheless be recognized that the Commission had at its disposal ways of expressing its thoughts on this matter rather more clearly. The applicant provides a choice of examples in its reply.

36. In particular, the regulation could have specified the nature of the fact concerned or made it clear that the percentages laid down in it are determined by analysis.

37. It follows, therefore, from the foregoing considerations that the terms used in the provisions in question do not unequivocally favour only one of the interpretations put forward.

38. However, whilst the Commission interpretation is not the only possible interpretation of the wording used, the Danish interpretation is likewise not the one which best corresponds to the literal content of the provision.

39. As regards the interpretation advocated by the United Kingdom, it must be stated that the text of the provisions does not provide clear support for the suggested distinction between *meat* and *lean meat,* by virtue of which the term 'meat content' can be taken to mean 'lean meat content'. Although that interpretation may well be the one which best corresponds to the ordinary view of what constitutes meat — as the word is employed in common usage, including that of butchers — it does not, in particular, provide any real justification for the choice of 10%, which appears to be based solely on United Kingdom practice.

40. *C* — It is therefore necessary to have recourse to other interpretative criteria to clarify the terms under consideration.

41. *D* — Let us consider, first, whether a *teleological interpretation* confirms the Commission's view.

42. As is apparent from the 10th recital in the preamble to Regulation No 805/68 and from Article 18 (1) thereof, the purpose of the system of export refunds in this sector is to promote the export of products covered by the common organization of the market, so as to 'safeguard Community participation in international trade in beef and veal'. By covering the difference between the prices of those products on the world market and the prices in the Community, the refunds facilitate exports which would otherwise be impossible, and Community producers are able to compete in external markets.

43. It is not necessarily a question, as was ultimately argued by the Commission, of promoting the export of products of the highest quality.

44. In any event, the pursuit of the general objective to which I have referred must take account of the matters referred to in Article 2 of Regulation No 885/68 and, in

particular (Article 2 (a)) the existing situation and the future trend with regard to prices and availabilities of beef and veal on the Community market.

45. The Commission has stated that, in the eighties, there has been a considerable surplus in the Community market for beef and veal; accordingly, it is not surprising that, in order to facilitate the disposal of beef and veal, the refunds to be granted in respect of preparations increase in step with the percentage of meat which they contain.

46. The Commission's interpretation is incontestably conducive to attainment of the objective of the system of refunds and that objective is achieved to a greater extent. The amount of the refund is not merely proportional to the percentage of meat without fat contained in the product, but is in fact higher. With regard to 1980 and 1981, it is to be noted that for products in which the content of meat without fat was 80% or more and between 60% and 80% the amount of the refunds to be granted for the latter category was not three-quarters of the amount granted for the former, which would be the result if the ratio between those percentages were taken as a basis, but is in fact a little more than half.

47. According to the Commission, the objective assigned to the system of export refunds in this sector was recently reinforced by the addition of a new category of products containing 90% meat by weight, excluding offal and fat, by means of Commission Regulation No 2672/85 of 23 September 1985.[7]

7 — Official Journal 1985, L 253, p. 18.

48. Although reformulated to amend the reference to the purported objective of 'promotion of exports of high quality products', it must be recognized that the argument provides support for the results obtained from a teleological interpretation, in the light of Regulation No 187/80.

49. On the other hand, the result of the Danish interpretation is that, as 30% of the meat can be replaced by fat of any kind — since, as we shall see later, the analytical methods used do not enable any distinction to be made, in the final product, between natural fat and added fat — the amount of beef and veal disposed of is reduced proportionately.

50. The first interpretation favours the export of preparations with the greatest possible meat content, in order to relieve an oversupplied internal market; the applicant's interpretation takes us a little further away from that objective.

51. Identical conclusions to those which I have just mentioned are also suggested if the economic aspect of the exports is considered, another of the factors mentioned in Article 3 (d) of Regulation No 885/68. It does not seem economically logical — as the Commission also stated at the hearing — to be able to use meat of lower quality and even to substitute fat of any kind for up to 30% of the meat and nevertheless to obtain the same refund, notwithstanding the lower cost of the raw materials used.

52. The United Kingdom's interpretation now seems closer to the stated objective and, without doubt, represents the minimum that can be required for that objective to be regarded as complied with.

53. *E* — In its reply, the applicant also draws support for its argument from the origin and history of the regulations on refunds in the beef and veal sector. In its view, Commission Regulation No 678/77 of 31 March 1977,[8] which, for the first time, fixed the export refunds for beef and veal, provided for exactly the same level of refund for preparations containing 80% or more of uncooked bovine meat as for the raw materials which are normally used to make them (forequarters). But an identical amount for the refund would only be arrived at by applying the applicant's interpretation; by contrast, the Commission's interpretation would lead to the grant of a lower refund for the forequarters used in the preparations than the refund which would be granted for unprepared forequarters.

54. However, the Commission's response to that argument suffices to deprive it of probative force. The products involved are different, having different values and different prices in the export markets; according to the Commission, the fact that the refunds were identical at that time was a matter of chance, a mere historical coincidence deriving from the assessment of the market made at that time and from the possibilities of disposing of the products.

55. According to the Commission, that explanation is corroborated by the fact, mentioned by the Danish Government itself, that after the adoption of Regulation No 678/77, that parallelism disappeared, so that in certain cases the amounts of the refunds were fixed at a higher level and in other cases at a lower level, according to the assessment made, at regular intervals, of the market situation and of the possibilities of disposal. This occurred in Regulation No 187/80, in which uncooked preparations containing 80% or more of meat received a refund of ECU 98.88 or of ECU 91.88 per 100 kg net weight, depending on the destination, as against amounts varying between ECU 72.5 and ECU 95.0 for unprepared forequarters.

56. It is not therefore possible to infer from the amounts of the refunds that the legislature intended to establish the parallelism referred to by the Danish Government, and accordingly that argument is not decisive.

57. The Danish Government and the United Kingdom refer to the fact that the regulations applicable to the pigmeat sector (in particular Regulation No 3065/86 of 7 October 1986[9]) require account to be taken, for the purpose of export refunds, of fat of *any nature and origin*,[10] which would indicate that, if there had been any intention to exclude all fat in the parallel case of bovine meat, an express reference would also have been made.

58. That argument likewise does not appear decisive and, moreover, it can be applied conversely. In the case of bovine meat, to which the disputed words in brackets refer, the intention was to establish a system different from that applied to pigmeat; it is therefore possible to say that, since the logic of the latter is less evident, it became necessary to make it clear that, for the purpose of the refund, all fats were to be included in the meat content of the product, by contrast with the approach adopted for bovine meat preparations, in relation to which, in the absence of clarification, all fats would be excluded.

8 — Official Journal 1977, L 84, p. 41.

9 — Official Journal 1986, L 285, p. 17.

10 — See also the corresponding heading in the Common Customs Tariff.

59. On the other hand, I do not think that any decisive interpretative argument can be inferred from the fact that on 29 October 1985 the Commission submitted to the Council a proposal for a regulation concerning the classification of goods within subheading 16.02 B III (b) 1 (aa) (33) of the Nomenclature contained in the annex to Regulation No 2672/85 — a proposal [11] which was embodied in Regulation No 244/86 of 4 February 1986 by reference to the annex to Commission Regulation No 149/86. [12]

60. For the Danish Government, that fact demonstrates the insubstantiality of the interpretation given by the Commission to Regulation No 187/80 and regulations of the same kind.

61. In the Commission's view, that proposal, which was prepared because of an actual case of incorrect classification of a product analysed by the Danish authorities, does no more than confirm the applicable law, its adoption having become necessary in order to avoid incorrect interpretations and to ensure — as recommended in the preamble to Regulation No 97/69 of the Council of 16 January 1969 on measures to be taken for uniform application of the Nomenclature of the Common Customs Tariff [13] — that the nomenclature contained in that tariff was applied uniformly.

62. Any conclusion sought to be drawn from the existence of that proposal regarding the interpretation of earlier legislation therefore seems to me to be a two-edged weapon, and accordingly I do not consider that any argument can be based on it one way or the other.

63. The same could be said with respect to Commission Regulation No 2429/86 of 31 July 1986, [14] which established a common procedure for determining the meat content of preparations containing beef, which clarified the position by describing fat as 'fat (including fat obtained from the meat itself)'.

64. This shows that — despite the difficulties existing within the Council — there came into being, as from 1986, clear legislative provisions which did not previously exist, a fact which supports the views put forward by the applicant and the United Kingdom.

65. *F* — Let us now consider the *technical* aspects.

66. It became apparent at the hearing that the meat content of the products in question can only be determined by analysis; it was also confirmed at the hearing that, as the applicant had already conceded in its reply, it is not possible to distinguish by chemical analysis between natural, visible or invisible fat and added fat.

67. The distinction suggested by the applicant thus seriously restricts the effectiveness of any examination of the finished product by analysis, so that greater importance would have to be attached to visual inspections at the point of production, together with the weighing of the raw materials.

68. But, as the Commission pointed out, the issue in the present action is determination of the amount of the export refund to be paid for a given finished product, from which it follows that its meat content (without fat, the Commission adds) must be determined. In those circumstances, any check carried out at the production stage is of secondary importance by comparison with inspection of the finished product, particularly since, being based on a visual assessment of the fat content of the product,

11 — Official Journal 1986, L 30, p. 8.

12 — Official Journal 1986, L 19, p. 24.

13 — Official Journal (English Special Edition) 1969 (I), p. 12.

14 — Official Journal 1986, L 210, p. 39.

it always involves — by contrast with analytical examination — a certain degree of arbitrariness and subjectivity.

69. This does not mean that companies are unable to determine with sufficient precision at the production stage what export refunds should be paid to them for the products in question, by reference to the quantity and the nature of the raw materials used, so that they are able to plan their production programme. This can be done by means of empirical examination by an 'experienced eye', a system which, as the applicant stated in its reply, could be improved upon by comparing the raw material under examination with colour photographs of meat with differing fat contents, determined by analysis.

70. But examination of the final product is entirely different and cannot be carried out otherwise than by recourse to analytical methods.

71. And even though doubts were raised several years ago as to the feasibility of chemical analytical methods based on nitrogen content and as to the 'normality', from the point of view of commercial or industrial practice, of the definition of 'lean meat determined analytically', the fact remains that, at the hearing, the agent for the Danish Government stated that in his country such methods (which, according to the United Kingdom, are internationally recognized and would appear to have been embodied in Regulation No 2429/86) have now been applied for several years.

72. It is not therefore surprising that the Commission should rely upon the results of those methods to check the content of meat without fat where, within the framework of the common agricultural policy, export refunds are granted in respect of preparations containing bovine meat.

73. Be that as it may, the conclusion that may be drawn is, of course, that there are no technical reasons for rejecting the interpretation advocated by the Commission, or for necessarily adopting the interpretation contended for by Denmark and the United Kingdom.

74. On the contrary, I believe that the technical questions raised militate in favour of the Commission's interpretation.

75. Since it is impossible to distinguish analytically between natural fat and added fat in the final product, the result of the applicant's interpretation is that any checking of the finished product might be evaded by substituting added fat for meat in quantities greater than those allowed by the Community regulations.

76. The circular from the Danish Ministry of Agriculture, which is attached to the application as Annex 5, appears to illustrate this problem.

77. Among the various calculation formulae recommended, it includes the following:

% of meat determined by analysis = % of meat without fat determined by analysis + % of fat determined by analysis.

78. Thus, for the purpose of analysis of bovine meat preparations, the Danish authorities apparently draw no distinction between natural fat and added fat, in so far as they add to the percentage of meat without fat determined analytically the percentage of fat of any origin and nature

to determine the analytical percentage of meat which, in its opinion, enables the product to be categorized for the purpose of calculating the refund.

79. The method which appears to be advocated in that circular is not capable of preventing fraud.

80. Even if the possibility of fraud is disregarded, the applicant's interpretation, by applying a coeffiient of 30% to determine the maximum permitted amount of intramuscular fat, lowers the analytical limits in terms of meat without fat, provided for in the regulation, from 80%, 60%, 40% and 20% to, respectively, 56%, 42%, 28% and 14%.

81. In view of the fact that superior quality bovine meat contains between 2% and 5% fat, this implies that the maximum refund will be paid both for a product whose content of meat without fat is between 95% and 98% and for a product with a content of only 56%, and in the latter case the remaining 44% may be made up of other ingredients.

82. It also implies that, for the purpose of calculating refunds, products of that kind instead of being placed in categories which progress evenly by 20% steps according to their content by weight of meat without fat, will ultimately have an upper category with a span of 44%, followed by three others with a span of 14% each.

83. The limit of 30% fat which the Danish Government considers permissible in bovine meat does not, moreover, seem sufficiently justified from the point of view of Community law.

84. As the Commission pointed out, no Community legislation refers to such a limit. The response to that statement will be that the Community legislature's silence indicates that the national criteria are to apply.

85. But, whilst it is true that the Danish Government, in justifying the choice of that percentage, relies upon the fact that the natural fat content of forequarters varies between 18% and 36%, it is no less true that no sound evidence has been produced to justify the specific figure of 30% rather than any other, the logical basis of which might, moreover, be presented more clearly.

86. And, whilst it is not possible to find any solid basis for the figure of 30% for natural fat (visible and invisible) allowed by the Danish Government, no incontestable justification has been put forward, as I stated earlier, for the figure of 10% for invisible fat advocated by the United Kingdom.

87. In any case, none of the views put forward appears capable of ensuring a 'Community' interpretation of the contested expression.

88. *G* — This means that the interpretative methods advocated by the two Member States concerned do not achieve the *desired uniform application of Community law.*

89. And, as the Court has held, 'the common organizations of the agricultural markets . . . can only fulfil their functions if the provisions to which they give rise are applied in a uniform manner in all the Member States', and it is therefore necessary for 'the descriptions of the goods which are subject to those organizations [to] have the same scope in all the Member States' (judgment of 18 June 1970 in Case

74/69 *Hauptzollamt Bremen* v *Krohn* [1970] ECR 451, paragraph 8 [15]).

90. Consequently, as the Commission stated, there has been a distortion of competition with respect to those Member States which adopt a strict interpretation of the regulation, in so far as Danish traders (and, to a lesser extent, United Kingdom traders) are able to obtain the same refund for products containing a lower percentage of meat without fat.

91. As the Court held in its judgments of 7 February 1979 in Cases 11/76 *Netherlands* v *Commission* and 18/76 *Federal Republic of Germany* v *Commission*, [16] the system provided for in Articles 2 and 3 of Regulation No 729/70 of the Council of 21 April 1970 requires a 'strict interpretation' of the conditions under which expenditure is to be borne by the EAGGF, having regard, in particular, to the objective of that regulation.

92. The Court stated:

'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'.

93. According to the Commission, the other Member States (with the exception of Luxembourg, to which the regulation does not apply) apply the rules at issue in accordance with the interpretation which it considers to be correct.

94. Since the practice adopted by the Danish authorities is derived from an erroneous interpretation of Community law, 'the Commission is not obliged to charge expenditure incurred on that basis to the Fund unless the incorrect interpretation may be attributed to a Community institution'. [17]

95. However, it is here, in my opinion, that the position maintained by the Commission regarding Denmark's application may show the first signs of shakiness.

96. On the one hand, the differences of position as between the Member States reveal the difficulties of interpretation to which the provisions at issue give rise.

97. On the other hand, the question arises whether the Commission's conduct is so unobjectionable that it cannot be said to have contributed in any way to Denmark's being led into error.

98. In any event, could not the circumstances surrounding the application of the regulation at issue by Denmark have been favourable to the interpretation adopted by it, convincing it that its view would be shared by the Commission?

15 — See also paragraphs 4, 9 and 10.

16 — [1979] ECR 245 and 343, paragraphs 9 and 8 respectively.

17 — Judgment of 27 January 1981 in Case 1251/79 *Italy* v *Commission* [1981] ECR 205, paragraph 17.

99. *H* — Let us consider now the problem of the various *language versions.*

100. It was the Commission which, in its defence, raised this problem by comparing the Danish version with the others. The applicant took advantage of that fact in its reply to hold the Commission responsible for the differing degrees of clarity of the wordings used.

101. In that connection, let us commence by recalling the decisions of the Court according to which, where there are linguistic divergences, 'it is preferable to explore the possibilities of solving the points at issue without giving preference to any one of the texts involved', [18] since the need for uniform interpretation of Community regulations makes it impossible, in case of doubt, for the text of a provision to be considered in isolation and requires that it should be interpreted and applied in the light of the versions existing in the other official languages. [19]

102. What carries even more weight is the fact that the Court has already held [20] that 'the different language versions of a Community text must be given a uniform interpretation and hence in the case of divergence between the versions the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part'.

103. The Commission explained that its argument had been based on the Danish version of Regulation No 187/80, and that it used the other language versions to corroborate, and perhaps clarify, the interpretation arrived at from that version.

104. Attention should however be drawn immediately to the difference between the grammatical forms used in the Danish version and those used in the others: 'ikke . . . fedt' appears to correspond, more precisely, to 'mas nao . . . a gordura' ('mais no . . . la graisse', 'but not . . . fat').

105. The words used seem to me to be indubitably less strong.

106. However, they are not incompatible with the Commission's interpretation, in so far as the interpretative criteria which I expounded earlier are applicable to them.

107. I therefore conclude that, as regards the first submission, the arguments of Denmark and the United Kingdom are not such as to show convincingly that the Commission adopted an incorrect interpretation of the provisions at issue.

108. Let us therefore analyse the second submission.

III — The second submission: infringement by the Commission of Article 5 of Regulation No 729/70

109. *A* — The Danish Government maintains that the fact that the Commission, contrary to Article 5 of Regulation No 729/70, was slow in clearing the accounts for 1980 and 1981, taking considerably more than the period of one year laid down therein, constitutes an infringement of a legal obligation to act, which prevents it from having recourse to a new legal definition.

18 — Judgment of 3 March 1977 in Case 80/76 *Kerry Milk* v *Minister for Agriculture and Fisheries* [1977] ECR 425, at p. 435.

19 — Judgment of 12 July 1979 in Case 9/79 *Koschniske* v *Raad van Arbeid* [1979] ECR 2717, paragraph 6.

20 — Judgment of 27 October 1977 in Case 30/77 *Regina* v *Bouchereau* [1977] ECR 1999, paragraph 14; see also judgments of 7 February 1979 in Cases 11/76 and 18/76, *supra*, at pp. 278 and 383.

110. If I understand it correctly, this submission can be divided into two limbs.

111. *B* — In the first, Denmark refers to the Commission's failure to comply with the prescribed time-limit for the clearance of the accounts. This is conceded by the Commission, which states that an excessive workload accounted for the delay.

112. However, that fact alone is not capable of rendering acceptable any irregularities on the part of the Member States in granting export refunds or of preventing financing from being refused by the EAGGF for expenditure incurred contrary to the Community rules, in breach of Article 2 of Regulation No 729/70.

113. It is apparent from previous decisions of the Court[21] that, under Community law, since the Treaty is not limited to creating reciprocal obligations between the natural and legal persons to whom it is applicable, the failure of a Community institution to fulfil its obligations does not, except where otherwise expressly provided, relieve the Member States of the duty to fulfil their obligations.

114. Moreover, as may also be deduced from the judgment in Joined Cases 90 and 91/63 (at p. 631), a Member State cannot rely upon a Community institution's failure to comply with a time-limit in order to exculpate itself for an infringement of Community law committed by it at an earlier time. In those circumstances, there is clearly no causal link between the Community's transgression and the infringement committed by the Member State.

115. The position in these proceedings is therefore, as the Commission has pointed out, that the infringements attributed to the applicant took place in 1980 and 1981 whereas the Commission failed to comply with the time-limit for the first time on 1 January 1982.

116. *C* — But the second limb of the argument seems to me to deserve to be viewed differently.

117. The Danish Government, by stating that the Commission cannot rely upon a new 'legal definition' after the period prescribed for the clearance of the accounts has expired, is basically alleging that, having regard to the circumstances, the Commission's application of its interpretation in the 1985 decision which partially rejected the accounts submitted for 1980 and 1981 frustrated the *legitimate expectation* of the Kingdom of Denmark that its accounts would be approved.

118. On what grounds could it be held, if at all, that that is the case?

119. It cannot be said, in *absolute terms,* that the legal definition applied in the contested decisions is 'new'.

120. The Commission contends — and was not shown to be wrong — that it has never adopted any interpretation different from that which it adopted in those decisions. It merely had no reason at an earlier stage to apprehend the applicant's error of interpretation, in so far as its first opportunity to do so was during an inspection visit carried out in July 1984.

21 — Judgment of 13 November 1964 in Joined Cases 90 and 91/63 *Commission* v *Luxembourg and Belgium* [1964] ECR 625, at p. 631.

121. Its interpretation of the contested legislation was even notified to Ireland as early as November 1979, in response to a question formulated by the Irish authorities; however, the Danish Government did not consult the Commission on that matter.

122. It seems to me that this provides us with our first glimpse of the essential elements for assessing the applicant's position as regards the problem of legitimate expectations.

123. Although it had been alerted in 1979 by the Irish authorities to the existence of doubts as to the interpretation of legislation in the same series as Regulation No 187/80, the Commission did not take the initiative to prevent the incorrect application of that legislation by other Member States by circulating the content of the reply given to Ireland.

124. It should have been prompted to do so by a duty of care or sound administration and indeed by the general duties incumbent upon it under Article 155 of the Treaty, and it cannot really justify its omission by relying upon difficulties of an administrative or bureaucratic nature.

125. Thus, use was not made of all 'the means available to ensure the uniform application of Community law' referred to in the judgments of 7 February 1979 cited earlier, as a condition to be fulfilled before EAGGF financing is withheld.

126. And it does not seem that the Commission's omission at that stage was consequential upon Denmark's failure to consult it on the interpretation of the contested passage.

127. It is doubtful whether, in that respect, Denmark was under a duty of the same extent as that incumbent upon the Commission.

128. Furthermore, there is no reason to doubt the applicant's good faith as regards its interpretation of the regulation, which it considered to be correct and which it based, as it explained, on its own usages and commercial and industrial criteria, without wondering whether different interpretations might be possible.

129. Moreover, the Commission approved the accounts submitted by Denmark for 1977, 1978 and 1979, without raising objections as to the financing of export refunds for bovine meat preparations.

130. It is true that, as the Commission contended, the information set out in the table sent to it by the Danish authorities together with their annual reports does not give a sufficiently precise indication of the meaning of the terms used to enable correct conclusions to be drawn as to the interpretation adopted by those authorities.

131. The fact is that — quite apart from any observations which may be prompted by the Commission's failure to check the applicant's statements regarding the clearance of the accounts — the approval of such accounts for several further years doubtless contributed to Denmark's belief that its conduct was not improper.

132. Moreover, although I take the view that the Commission's interpretation is correct, it was not, having regard to the

applicable legislation, the only possible interpretation and there is no doubt that other meanings were compatible with the wording used, as is shown by the divergent interpretations to which the ambiguity of the texts gave rise.

133. If at the same time we recall the lesser force of the Danish version of the regulation which I mentioned earlier, Denmark's interpretation of the provisions in question for the years 1980 and 1981 must necessarily be seen in a very special light.

134. I must therefore conclude that, taken together, the factors which I have just desribed were of such a nature as to lead the Danish authorities to believe that their interpretation was correct and to create the legitimate expectation that the Commission would continue to act, with respect to the clearance of accounts, as it had acted in previous years.

135. In view of what I have said, it must also be concluded that, having been insufficiently diligent, the Commission contributed, by omission, to the applicant's error — or, at least, did not take the measures available to it to prevent that error.

136. It therefore seems to me that the applicant has good grounds for securing recognition by the EAGGF of the expenditure incurred in respect of export refunds to which these proceedings relate.

137. *D* — In its reply, the applicant put forward another submission.

138. In its view, it would have been preferable to assess Denmark's allegedly erroneous interpretation in proceedings for the failure of a Member State to fulfil its obligations, in accordance with Article 169 of the Treaty, since recourse to the procedure for the clearance of accounts without limitation as to time and without the guarantees provided by Article 169 of the Treaty is unacceptable.

139. Being out of time, that submission should not be regarded as admissible.

140. In any event, it does not seem to me that that view in fact casts doubt upon the propriety of the procedure adopted by the Commission.

141. The Court has already had occasion to make it clear, in its judgment of 7 February 1979 in Joined Cases 15 and 16/76 *France* v *Commission*,[22] that the two procedures are independent of each other as they serve different aims and are subject to different rules (paragraph 26). Actions regarding failure to comply with Treaty obligations are brought for the purpose of obtaining a declaration that the conduct of a Member State infringes Community law and of terminating that conduct (paragraph 27); that procedure therefore essentially looks to the future, in order to bring to an end or to prevent the repetition of unlawful conduct. For its part, the procedure of clearance of accounts is designed, at the present stage of development of Community law, to check not only that the expenses were actually and properly incurred but also that the financial burden of the common agricultural policy is correctly apportioned between the Member States and the Community, and in this respect the Commission has no discretionary power to derogate from the applicable mandatory rules (paragraph 29); that procedure therefore looks essentially to the past, making it possible to give effect to the financial consequences of the infringements of Community law committed by the

22 — [1979] ECR 321, at p. 339.

Member States in their application of the rules of the common agricultural policy.

142. The bringing of an action for failure to fulfil Community obligations, under Article 169 of the Treaty, must not therefore be regarded as a necessary precondition or a substitute for the withholding of financing in connection with the clearance of EAGGF accounts.

143. This is particularly true if it is borne in mind that, according to the current case-law (see for example the judgment just cited, paragraph 27), it is for the Commission to decide whether it is appropriate to have recourse to an action under Article 169 and, in particular, to decide not to bring an action when the infringement has ceased, without such discontinuance constituting recognition that the contested conduct was lawful.

IV — Conclusion

144. In view of the foregoing considerations, my opinion is that the first submission contained in the application is unfounded and that the submission put forward in the reply is inadmissible (and, in any case, unfounded).

145. On the other hand, it seems to me that the EAGGF's failure to approve the expenditure incurred in respect of export refunds in the circumstances to which these proceedings relate constitutes frustration of the applicant's legitimate expectation that the expenditure would be upheld.

146. For that reason, I propose that the Court should uphold the application, declaring the contested decisions void, and should order the Commission to pay the costs, including those relating to the intervention of the United Kingdom of Great Britain and Northern Ireland.