

OPINION OF ADVOCATE GENERAL
FENNELLY

delivered on 27 November 1997 *

I — Introduction

1. The issue in this case is whether Member States can apply national rules of set-off between fiscal debts owed under national law and sums due to the same persons pursuant to Community law. The applicable Community legislation, part of the McSharry agricultural reforms, requires that certain agricultural aids be paid to their intended recipients 'in their entirety', by a specified date.

ber 1991 establishing a support system for producers of soya beans, rape seed and colza seed and sunflower seed¹ and Commission Regulation (EEC) No 615/92 of 10 March 1992 laying down detailed rules for a support system for producers of soya beans, rape seed, colza seed and sunflower seed,² and extended by Council Regulation (EEC) No 1765/92 of 30 June 1992 establishing a support system for producers of certain arable crops³ (hereinafter 'the Regulation'). The second recital in the preamble to the Regulation states that 'in order to ensure better market balances a new support system has to be established ... to compensate the loss of income caused by the reduction of the institutional prices by a compensatory payment for producers who sow such products'. The recital adds that 'the area eligible should be restricted to the area down to arable crops or publicly funded set aside in the past'.

II — Legal and factual context

(i) *Community law*

2. The agricultural reforms in question replaced indirect subsidies by means of price supports with a system approximating Community and world market prices, and with payment of compensating aids directly to producers. They were initiated by Council Regulation (EEC) No 3766/91 of 12 Decem-

3. Compensatory payments are based on the amount of land either under cultivation or set aside.⁴ Applicants for aid are subject to an obligation to set aside a specified proportion of the land in their holding, in return for

1 — OJ 1991 L 356, p. 17.

2 — OJ 1992 L 67, p. 11.

3 — OJ 1992 L 181, p. 12.

4 — Articles 2(2) and 7 of the Regulation.

* Original language: English.

compensation.⁵ The amount of the compensatory payment per hectare is calculated on a regional basis, by multiplying a specified basic monetary sum per tonne by the average cereals yield from 1986/87 to 1990/91 determined for the region concerned.⁶ This amount, and the related compensation for set-aside obligations, may be changed in the light of developments in production, productivity and the markets.⁷ Where the sum of the individual areas for which aid is claimed is greater than the regional base area in which arable crops were grown or which were subject to publicly funded set-aside in the reference period 1989/91, the area eligible for aid is proportionately reduced or, in subsequent years, proportionate increases in uncompensated set-aside shall be imposed.⁸ As an alternative to using a regional base area, Member States have the option of awarding aids on the basis of individual base areas, based on the average number of hectares in arable cultivation or set-aside during the reference period in each holding in its territory,⁹ in which case individual producers can apply for aid only in respect of the area attributed to them.

4. Article 13 of the Regulation states that the measures provided for shall be deemed to be interventions intended to stabilise the agricultural markets within the meaning of Article 3(1) of Council Regulation (EEC) No 729/70 of 21 April 1970 on the financing

of the common agricultural policy.¹⁰ Article 10(1) provides that the compensatory payments shall be made between 16 October and 31 December following the harvest. Article 15(3), which is central to the present case, states that '[t]he payments referred to in this Regulation are to be paid over to the beneficiaries in their entirety'. Article 2(2) of Regulation No 615/92 provided, similarly, that '[t]he payments referred to in this Regulation shall be made to producers without any deductions except as otherwise provided in this Regulation'.

5. At the time of the events giving rise to the present action,¹¹ Article 4 of Regulation No 729/70 provided for the designation by Member States of authorities and bodies, empowered to effect the expenditure provided for, to whom the Commission would make available the necessary credits. The second indent of Article 4(2) provided that '[t]he Member States shall ensure that those credits are used without delay and solely for the purposes laid down'. After the end of the 1987 financial year, the Member States were required to mobilise the financial resources to cover the necessary expenditure, in accordance with the needs of their disbursing authorities, while the Commission made payments to cover expenditure already effected by the Member States.¹²

5 — Articles 2(5) and 7(1) of the Regulation. Article 8(1) provides that small producers may apply under a simplified scheme which does not include a set-aside obligation.

6 — Article 4(1) and (2) of the Regulation.

7 — Article 15(1) of the Regulation.

8 — Article 2(6) of the Regulation.

9 — Article 2(3) of the Regulation.

10 — OJ, English Special Edition, First Series 1970 (I), p. 218.

11 — Articles 4, 5 and 8 of Regulation No 729/70 were amended by Council Regulation (EC) No 1287/95 of 22 May 1995, OJ 1995 L 125, p. 1, with effect from 16 October 1995.

12 — Third subparagraph of Article 4(2) and Article 5(2)(a) of Regulation No 729/70, as inserted and amended, respectively, by Council Regulation (EEC) No 3183/87 of 19 October 1987 introducing special rules for the financing of the common agricultural policy, OJ 1987 L 304, p. 1, and further amended by Council Regulation (EEC) No 2048/88 of 24 June 1988, OJ 1988 L 185, p. 1. Article 5(2)(a) formerly provided for the Commission to make advances to Member States before expenditure was effected.

Article 8 of Regulation No 729/70 provided at the relevant time:

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

'(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 [European Agricultural Guidance and Guarantee] Fund are actually carried out and are executed correctly;

6. Article 14 of Commission Regulation (EEC) No 3887/92 of 23 December 1992 laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes¹³ is concerned with reimbursement of wrongly paid aids. Article 14(2) provides as follows:

— prevent and deal with irregularities;

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

'However, Member States may decide that the amount owed [in the case of wrongful payment to a farmer] should not be paid over but deducted from the first advance or first payment due to the farmer concerned after the date on which the repayment decision was taken. No interest shall run after the beneficiary has been informed of the wrong payment.'

...
(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.

¹³ — OJ 1992 L 391, p. 36. Commission Regulation No 3387/92 is applicable from 1 February 1993 and was adopted on the basis of Council Regulation (EEC) No 3508/92 of 27 November 1992 establishing an integrated administration and control system for certain Community aid schemes, OJ 1992 L 355, p. 1, which applies to, *inter alia*, the aid scheme established by the Regulation.

(ii) *Danish law*

7. Under general principles of Danish law, public authorities are entitled to recover fiscal debts owed to them by the beneficiaries of public aid in three ways. First, a public authority, like any creditor, may seek the attachment of aid monies owed to its debtor, which, if resisted by the debtor, requires an order of a competent court. The normal rules of priority apply. The aid will be paid directly to the grantee of such an attachment order.

8. Secondly, the debtor may voluntarily assign his interest in the monies owed to him or expected to be owed to him by a public authority to his creditors, including public authorities. In the case of an assignment to a number of creditors, the rules of priority apply. In the case of an assignment to a private creditor, the assignee will then be entitled to claim the aid in question directly from the responsible public authority.

9. Finally, the method at issue in this case is that of set-off in respect of debts in a liquidated sum. The respective debts and credits must be mutual, that is, the debtor in respect of one is the creditor in respect of the other. The different organs of the Danish State are considered to constitute a single entity for

these purposes.¹⁴ Thus, for example, fiscal debts owed to the revenue authorities can normally be set off against monies owed to the same person by other ministries.

10. However, set-off is in certain cases precluded by social and general considerations.¹⁵ It is not the practice to set off debts to private parties arising under the law of property (e. g. for the supply of goods and services or under contracts) against other debts, such as fiscal debts.¹⁶ In addition, it appears that the State's practice with regard to economic subsidies has varied. In certain fields, set-off has not been operated in the past as regards subventions for specific projects, on the grounds that the project might not otherwise be completed. Law No 284 of 27 April 1994 provides for set-off in certain specified cases of amounts not to exceed 20% of such subventions, although it appears that this is without prejudice to the State's general entitlement to set off the full amount. Subventions within the province of the Ministry of Agriculture which are subject, in practice, to this limited form of set-off include those for the development of

14 — This statement in the order for reference is disputed by Mr Jensen, on the basis of a distinction between the State and regional and local authorities. It is for the national court to resolve any subsisting dispute regarding the interpretation of the national rules.

15 — It appears that set-off is not possible in respect of payments necessary to satisfy basic needs, such as salaries, pensions and social aids.

16 — Circular No 186 of the Minister for Justice, of 22 November 1983.

agricultural or fishery products, whether in respect of projects in primary agriculture or those concerning the processing of such products. It appears that set-off does not take place at all in respect of subventions outside the scope of Law No 284.

11. The assignment of a debt will not normally affect the right of set-off. Where a creditor assigns a debt to a third party, the debtor may still claim set-off between that debt and monies owed to him by the original creditor save where the latter debt arose after he knew or could have known of the assignment. If, at the time the debtor knew or ought to have known of the assignment, the assigned debt was not yet due, the debtor can still proceed to set it off against the original creditor's debt to him where the latter debt becomes due, at the latest, on the same day as the assigned debt.¹⁷

(iii) *The facts*

12. It appears that, in the past, the Danish State had extensive recourse to set-off of agricultural aids against fiscal debts owed by farmers and others. The EC Directorate of the Danish Ministry of Agriculture, the

national authority responsible for granting compensatory payments, sought advice from the Commission's Directorate-General for Agriculture in July 1992 regarding this practice, in the light of Regulation No 615/92. The latter advised in a letter of 12 November 1992 that, where national law permitted such set-off, there was no objection to it under Community law so long as the procedure was applied neutrally, without discrimination as between debts arising under Community and national law, and the Community payments regime was not thereby rendered impossible. Articles 2(2) of Regulation No 615/92 and 15(3) of the Regulation, it said, required only that no deduction for administrative expenses or other reasons could be made from the amounts owed to producers. However, on 7 October 1994, the Directorate-General, upon further consideration of the issue by the Commission's Legal Service, advised the Danish Ministry of Agriculture of the reversal of its earlier 'provisional view'. The Commission's Legal Service had advised that the set-off of other debts against monies owed under the Regulation was not permissible, due to the requirement in Article 15(3) that aids be paid in their entirety. Furthermore, the system of set-off would undermine the efficacy of the regime, as Member States would be enabled to recover fiscal debts from producers without following normal recovery procedures, in a way which was not possible under the previous price-support regime.¹⁸ The Danish State thereupon desisted from the practice, without accepting the correctness of the Commission's view.

¹⁷ — Article 28 of Law No 669 of 23 September 1986.

¹⁸ — Memorandum of 27 April 1994 from the Commission Legal Service to the Commission Director General for Agriculture.

13. The present litigation involves one case of simple set-off and one of set-off after an assignment, both of which occurred in 1993, before the change of policy on the part of the Commission and the Danish State. The aids owed to Mr Jensen at the end of 1993 (DKR 33 563) were set off against VAT debts which were due and which were greater than the amount of the aid. It appears that the aid would otherwise have been used to make part payment of all of Mr Jensen's debts, including that to the fiscal authorities, in the framework of an agreement with his creditors, and that the set-off resulted in a significant reduction in his payments to the other creditors.

question. The national court suspended proceedings and referred the following questions for a preliminary ruling pursuant to Article 177 of the Treaty establishing the European Community:

- '1. Does Community law in general preclude a Member State from setting off an amount due to the beneficiary of aid under a Community measure against outstanding debts to a Member State?

14. The Korn-og Foderstofkompagniet A/S (hereinafter 'KFK'), a farm supplies company, had, for its part, received an assignment in spring 1993 from a farmer, Mr Stenholt, of aid monies which would be owed to him at the end of the season (DKR 45 574), in order to pay for certain supplies. However, the Danish State was able to set off that amount against Mr Stenholt's debts to the State under a debt-conversion loan dating from 1984, when his total debts to both public and private creditors were reduced in a procedure akin to bankruptcy.

2. (a) Is it of any significance for the answer to Question 1 whether the amount of aid under Community law is paid in advance by the Member State which has a claim to be reimbursed for the aid paid out only if the rules of Community law on payment are satisfied, and which must itself defray the expenditure involved in the administration of the support system?

15. Both Mr Jensen and KFK initiated proceedings before the Østre Landsret (Eastern Regional Court, hereinafter 'the national court') for the payment to them by the EC Directorate of the Ministry of Agriculture (hereinafter 'the Ministry') of the aids in

- (b) Is it of any significance for the answer to Question 1 that under the Member State's rules on set-off it is a condition for effecting set-off that there be reciprocity between the debtor under the principal claim and the creditor under the counterclaim?

- (c) Is it of any significance for the answer to Question 1 that the Member State's practice with regard to certain trade and environmental subsidies is established in such a way as to permit set-off in an amount not exceeding 20% of the said State subsidies?
- (d) Is it of any significance for the answer to Question 1 what legal basis exists for the outstanding debt to the State against which set-off is to be effected?
4. Is Article 10(1) of Council Regulation No 1765/92 to be interpreted as meaning that the compensatory amounts in question are to be paid over immediately the intervention agency has concluded the procedure with regard to the beneficiary's application, or is it permissible to delay the payment for an investigation as to whether the State has outstanding claims against the beneficiary in respect of which it wishes to effect a set-off, provided always that the payment is effected at the latest by 31 December of the relevant support year?

III — Observations

An answer is desired in particular to the question whether the Member States have greater scope to effect set-off if all or part of the sum to be set off constitutes part of the Community's own income.

3. If Questions 1 and 2(a) to 2(d) are answered to the effect that set-off is in general possible, or possible subject to certain conditions, is Article 15(3) of Council Regulation No 1765/92 to be interpreted as meaning that a Member State is precluded from requiring a national intervention agency to effect set-off in the case of a beneficiary of compensatory payments with outstanding debts to the State which could otherwise be involved in set-off?

16. Written observations were submitted by Mr Jensen, the EC Directorate of the Danish Ministry of Agriculture, the Commission, the Kingdom of Denmark, the Republic of Finland, Ireland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland. Oral observations were submitted by Mr Jensen, KFK, the Ministry, the Commission, the Kingdom of Denmark, the Republic of Finland, the French Republic, the Hellenic Republic and Ireland.

17. Generally speaking, all of the Member States which have submitted observations, as well as the Ministry, support the possibility of set-off of compensatory payments under the Regulation against fiscal debts, for largely similar reasons, although they do not all make submissions regarding all of the questions referred by the national court. I

will not, therefore, seek to distinguish the arguments attributable to each in respect of the first and third questions. I will refer to them, simply, as the Member States. While the Commission does not wish to exclude in all circumstances the possibility of set-off by Member State public authorities of Community aids against national fiscal debts, it submits, as do Mr Jensen and KFK, that this is impermissible in respect of aids granted pursuant to the Regulation. It is, therefore, convenient to summarise the arguments put forward regarding each of the questions referred by the national court in terms of these two broad schools of thought. As the observations raise related arguments in respect of the more general issue of set-off in Question 1 and the more specific issue of legislative interpretation in Question 3, I propose to treat those two questions together.

Both Mr Jensen and the Commission rely on the objectives of the Regulation, summarised immediately below, to reinforce this interpretation of Article 15(3). The Commission states that Article 15(3) of the Regulation does not prejudice either the attachment procedure or the imposition and recovery of taxes, provided that this is not discriminatory and does not undermine the common organisation of the markets. In response to a question at the oral hearing, the Commission stated that Article 15(3) of the Regulation would not preclude the set-off of aid against monies owed by a farmer under Community law, as is confirmed by the case-law of the Court.

Questions 1 and 3

18. Mr Jensen, KFK and the Commission submit that Article 15(3) of the Regulation contains a clear prohibition of set-off. The set-off and, thus, satisfaction of a counter-debt cannot be deemed to be equivalent to payment in the absence of receipt of the monies in question. The Commission argues that the farmer should receive the money in the same way as if he had sold his produce. The farmer should have a choice regarding its expenditure, rather than having a particular use of the money imposed unilaterally.

19. Mr Jensen submits that, irrespective of whether reciprocity between the debts in question is required by Community law or merely by Danish law, this condition is not satisfied in the present case. The aid scheme established by the Regulation is regulated, paid for and supervised by the Community. He and KFK state that the aid scheme is merely managed by the Member States, and that aids must be passed on faithfully to its intended beneficiaries.¹⁹ It is immaterial, therefore, whether the Member State's capacity is described as that of an agent or intermediary, as the aid is really owed by a third party, the Community. Mr Jensen and KFK argue that set-off by the State must be prohibited in all cases, as a Member State cannot

¹⁹ — Case C-186/93 *UNAPROL v AIMA* [1994] ECR I-3615.

be permitted unilaterally to exploit its position as the distributor of aid, without any form of judicial control.²⁰ Member State authorities would otherwise be in a privileged position relative to other creditors, a view echoed by the Commission at the oral hearing. Mr Jensen states that the objective of the agricultural reforms was not to give Member States an easy new tax-collection device. Furthermore, KFK states that the distribution of aid by an organ of the State itself, rather than by an independent designated body, was not imposed by Regulation No 729/70, but was a matter of choice for the Member States.

to Community law. The Commission states that neutral national rules on set-off would, therefore, normally be permitted to apply in the absence of Community rules. Although Mr Jensen suggests that the express legislative provision for set-off in Article 14(2) of Regulation No 3887/92 excludes it in all other circumstances, the Commission does not think that provision relevant to other situations.

20. The Commission states that there is no general Community-law obstacle to the imposition or recovery of national taxes in the agricultural sector, in the light of its close links with the economy as a whole,²¹ so long as the structure of the market or the functioning of market mechanisms established by the common organisation of the markets is not thereby undermined. There are no Community rules regarding set-off of Community aids against national fiscal debts, though Article 14 of Regulation No 3887/92 and the decisions of the Court in *DEKA v EEC*²² and *Continental Irish Meat v Minister for Agriculture*²³ permit set-off in cases where the reciprocal debts concerned arise pursuant

21. However, Mr Jensen, KFK and the Commission all argue that the application of national set-off rules in the present case would prejudice the achievement of the objective of the Regulation, which is to make a direct contribution to farmers' incomes and to compensate for losses from the scaling down of price guarantees and export refunds. The aid is an integral part of the credit base of farming enterprises. This would be threatened if their cash-flow were to be cut off, whereas the former intervention system, being indirect, did not lend itself to the use of set-off by the State. KFK observes that a mortgage on the crop alone does not provide sufficient security because of the reduction in prices entailed by the agricultural reforms, and submits that farmers should be able to choose the creditors to whom they grant security. Mr Jensen and the Commission also point out that attachment of debts would remain possible and claim that this is a more transparent procedure which is open to all creditors.

22. The Member States argue that Article 15(3) of the Regulation is insuffi-

20 — Case C-34/89 *Italy v Commission* [1990] ECR I-3603.

21 — Article 39(2)(c) of the Treaty.

22 — Case 250/78 [1983] ECR 421.

23 — Case 125/84 [1985] ECR 3441.

ciently precise to give rise to a prohibition of set-off of fiscal debts against aid. There is nothing in the recitals in the preamble to the Regulation to suggest any such legislative intention. Variations on the formula used in Article 15(3) are to be found in other legislation, such as Article 2(2) of Regulation No 615/92 and Article 7(2) of Commission Regulation (EEC) No 84/93 of 19 January 1993 on the specific aid to be granted to producer groups in the raw tobacco sector.²⁴ The Commission's 'linguistic' interpretation of the article would lead to legal uncertainty, as it would never be clear in any given case whether the operation of set-off would prejudice the wider objectives of the aid scheme.

23. The Member States argue that set-off results in the full payment of aid to the affected farmer: in so far as his indebtedness is reduced by that entire amount, he is thereby enriched. Payment can take place other than by the issuing of a cheque or other banking transaction. Thus, set-off is neutral in its effects. Article 15(3) of the Regulation is designed to prohibit, in reality, the deduction by the Member States from aid payments of administrative charges, which are not financed by the Community, or of special taxes, as distinct from those of general application. The Commission communication which accompanied the proposal

for the Regulation is cited in support of this view.²⁵

24. The Member States argue that, in the absence of Community rules, national rules can continue to apply, provided they are non-discriminatory and do not undermine the common organisation of the market.²⁶ The Court's case-law recognises the possibility of set-off,²⁷ and its operation in the circumstances of the present case is no different, in principle, from set-off in respect of wrongly paid Community aid pursuant to Article 14(2) of Regulation No 3887/92. The provision for set-off in that provision applies both to schemes which are wholly financed by the Community and to those which are co-funded by the Community and the Member States. The universal right, in the Member States' legal systems, to set-off or to similar types of debt recovery procedure should be considered to give rise to a general principle of Community law in its favour. In the light of the principle of subsidiarity, any applicable national rules would have to be excluded expressly.

25. The consequences for debt collection of the agricultural reforms were not discussed

25 — COM(91) 379 final, 18 October 1991, *Reform of the common agricultural policy*.

26 — Case 33/76 *Rewe v Landwirtschaftskammer Saarland* [1976] ECR 1989; Case 45/76 *Comet v Produktschap voor Siergewassen* [1976] ECR 2043; Case 199/82 *Amministrazione delle Finanze dello Stato v San Giorgio* [1983] ECR 3595.

27 — *DEKA v EEC*, cited in footnote 22 above.

24 — OJ 1993 L 12, p. 5.

by the Community legislature, so that the objectives of those reforms cannot be invoked to prevent set-off. The reforms are concerned with a move towards world market prices, rather than with guaranteeing a specific payment to individual farmers, or their protection from creditors. Farmers do not escape the reach of the Member States' general law,²⁸ and the close links between the agricultural sector and the rest of the economy can vary the effect of the common agricultural policy in accordance with local economic conditions, including levels of taxation.²⁹

intended beneficiaries of aid, would also benefit from this privilege. It would be especially inappropriate since the State, unlike a private creditor, is not in a position to choose its debtors. The recovery of taxes is a central State function, and the mandatory requirement of fiscal control is recognised by Community law.³⁰ There is a Community interest in the economies and fiscal health of the Member States. Moreover, it is unreasonable to force a solvent creditor to pay money to his insolvent debtor.

26. Prior to the reforms, there was nothing to prevent set-off of debts by operators, such as KFK, against producers under the former system of indirect agricultural aids, nor does anything appear to preclude the operation of set-off by private actors such as banks under the new regime. Furthermore, set-off was possible as between public authorities and the operators under the price-support system. In any event, a new system may give rise to new consequences for beneficiaries when managed within the framework of a national legal system. The exclusion of the operation of set-off by Member State tax authorities would unjustifiably discriminate in favour of, and give a competitive advantage to, those farmers who do not pay their taxes, to the detriment of the public treasury, of other categories of taxpayer, such as salaried persons, and of farmers who punctually pay their taxes. Furthermore, private creditors such as KFK, who are not even the

27. The Member States emphasise the potential significance of this case for other types of debt recovery, such as attachment. They take the view that the logic of the Commission's arguments would lead to the condemnation of all types of seizure of aid, even by private parties, and would extend to set-off in favour of the Community, which has already been expressly approved by the Court. The exclusion of any type of aid seizure for the purposes of debt recovery could make it more difficult for farmers to obtain credit. In the alternative, continued acceptance of other debt recovery procedures such as attachment would demonstrate the benefits of set-off, which is speedier and involves no additional cost for affected farmers. The Commission's preference for judicial recovery procedures

28 — Case 297/82 *Samvirkende Danske Landboforeninger v Ministry of Fiscal Affairs* [1983] ECR 3299.

29 — Article 39(2)(c) of the Treaty; Joined Cases 36/80 and 71/80 *Irish Creamery Milk Suppliers Association v Ireland* [1981] ECR 735.

30 — Case 120/78 *Rewe-Zentral v Bundesmonopolverwaltung für Branntwein ('Cassis de Dijon')* [1979] ECR 649.

would interfere with the balance between the rights of debtors and of creditors developed in the legal systems of the different Member States.

Question 2

28. Regarding Question 2(a), Mr Jensen submits that it is irrelevant that Member States advance the necessary monies for aid payments from their own resources, as they have a right to claim a full reimbursement from the Community. The change in payment procedure in 1988 (replacing the former system of advance payment by the Community to the Member States)³¹ cannot have altered the nature of the agency relationship between the Member States and the Community. The fact that Member States can only claim reimbursement if aid has been paid out in conformity with Community rules is in no way inconsistent with such an agency relationship. The Commission took the view at the oral hearing that the principle of reciprocity was not, in itself, a barrier to set-off because the Member State acted on its own account in distributing aid.³²

29. The Ministry, Denmark and Finland argue that the debts in question are owed

mutually by and to the Danish State. The payment mechanism, the support of administrative costs by the Member State, and the fact that the Member State is solely responsible to the Community for this expenditure, indicate that the Ministry is the farmer's debtor in respect of the aid. The obligation to pay the aid is imposed directly upon the Member States, with the result that the beneficiary cannot claim aid directly from the Community.³³

30. In response to Question 2(b), Mr Jensen argues that the general principle of equality requires that reciprocity of debts be a condition of acceptance by Community law of the possibility of set-off. While the Court cannot interpret the Danish rules in this regard, it should make a finding as to the capacity in which the Ministry acts when managing Community aid schemes. Set-off would result in unacceptable inequality as between Member States, due to divergent practices.

31. The Ministry agrees that the Court should only rule on whether aid monies are owed to the farmer by the Member State acting in its own capacity (on which it favours a positive response, however), and that consequential questions of national law, regarding, for example, whether the State constitutes a single juridical entity, should be left to be decided by the national court. The United

³¹ — See footnote 12 above.

³² — Case 109/83 *Enrico v Commission* [1984] ECR 3581.

³³ — *UNAPROL v AIMA*, cited in footnote 19 above; *Enrico v Commission*, cited above.

Kingdom, on the other hand, submits that reciprocity is a generally applicable condition for the operation of set-off in a Community-law context, but that it exists in the present context, as national authorities do not work for the account of the Community,³⁴ and that a wide margin of appreciation should be left to national law.³⁵

with national subventions, they are not equivalent, so that no unlawful discrimination exists in Danish law.

32. Mr Jensen and the Commission argue, in respect of Question 2(c), that the operation of set-off in respect of direct agricultural aids is discriminatory, and therefore unlawful,³⁶ because equivalent national subventions are either not subject to set-off at all or are subject to set-off limited to 20% of the total amount. The Commission adds that the highly discretionary manner in which set-off is operated would, in any event, create a permanent risk of discrimination. In the alternative, Mr Jensen states that aid payments should be deemed to relate to the law of property, so that they cannot be set off against fiscal debts.

34. Mr Jensen suggests that the Court should declare, in response to Question 2(d), that there is nothing in Community law which indicates that Member States should resort to otherwise impermissible recovery techniques in respect of fiscal debts which contribute to the Community's own resources. In any event, only approximately 1.4% of VAT receipts form part of the Community's own resources.

33. The Ministry argues that, although it is for the national court to undertake a comparison of Community agricultural aids

35. The Ministry submits that, if set-off of fiscal debts against Community agricultural aids is not generally permissible, it should, at least, be possible in respect of taxes which contribute to the Community's own resources. It observes that Council Regulation (EEC, Euratom) No 1552/89 of 29 May 1989 implementing Decision 88/376 EEC, Euratom on the system of the Communities' own resources³⁷ requires Member States to do all in their power to collect the taxes in question.

34 — See *Eurico v Commission*, cited in footnote 32 above; and *Continental Irish Meat v Minister for Agriculture*, cited in footnote 23 above.

35 — *UNAPROL v AIMA*, cited in footnote 19 above.

36 — Joined Cases 146/81, 192/81 and 193/81 *BayWa v Balm* [1982] ECR 1503.

37 — OJ 1989 L 155, p. 1.

Question 4

the application has taken place. Both Ireland and the United Kingdom submit that payment should take place within a reasonable period after the completion of the examination of the aid application, subject to observance of the final deadline imposed by Article 10(1).

36. Mr Jensen submits that, where examination of an aid application has been completed, it is contrary to Article 10(1) of the Regulation for payment to be delayed, even before the final deadline set out in that provision, in order to permit an additional check for possible fiscal debts. This delay serves Member States' unilateral interests, and is contrary to the requirement in Article 4(2) of Regulation No 729/70 that Member States ensure that payments are made without delay and solely for the purposes laid down. Furthermore, such delays result in inequality of treatment, because they will vary as between different Member States.³⁸ Mr Jensen has sought interest from the Ministry from the date on which the examination of his aid application ended. The Commission, on the other hand, takes the view that Article 10(1) of the Regulation has no significance for the present case independently of Article 15(3).

IV — Analysis

38. The first three questions referred by the national court all concern the question whether there are any obstacles to the application of the Danish rules on set-off in the circumstances of the present case, either, firstly, on the basis of its inconsistency with Community law in general, taking into account factors such as the capacity in which the Ministry acts when distributing Community aids, or, secondly, on the particular basis of the operation of the Danish rule of reciprocity, the allegedly discriminatory manner in which set-off is operated, and the legal basis of the fiscal debt which is satisfied by way of set-off, or, thirdly, on the basis of its inconsistency with Article 15(3) of the Regulation. I shall, therefore, treat these three questions together, although it will be convenient to examine first Question 3 regarding Article 15(3), since that provision is claimed to amount to an express negation of set-off, followed by the more general Question 1 and then the more specific queries in Question 2. I will then examine separately

37. The Ministry remarks that the Regulation contains no special rules on the processing of applications, and that the Member States have a wide margin of appreciation regarding the manner in which they manage the payment of aids,³⁹ provided the deadline is respected. It is for the national court to determine whether a speedy examination of

³⁸ — Joined Cases 205/82 to 215/82 *Deutsche Milchkontor v Germany* [1983] ECR 2633.

³⁹ — *UNAPROL v AIMA*, cited in footnote 19 above.

Question 4, which relates to the manner in which set-off is operated, and needs to be answered only if set-off is permissible.

Questions 1, 2 and 3

39. The text of Article 15(3) of the Regulation, cited particularly by the Commission, does not expressly mention set-off. The crediting of the aid to the beneficiary by way of set-off against and, *pro tanto*, discharge of an existing fiscal debt to the State responsible for granting the aid is clearly distinguishable from the deduction of special administrative fees or taxes from the aid, which are the only forms of deduction mentioned in the Commission communication accompanying its proposal for the Regulation. However, the imposition of special charges to compensate for national administrative costs would secure no benefit of equal value for the beneficiary, and would be clearly prohibited by Article 15(3). In the case of set-off, the beneficiary receives the entire monetary value of the aid, although he does not have full control over its disposal. The same would be true in the case of attachment of the aid to discharge a debt, or of any other process of execution applied against the beneficiary or his assets either in anticipation of or after actual payment. These are all consequences of the fact that, as Advocate General Mancini put it in *DEKA v EEC*, 'a person who is under an obligation to make a monetary payment offers his creditors a kind of general guarantee in the form of his assets ... [T]he debtor is in a subordinate position in regard

to his own assets'.⁴⁰ There would be no question of the aid not being considered to have been paid in full if it were transferred to the beneficiary, formed (perhaps only momentarily) part of his assets and were then seized or attached, against his will, for the benefit of any creditor. Execution before the actual transfer of money differs little, from the point of view of the degree of liberty enjoyed by the beneficiary in respect of his assets, from any form of post-payment execution.⁴¹ Furthermore, there is no evidence that the Community legislature intended, in adopting the rather laconic Article 15(3), to limit the widely varying debt-recovery methods which exist in national law. I conclude, therefore, that Article 15(3) of the Regulation does not prohibit the setting off, under national rules, of aid under the Regulation against prior debts to the State, where that is provided for by national law and the beneficiary of the aid is credited with its full value.

40. I now turn to the more fundamental inquiry required by Question 1, namely whether the application of national rules on set-off in the context of the Regulation is contrary to Community law.

40 — Cited in footnote 22 above, p. 439 of the Opinion.

41 — Regarding its effects on creditors, see paragraphs 47 to 54 below.

41. It is one of the fundamental characteristics of a common organisation of the market that the Member States are deprived of their powers unilaterally to regulate the sector concerned. The Court said of Member States in Case 48/85 *Commission v Germany*,⁴² '[t]heir legislative competence can only be residual; it is limited to situations which are not governed by the Community rules and to cases where those rules expressly give them power to act'. The latter situation is exemplified by Article 8(1) of Regulation No 729/70, which provides for the supervision of the exercise of Community policies and the prevention and remedying of irregularities to be governed by national law.⁴³ In the former situation, where Community law is silent, it is supplemented by national procedural or substantive rules in order to give effect to Community-law rights.⁴⁴ On the other hand, nothing in the common organisation of markets deprives Member States of their right generally to legislate in respect of independent aspects of national policy. The Court has, for example, ruled that the imposition of a temporary excise tax on agricultural produce or a land tax on agricultural property, in pursuance of a national incomes policy designed to share the burden of taxation, is not, in principle, incompatible with Community law. The common agricultural policy is not intended to shield its beneficiaries from the effects of distinct national policies of general application.⁴⁵ The Court's

recognition of the Member States' competence to pursue and protect their own fiscal interests⁴⁶ may, indeed, be flanked by recognition of a distinct Community interest in the fiscal efficacy of the Member States, not only because VAT and customs duties contribute to the Community's own resources, or because coordination of Member State economic policies, including levels of public indebtedness, is a matter of common concern in a developing economic and monetary union,⁴⁷ but, ultimately, because the proper functioning of the Community depends on the adequacy of the administrative, judicial and other machinery which is operated and financed by the Member States. In my opinion, national rules governing the payment and collection of fiscal debts and all associated matters, including processes of execution or attachment, priorities between creditors and, therefore, rights of set-off come within the scope of that principle, provided they are, otherwise, compatible with Community law.

42. In all such cases, the application of national rules is subject to conditions which, generally speaking, are designed to ensure the effectiveness of Community law. For example, in *Deutsche Milchkontor v Germany*, the Court outlined the conditions

42 — [1986] ECR 2549, paragraph 12 of the judgment.

43 — Case 118/76 *Balkan-Import-Export v Hauptzollamt Berlin-Packhof* [1977] ECR 1177, paragraph 5 of the judgment; *Deutsche Milchkontor v Germany*, cited in footnote 38 above, paragraph 2; Case C-34/89 *Italy v Commission*, cited in footnote 20 above, paragraph 9; Joined Cases 146/81, 192/81 and 193/81 *BayWa v Balm*, cited in footnote 36 above, paragraph 29.

44 — *Rewe v Landwirtschaftskammer Saarland*; *Comet v Produktschap voor Siergewassen*; and *Amministrazione delle Finanze dello Stato v San Giorgio*, paragraph 12; all cited in footnote 26 above.

45 — *Irish Creamery Milk Suppliers Association v Ireland*, cited in footnote 29 above, paragraph 13 of the judgment; *Samvirkende Danske Landboforeninger v Ministry of Fiscal Affairs*, cited in footnote 28 above, paragraph 8.

46 — See also *Cassis de Dijon*, cited in footnote 30 above, paragraph 8 of the judgment, Case C-250/95 *Futura Participations SA, Singer v Administration des Contributions* [1997] ECR I-2471, paragraph 31, and, in a different context, my Opinion of 20 March 1997 in Joined Cases C-286/94, C-340/95, C-401/95 and C-47/96 *Garage Molenheide BVBA and Others v Belgian State*, paragraph 43.

47 — See Articles 3a(3) and 104c of the Treaty.

regarding national rules on recovery of wrongly paid sums, expressly referred to in Article 8(1) of Regulation No 729/70:

'In the first place the application of national law must not affect the scope and effectiveness of Community law. That would be the case in particular if the application of national law made it impossible in practice to recover sums irregularly granted ... Secondly, national law must be applied in a manner which is not discriminatory compared to procedures for deciding similar but purely national disputes.'⁴⁸

Where Community law relies implicitly on the supplementary framework of national substantive and formal rules to secure the exercise of Community-law rights, those rules are also subject to the conditions, which I shall call the *San Giorgio* rules, that they 'may not be less favourable than those relating to similar claims regarding national charges and they may not be so framed as to render virtually impossible the exercise of rights conferred by Community law'.⁴⁹

43. Independent national rules are subject to specific conditions, having regard to the fact that they are not immediately or directly necessary for the implementation of Community law in the field in question. In the field of the common organisation of agricultural markets, such national rules would be incompatible with the Treaty if they 'interfered with the functioning of the machinery employed by those organisations in order to achieve their ends'.⁵⁰ Such interference could, in the case of a national tax, be manifested by an effect on price levels, on supplies on the market, or on the structure of agricultural production or of agricultural holdings.⁵¹

44. The setting off, on the basis of national rules, of aids due to farmers under the Regulation against fiscal debts owed by those farmers to a Member State belongs, in part, to both situations. Set-off is a procedure provided for in Danish law which, while securing the payment in full of Community aids, does so in a particular manner with a view to securing the independent national objective of recovering tax revenue. I refer to the conditions regarding both types of rules in the analysis which follows. I do not think, however, that in a hybrid case such as the present, the differently formulated condi-

48 — Cited in footnote 38 above, paragraphs 22 and 23 of the judgment; see also *Balkan-Import-Export v Hauptzollamt Berlin-Packhof*, cited in footnote 43 above, paragraph 5; *BayWa v Balm*, cited in footnote 36 above, paragraph 29; and *Case C-34/89 Italy v Commission*, cited in footnote 20 above, paragraph 9.

49 — *Amministrazione delle Finanze dello Stato v San Giorgio*, cited above, paragraph 12 of the judgment.

50 — *Irish Creamery Milk Suppliers Association v Ireland*, cited in footnote 29 above, paragraph 15 of the judgment; see also *Samvirkende Danske Landboforeninger v Ministry of Fiscal Affairs*, cited in footnote 28 above, paragraph 11. The Court has not found that the liability to pay national taxes of farmers in receipt of Community support is contrary to the requirement in the applicable version of Article 4(2) of Regulation No 729/70 that Member States use credits made available by the Commission 'solely for the purposes laid down'.

51 — *Irish Creamery Milk Suppliers Association v Ireland*, cited in footnote 29 above, paragraph 22 of the judgment; *Samvirkende Danske Landboforeninger v Ministry of Fiscal Affairs*, cited in footnote 28 above, paragraphs 14 to 16.

tions, recited in paragraphs 42 and 43 above, result in materially different requirements. The key issues are whether the implementation of set-off renders actually or virtually impossible the enjoyment of rights under the Regulation or otherwise affects the functioning of the system established thereby, and whether set-off gives rise to discrimination relative to the exercise of similar rights under national law.

to claims against traders for the reimbursement of wrongly paid sums, and that reciprocal and even related claims could result, as between authorities and traders, which are an appropriate subject for set-off.⁵⁵

45. The Court has already indicated in *DEKA v EEC* that, in the case of an insolvent trader, set-off by the Community of a reciprocal or related claim may be the only practicable way to recover wrongly paid sums which are owed directly to the Community.⁵² Advocate General Mancini had suggested in his Opinion that, in order to ensure uniformity throughout the Community, such a right of set-off should be deemed to be based on a general principle common to the legal systems of the Member States, and applied to claims having their basis in Community law.⁵³ The same reasoning clearly underlies the judgment.⁵⁴ The Court noted that Community rules on production and export refunds could give rise not only to debts which could be raised by traders against the administering authorities, but also

46. In *Continental Irish Meat v Minister for Agriculture*,⁵⁶ the Court accepted, without objection, the application of national set-off rules in respect of monetary compensatory amounts owed, respectively, by and to the intervention agency of the Member State concerned. Two points may be made. First, the operation of set-off is permitted for certain schemes by Article 14(2) of Regulation No 3887/92. Wrongly paid aids may be deducted from aids still to be paid. Article 14(2) of Regulation No 3887/92 does not, in my view, exclude, by a *contrario* reasoning, the operation of set-off in other contexts. This much is clear, of course, from the continuing applicability of the Court's own case-law in the matter, but also from the context of that provision. Article 14 of Regulation No 3887/92 is concerned generally with the recovery of wrongly paid sums, and set-off is permitted as an alternative to other forms of recovery. It should not, therefore, be read as prejudging the issue in respect of debts arising outside the particular context with which it is concerned. Secondly, if Community law permits set-off, either directly in the Community's own favour, or by the Member States in contexts where both debt and counter-debt arise under a Community scheme, then the Community's

52 — Cited in footnote 22 above, paragraphs 13 and 14 of the judgment.

53 — Page 439 of his Opinion.

54 — See paragraphs 13 to 15 of the judgment. Paragraph 15 refers expressly to a general principle against fraudulent assignment of claims.

55 — Paragraph 13 of the judgment.

56 — Cited in footnote 23 above.

interest in the effectiveness of Member State fiscal control dictates that set-off of aid under the Regulation against fiscal debts due to a Member State should be permitted pursuant to national rules, unless there is compelling evidence of a detrimental impact on the scope and effectiveness of Community law, including that of the Regulation. No distinction of principle should, in my view, be drawn, in the absence of a clear contrary indication, between a debt owed to a Member State authority charged with the recovery of Community funds and one charged with the collection of taxes, such as would permit the first but not the second to withhold payment by way of set-off in discharge of a debt admittedly due. To hold otherwise would invert the *San Giorgio* rules by requiring national law to give preferential treatment to Community-law debts.

tion in the light of changes on the markets,⁵⁸ while an excess of applications relative to the area forming the basis of the compensation calculation will lead to proportionate aid reductions for all and, eventually, to increased, uncompensated set-aside.⁵⁹ Thus, contrary to the arguments of Mr Jensen and KFK, the Regulation is not designed to protect every individual farmer against any drop in disposable income. Furthermore, no such entitlement arises from Community law generally.⁶⁰ I accept the arguments advanced by the Member States that farmers were both directly and indirectly subject to the vagaries of set-off procedures under the old regime.⁶¹ Operators could set off the aid-subsidised prices owed to producers against debts owed to them. Moreover, the intervention agency of each Member State could operate set-off of price support aid against amounts owed by operators. In a situation of insolvency, this would inevitably have resulted in a loss to the operators' other creditors, possibly including farmers to whom payment for produce was due.⁶²

47. The objectives of the Regulation clearly relate to the general functioning of agricultural markets. This emerges not only from the recitals quoted above, and from the statement in Article 13 that expenditure under the Regulation is intended to stabilise agricultural markets, but also from the nature of the scheme established by the Regulation. Thus, while it is sought to compensate farmers for the drop in prices, compensation is not calculated on the basis of particular farmers' entitlements under the pre-existing regime, but, rather, by reference to regional productivity, which may over- or under-compensate certain farmers.⁵⁷ It is also subject to varia-

48. In my opinion, the mere fact that direct set-off by the State against aids due to farmers was not practicable in the past does not

58 — Article 15(1) of the Regulation.

59 — Article 2(6) of the Regulation.

60 — See Case 230/78 *Eridania v Ministry of Agriculture and Forestry* [1979] ECR 2749.

61 — See paragraph 25 above.

62 — This could have occurred, for example, in the circumstances of *Continental Irish Meat v Minister for Agriculture*, cited in footnote 23 above.

57 — Article 4(1) and (2) of the Regulation.

exclude its applicability now. The real question is whether the new system established by the Regulation would be so affected by set-off as to undermine its proper functioning.

feature is not, however, the degree of protection of the farmer, whose aid may be diverted in all cases, but that of other creditors, persons not directly addressed by the Regulation. There is no immediate Community interest in disturbing the balance drawn by national law between the rights of different classes of creditors.

49. As I have already pointed out, set-off results in the farmer being credited with the full amount of the aid in question, although his freedom to dispose of it as he pleases is restricted. In this, he is already at an advantage relative to other forms of deduction which are, in principle, permitted by Community law, such as the levying of taxation, which actually reduce the value of the aid to the farmer.⁶³ The deduction of aid monies at source to satisfy existing tax debts, in a fashion which ensures that the full value of the aid none the less accrues to the farmer, having regard to his liabilities as well as his disposable income, does not appear any more likely to affect the objectives of the common organisation of the market than such direct taxation.

51. The degree of protection of a farmer's private creditors has been linked to the functioning of the Regulation, however, through the invocation of the need for liquidity. The interest of banks or supply companies in offering credit to farmers is said to be reduced if either their expectation of being able to attach aid, or their formal entitlement to the aid through the operation of an assignment, is endangered by the intervention of set-off operated by the State, to the ultimate detriment of farmers. There is nothing to suggest that the Regulation is concerned with farmers' liquidity as such. This depends on many structural factors as well as the level of price or aid they receive — factors like seasonality, levels of interest rates, land values and so on. Putting the matter bluntly, the Community can hardly intend to contribute to farmers' liquidity by enabling them to delay or defeat legitimate tax claims against them.

50. Furthermore, not surprisingly, nobody has contested the right of creditors generally to avail of attachment or other forms of execution or judicial attachment, against the debtor farmer's will. The distinguishing

52. In any event, a prohibition of State set-off of national fiscal debts against aid on

⁶³ — See *Irish Creamery Milk Suppliers Association v Ireland*, cited in footnote 29 above, and *Samvirkende Danske Landboforeninger v Minister of Fiscal Affairs*, cited in footnote 28 above.

grounds which were equally applicable to set-off by other parties and to attachment could ultimately have a much more detrimental effect on farmers' creditworthiness and liquidity than continued recourse by the State to one among a number of forms of recovery provided for in national law.

53. Set-off is of importance only in situations of actual or impending insolvency. Its application to mutual running accounts between traders is routine and uncontroversial, because it suits the convenience of both parties. It is inherently unlikely that the insolvent farmer, or one in financial difficulty, would personally enjoy the free disposal of the aid monies. The various forms of set-off and recovery which exist in the legal systems of the Member States are all concerned with managing the risks posed to creditors by insolvency.⁶⁴ The possibility of set-off grants an advantage to the creditor whose debtor's debt to him is matched, in whole or in part, by a debt he owes to his debtor, of which he can take advantage to alleviate that risk. It has been asserted that the State should not be permitted to exploit its privileged access to aid monies by way of set-off. However, it is in the nature of set-off

— a practice which the Court has not found objectionable *per se*, in other contexts — that one creditor has the good fortune to find himself in such a privileged position, relative to others. It is important not to view that privilege in isolation from others which may exist. All forms of security are contingent on some kind of privileged access to the means of recovering the debt in question. Other creditors may have organised their affairs in order to have equally privileged access to other assets of the farmer. These might include ensuring that they owe him amounts for produce which match the credit granted, retaining title in equipment supplied or securing a mortgage on the farmer's lands, crops or other property. The argument against such privileged access, by the State or any other creditor, is essentially an argument based on fairness, relative to other creditors, rather than one touching on the proper functioning of the Regulation. I can only repeat that there is no apparent need in Community law to disturb the balance drawn by the various national legal systems between the entitlements of different types of creditor, secured or unsecured. The same is true of the relative status in national law of the right to set-off and of rights under arrangements with creditors such as that which was apparently concluded by Mr Jensen.

⁶⁴ — See, once more, paragraph 14 of the judgment in *DEKA v EEC*, cited in footnote 22 above, as well as p. 439 of the Opinion of Advocate General Mancini, p. 3447 of his Opinion in *Continental Irish Meat v Minister for Agriculture*, cited in footnote 23 above, and the reference to a 'shortage of funds' in paragraph 41 of my Opinion in *Garage Molenbeide BVBA and Others v Belgian State*, cited in footnote 46 above.

54. It has also been argued that the farmer's ability to secure private credit is reduced if set-off is availed of by the State, to the detriment of his private creditors: the farmer cannot then use the benefit of the aid to give

security to the creditor of his choice. However, a farmer could never use a future aid payment to secure credit from the fiscal authorities, who, as has been said, cannot avoid being his creditor, and, thus, do not have to be enticed to grant credit. Just as public authorities are the only bodies likely to be obliged, in the general interest, to be the creditors of any given economic actor (for taxes, customs duties, or other dues), they are the bodies which are responsible, in the general interest, for the payment and distribution of various types of aid and benefit (economic, social security, and so on) to wide sections of the population. The fact that the State may have privileged access to various types of public aid, including Community-funded aid, cannot, therefore, be examined in isolation from the fact that it has the burden of collecting taxes and other dues which ultimately go to fund such aids, as well as the machinery for administering them. While their functions are very different, no cogent argument has been advanced to suggest why the benefits of risk management pursuant to ordinary national debt-recovery rules should be denied to the State, whose role entails that it be both creditor and debtor, while they can continue to be granted to creditors who freely accept the risk of advancing credit to freely contracting economic actors such as farmers.

set-off, farmers in difficulties with their taxes would be able to avail of this involuntary credit while simultaneously borrowing on the security of their entitlement to aids under the Regulation. Such borrowing would inevitably result in a loss of revenue to the State. The Court has already had occasion to condemn assignments, where they amount to fraud on creditors (in that case, the Community itself) in *DEKA v EEC*.⁶⁵

56. Finally, my response to the argument that permitting set-off in this case will result in widespread differences in treatment as between the different national legal systems, leading to a disruption in the functioning of the common organisation of the markets is that, if the disparities prove to be such as to compromise the equal treatment of producers in different Member States or to distort or impair the functioning of the common market, it is not for the Court to exclude the application of all such national rules on debt recovery, but for the Community legislature to adopt the provisions needed to remedy such disparities.⁶⁶

55. It also follows from the State's necessary role as fiscal creditor that, in the absence of

57. I shall now turn to Question 2(a) to (d), where the national court draws attention

65 — Cited in footnote 22 above, paragraphs 15 to 18 of the judgment.

66 — *Deutsche Milchkontor v Germany*, cited in footnote 38 above, paragraph 24 of the judgment.

to certain specific aspects of the national rules.

Question 2(a) and (b)

58. Parts (a) and (b) of Question 2 both relate, in effect, to the question of the reciprocity of debts subjected to set-off. Question 2(a) asks, essentially, if the capacity in which the State acts when granting aid under the Regulation affects, as a matter of Community law, its national-law right to set off against it fiscal debts owed to it. Question 2(b) asks if it is relevant that the national law on set-off imposes a reciprocity requirement. The Court has not been asked to define the capacity in which the designated Member State authority acts when distributing Community funds in the form of aid.

59. The Court indicated in *DEKA v EEC* that 'reciprocal or even related claims are an appropriate subject of set-off' in Community law.⁶⁷ As disclosed in the case-law, reciprocity requirements exist in the various national legal systems which permit set-off, although they vary greatly in detail. In some Member

States, the State and its agencies do not constitute a single entity for that purpose. In Ireland, for example, each government minister is a distinct corporation sole, so that one minister cannot set off an amount due to another against a payment due by him. It is an obvious pre-condition for the use of set-off in the present case that Danish law treat the Ministry and the tax-collecting authority as a single entity for that purpose, which is a matter for the national court. Community law does not determine the meaning or range of application of reciprocity or mutuality demanded for the application of national rules of set-off.⁶⁸ The test in Community law remains the more general one of whether the national rule affects the scope and effectiveness of Community law, including the Regulation.

60. In *UNAPROL v AIMA*,⁶⁹ for example, the Court noted that Community law did not regulate the right to retain interest earned on sums held by a national intervention agency pending disbursement to beneficiaries in the form of aid. The existence of such a right was thus a matter to be settled by national law, provided that the rules in question did not jeopardise the uniform

68 — The situation is different, of course, where set-off is operated directly by the Community itself, as in *DEKA v EEC*, in which case, in the absence of specific rules, a Community standard must be devised based on the general principles common to the laws of the Member States.

69 — Case C-186/93, cited in footnote 19 above.

67 — Cited in footnote 22 above, paragraph 13 of the judgment.

application or effectiveness of Community law.⁷⁰ The Court did not need, therefore, to classify the national agency either as an intermediary or as owner of the sums in question.⁷¹

61. I have already stated my opinion that the interests of aid beneficiaries are not prejudiced by set-off in any way which disturbs the proper functioning or the achievement of the objectives of the Regulation, or which contravenes the provisions of Regulation No 729/70. For the same reasons, it cannot be said that the Community suffers any prejudice thereby.

62. It may be helpful, none the less, to state my view on the capacity in which the authorities designated by Member States act, as a matter of Community law, when they pay out monies under the Regulation, in case the Court should decide that the capacity in which these agencies act when granting aid monies is independently significant, or in case it might be useful to the national court in applying the national rules. In my opinion, the relationship of the Member States and their agencies with the Community⁷² in this context differs little from that which arises when they take steps to comply with any obligation imposed by Community law, be it the collection of VAT, the enforcement

of directly effective Community rules, or the implementation of directives. They act on their own account, and exercise their own powers, as subjects both of national and Community law. They do not act as the Community's agent or intermediary, or on its behalf, in anything other than the colloquial sense. They 'apply Community law on their own responsibility'.⁷³ Thus, in a series of cases, the Court has held, with respect to various losses suffered by private individuals as a result of implementation of the common agricultural policy, that, regardless of the role played by the Commission, it is the intervention agencies which are responsible, due to their independence from the Community authorities.⁷⁴ This conclusion is not in any way undermined by the fact that the Community funds the necessary expenditure under the Regulation (subject, of course, to the financially significant exception of administrative costs). The fact that the Community provides the necessary funds before or after the corresponding payment of aid is not, therefore, of any relevance.

63. The Court has often stated that the common agricultural policy operates on the basis

70 — Paragraphs 24, 25 and 28 of the judgment.

71 — Paragraph 12 of the judgment.

72 — As I have already pointed out, the relationship of the various branches of the State *inter se* is determined by national rules on reciprocity.

73 — Case 217/81 *Interagra v Commission* [1982] ECR 2233, paragraph 7 of the judgment; Case 133/79 *Sucrimex v Commission* [1980] ECR 1299.

74 — *Eurico v Commission*, cited in footnote 32 above, paragraph 18 of the judgment; Case 60/75 *Russo v AIMA* [1976] ECR 45; Case 101/78 *Granaria v Hoofdproduktenschap voor Akkerbouwprodukten* [1979] ECR 623; *Sucrimex*, cited above; *Interagra*, cited above.

of a division of powers between the Community and the Member States.⁷⁵ This division is expressed in the agricultural sector by, *inter alia*, Articles 4 and 8 of Regulation No 729/70. Thus, in Case C-34/89 *Italy v Commission*, the Court distinguished between the relationship, under Article 8 of Regulation No 729/70, of intervention bodies and economic operators, which is governed by national law, and that between Member States and the Commission, which 'is concerned not with the granting of aid or the recovery of excessive advance payments as such, but with whether the Member State concerned or the Community has to bear the relevant financial burden'.⁷⁶

through a comparison by the national court of the rules applicable to different types of debts, and of the material characteristics of those debts, though the Court is competent to provide guidelines for that process of comparison. The overriding consideration is that national rules must not allow set-off to be used more freely against Community-law than against national-law debts.

Question 2(c)

64. Here the national court raises the question of discrimination and, in particular, that of the significance of a limitation in practice of set-off of certain national environmental and development subsidies against their beneficiaries' fiscal debts to the State. Any question of discrimination can only be resolved

65. The first possibly discriminatory aspect of the application of the Danish rules relates to the existence of what is referred to in the order for reference as an exception for general and social considerations. While the precise nature of this exception is unclear, unlawful discrimination would exist if it were not also available, in so far as it is applicable, to the process of set-off of fiscal debts against Community agricultural aids. If, for example, the exception permits, or requires, the personal circumstances of the debtor to be taken into account, it would be contrary to Community law for a farmer to be deprived of the full sum of aid, by virtue of his fiscal debts, while another person, in a similar position, or even the same person, could claim a derogation in respect of all or part of a debt owed by the State under national law. If, on the other hand, entire categories of payments by the State, such as, for example, salaries, pensions or social

75 — *UNAPROL v AIMA*, cited in footnote 19 above, paragraph 27 of the judgment; *Balkan-Import-Export v Hauptzollamt Berlin-Packhof*, cited in footnote 43 above, paragraph 5. See also the discussion by Advocate General van Gerven in paragraphs 14 and 15 of his Opinion in *UNAPROL v AIMA*.

76 — Cited in footnote 20 above, paragraph 10 of the judgment. This division of powers is also evidenced by the supervisory regime established by Article 9 of Regulation No 729/70. See Case C-366/88 *France v Commission* [1990] ECR I-3571, paragraphs 20 to 23 of the judgment.

security entitlements, or specified minimum amounts of such payments, are excluded from the scope of national rules on set-off on social or general grounds, the national court must examine whether such debts are comparable to aids under the Regulation. To that end, the national court should take into account that, while the Regulation is structural in nature, it is still, as the second recital in the preamble indicates, concerned with farmers' incomes, and that Article 39(1)(b) of the Treaty lays down that one of the objectives of the common agricultural policy shall be to ensure a fair standard of living for the agricultural community. Save in the case of compensatory payments in respect of set-aside, aids paid under the Regulation merely supplement the price received by the farmer for his crop, but this would only be material if the national-law restrictions on set-off of salaries and so on are lifted in the light of additional income sources.

66. Secondly, the exceptional treatment of certain national economic subventions must be examined. At the time when the set-offs at issue in the present case were effected, it appears that at least certain of such subventions were not, in practice, subject to set-off at all, for fear of giving rise to a disincentive to implementing the projects in question. Certain of the exempted subventions related to projects in the agricultural sector, regarding both primary production and secondary processing. It is not necessary, in my view, for the exempted national aids to be comparable in all respects and in detail with aids granted under the Regulation, in order for a finding of discrimination to be made. As Advocate General Mancini observed in *Amministrazione delle Finanze dello Stato v*

San Giorgio, in the context of a national tax system, to divide national tax measures (or, as in the present case, national subventions) into a number of sectors, and then to confine the applicability of the principle of non-discrimination within each of those sectors would not just amount to a weakening of that principle but would come close to destroying it.⁷⁷ Thus, the Court spoke in *Finsider v Commission* of differences in treatment being justifiable where they were based on 'objective and substantial differences'.⁷⁸ Any aid directed at the support of economic activity which might not otherwise be possible, given the structure of the market, should be seen as comparable. It is not even necessary for such a finding that the exemption apply to aid in the agricultural sector, as we are not necessarily concerned with discrimination as between different types of aid received by the same beneficiary. If compensatory payments under the Regulation are found to be comparable to any of the various types of national subventions, unlawful discrimination will exist, even if national subventions are, in theory, subject to full set-off, if, in practice, they are not.

67. The existence of discretion on the part of the Danish authorities regarding the applica-

77 — Cited in footnote 26 above, p. 3634 of the Opinion. See also Joined Cases 117/76 and 16/77 *Ruckdeschel v Hauptzollamt Hamburg St. Annen* [1977] ECR 1753, paragraph 7 of the judgment.

78 — Case 250/83 [1985] ECR 131, paragraph 8 of the judgment (emphasis added).

tion of set-off rules is not necessarily unlawful, in my view, by reason of what the Commission describes as the permanent risk of discrimination. The decision to avail of set-off is probably always discretionary, in the sense that it is an option of the creditor, whose resort to it will turn on his perception of the solvency of the debtor. Derogations in the light of the personal circumstances of tax debtors or of the likelihood of their being able to remain in business are also inherently discretionary in character. On the one hand, the Court has ruled out the application of national rules which entail the exercise of a discretion as to the expediency of waiving recovery of sums unduly or irregularly paid from Community funds,⁷⁹ particularly in accordance with economic criteria.⁸⁰ On the other hand, the Court has permitted the waiver of the recovery of such sums on grounds of personal equity, pursuant to non-discriminatory national rules which do not impair the objectives of the common organisation of the market in question.⁸¹ The Court has also approved the non-discriminatory application of national rules which permit, on equitable grounds, the remission after the normal national time-limit of over-paid customs duties, where this does not alter the effect of the relevant Community-law rules.⁸² The discretionary grant to a farmer of compensatory payments under the Regulation, on social or equitable grounds, instead of their retention by way of set-off, clearly does not impair the functioning of the Regulation. It is not, in my view, comparable to the waiver of recovery of

funds improperly paid from Community funds. It is much closer to the very different circumstances of *Reichelt v Hauptzollamt Berlin-Süd*, where the exercise of a discretion in accordance with national equitable rules was permitted to counteract a national rule on limitation periods which restricted an importer's ability to recover overpaid duties to which he was, in principle, entitled as a matter of Community law. For that reason, I also think that the exercise of a discretion regarding the exercise of set-off on broader economic grounds would also be permissible. However, this remains subject to the rule against discrimination. If some comparable national subventions are, in practice, never subject to set-off, the mere possibility of a discretionary waiver of set-off in respect of payments under the Regulation will not satisfy the requirement of equal treatment of Community-law and national-law payments.

Question 2(d)

79 — *BayWa v Balm*, cited in footnote 36 above, paragraph 30 of the judgment; *Deutsche Milchkontor v Germany*, cited in footnote 38 above, paragraph 22.

80 — *Balkan-Import-Export v Hauptzollamt Berlin-Packhof*, cited in footnote 43 above, paragraph 5 of the judgment.

81 — Case C-290/91 *Peter v Hauptzollamt Regensburg* [1993] ECR I-2981, paragraph 11 of the judgment. Advocate General Jacobs distinguishes an equitable discretion from a discretion as to the expediency of waiver of recovery at paragraph 22 of his Opinion.

82 — Case 113/81 *Reichelt v Hauptzollamt Berlin-Süd* [1982] ECR 1957, paragraph 16 of the judgment.

68. In the light of the foregoing discussion, I do not think that it is necessary for the application of non-discriminatory national set-off rules to aids under the Regulation

that the counter-debt have as its legal basis Community law, or that part of the counter-debt is required to be passed on to the Community as part of its own resources. However, in the event of the Court disagreeing with my analysis, the fact that Member States are required by Community law to implement a system of value added tax, the tax which Mr Jensen had failed to pay, would be significant. The Member States perform essentially the same function when collecting VAT as when they distribute Community agricultural aid, that is, as independent subjects of Community law complying with their duties thereunder.⁸³ The facts that, in the former case, they distribute money provided entirely by the Community, while underwriting administrative costs themselves, and, in the latter case, they keep the lion's share of tax receipts, passing on only a small fraction to the Community, are immaterial. In that case, the debts could be said to be reciprocal in the same way as those in *DEKA v EEC*, where, although both of the debts at issue arose under the common agricultural policy, they did not relate to the same scheme — one related to production refunds, the other to wrongly paid export refunds. If Community law permits set-off by the Community between debts arising under two different legislative schemes, it should also permit the Member States to set off, pursuant to non-discriminatory national

rules, tax debts which they are obliged by Community law to collect against agricultural aids which they are obliged by Community law to pay out to the tax debtor.

Question 4

69. Article 10(1) of the Regulation lays down an 11-week time-period within which aid is to be paid out, but does not expressly require that payment be made as soon as the designated Member State agency has verified that the applicant farmer is qualified to receive such a compensatory payment. However, it would, in my view, interfere with the proper functioning of the Regulation for payment to be delayed once an applicant's entitlement is established, even if the prescribed time-limit is respected. While it is not, in principle, contrary to Community law for Member State authorities to use compensatory payments for the purposes of set-off, this does not mean that their efforts to check whether a farmer is also a tax debtor can be permitted to disturb the ordinary functioning of the Regulation. Such delays would, presumably, affect all farmers, and not just those who are found, upon enquiry, to be indebted to the fiscal authorities. Any delay in payment could be costly to farmers, especially to those who wish to use the aids to repay debts to third parties on which interest is payable. Article 13 of the Regulation refers to Regulation No 729/70, the applicable version of Article 4(2) of which states that Member States shall ensure that credits supplied by the Commission are

83 — For the basic obligation to introduce a system of value added tax, see Article 1 of the Second Council Directive (67/228/EEC) of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes — Structure and procedures for application of the common system of value added tax, OJ, English Special Edition, First Series 1967, p. 16.

used without delay. Although this provision has been deprived of much of its effect by the fact that the Member States have, since 1988, received advances only in respect of expenditure already incurred out of national

resources, it still testifies to the Community's interest in the prompt payment of, *inter alia*, sums intended to stabilise agricultural markets. Furthermore, the delay in question is probably objectively unnecessary.

V — Conclusion

70. In the light of the foregoing, I propose that the Court answer the questions referred by the Østre Landsret as follows:

- (1) It is not contrary to Article 15(3) of Council Regulation (EEC) No 1765/92 of 30 June 1992 establishing a support system for producers of certain arable crops for a Member State, pursuant to national rules, to set off, without additional cost, compensatory payments to which a farmer is entitled under that Regulation against fiscal debts owed by that farmer to the Member State;
- (2) Community law does not preclude a Member State from setting off, pursuant to national rules, an amount due to the beneficiary of aid under a Community measure against outstanding debts to a Member State, provided that those national rules do not render impossible the enjoyment of the Community-law right in question or hinder the functioning of the system established by the Community measure, and are not applied in a discriminatory fashion;
- (3) The setting off by a Member State, pursuant to national rules, of compensatory payments under Regulation No 1765/92 against outstanding fiscal debts to the Member State does not render impossible the enjoyment of rights under that Regulation or hinder the functioning of the system established by it;

- (4) The answer given at point (3) is not affected by the fact that the amount of aid is paid in advance by the Member State, which has only a claim to be reimbursed for the aid paid out, provided that the rules of Community law on payment are satisfied, and which must itself defray the expenditure involved in the administration of the system established by Regulation No 1765/92;
- (5) The answer given at point (3) is not affected by the existence of national rules which require, as a condition for effecting set-off, that there be reciprocity between the debtor under the principal claim and the creditor under the counterclaim;
- (6) The answer given at point (3) is not affected by the legal basis for the outstanding debt to the State against which set-off is to be effected nor, in particular, by the fact that part of the sum to be set off constitutes part of the Community's own resources;
- (7) It is for the national court to determine whether national subventions, which are subjected, in practice, to set-off in an amount not exceeding 20% of the sum involved, are comparable to compensatory payments under Regulation No 1765/92, for the purpose of establishing whether the national rules on set-off are applied in a discriminatory fashion. It is, equally, for the national court to determine, for the same purpose, whether compensatory payments under that Regulation are comparable to certain other types of payment in respect of which set-off is restricted on social grounds;
- (8) It is contrary to Community law for the disbursement of compensatory payments under Regulation No 1765/92 to be delayed in order to permit an investigation of whether the State has outstanding claims against the beneficiary in respect of which it wishes to effect a set-off.