3. As Community law now stands the procedure for the discharge of the accounts submitted by the Member States in connexion with expenditure financed by the EAGGF serves to determine not only that the expenditure was 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 rules regulating the allocation of expenses.
4. In cases where the Community rules relating to the agricultural markets authorize payment of an aid only on condition that certain formalities relating to proof are complied with at the time of payment, aid paid in disregard of that condition is not in accordance with Community law and the related expenditure cannot, therefore, in principle be charged to the EAGGF when the accounts for the financial year in question are discharged, without prejudice to any possibility of the part of the Commission to take account, during another financial year, of the subsequent production of the requisite proof.
5. In applying Community rules the Member States cannot unilaterally adopt additional measures which are such as to compromise the equality of treatment of traders throughout the Community and thus to distort competitive conditions between the Member States.

In Joined Cases 15 and 16/76,

FRENCH GOVERNMENT, represented by Guy Ladreit de Lacharrière, acting as Agent, with an address for service in Luxembourg at the French Embassy, 2 Rue Bertholet,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Advisers, Jean Amphoux and Götz zur Hausen (in Case 15/76) and Bernard Paulin and Giuliano Marenco (in Case 16/76), acting as Agents, with an address for service in Luxembourg at the office of its Legal Adviser, Mario Cervino, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for the annulment of Commission Decisions 76/142/EEC and 76/148/EEC of 2 December 1975 concerning the discharge of the accounts presented by the French Republic in respect of the European Agricultural Guidance and Guarantee Fund (EAGGF), Guarantee Section, expenditure for 1971 and 1972 (Official Journal L 27 of 2 February 1976,

p. 6 and p. 17) in so far as the Commission failed to recognize as chargeable to the EAGGF sums of FF 1 240 514 and FF 72 590 447.69 relating to aid for skimmed-milk powder exported to Italy for animal feed and the distillation of table wines respectively,

THE COURT

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

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

gives the following

JUDGMENT

Facts

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

I — Financing of intervention measures

1. Regulation (EEC) No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy (Official Journal, English Special Edition 1970 (I), p. 218) provides in Articles 2 and 3 that the EAGGF, Guarantee Section, is to finance refunds on exports to third countries and intervention intended to stabilize the agricultural markets, undertaken according to Community rules within the framework of the common organization of agricultural markets.

Article 4 of the regulation provides that the Commission is to make available to Member States the necessary credits so that the designated authorities and bodies may make the payments referred to in Articles 2 and 3.

Article 5 (1) (b) of the regulation provides that the Member States are to transmit to the Commission the annual accounts concerning the authorities and bodies referred to in Article 4 relating to transactions financed by the EAGGF, Guarantee Section, accompanied by the documents required for their discharge.

Article 5 (2) (b) of the regulation provides that the Commission, after consulting the Fund Committee, is to discharge the accounts transmitted by the Member States on the basis of the documents referred to in paragraph (1) (b).

II — Case 15/76

A — Facts

1. Pursuant to Article 10 (1) of Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organization of the market in milk and milk products (Official Journal, English Special Edition 1968 (I), p. 176) aid is to be granted for skimmed milk and skimmed-milk powder which are produced in the Community and are for use as feedingstuffs if these products reach certain standards.

2. The rules for the grant of the aid in question were introduced by Regulation (EEC) No 986/68 of the Council of 15 July 1968 laying down general rules for granting aid for skimmed milk and skimmed-milk powder for use as feed (Official Journal, English Special Edition, 1968 (I), p. 260), as amended by Regulation (EEC) No 1227/70 of the Council of 29 June 1970 (Journal Officiel L 141 of 29 June 1970, p. 33) and by Regulation (EEC) No 673/71 of the Council of 30 March 1971 (Official Journal, English Special Edition 1971 (I), p. 185).

Article 2 of Regulation No 986/68 is worded as follows:

"— Aid may be granted for:

. . .

— skimmed-milk powder which has been denatured according to methods to be determined;

— skimmed-milk powder and skimmed milk produced and processed in the dairy and used in the manufacture of compound feedingstuffs . . ."

Article 3 of the regulation is worded as follows:

"— The aid shall be paid by the intervention agency of the Member State within whose territory is situated:

. . .

— the farm or other concern which denatured the skimmed-milk powder or used it in the manufacture of compound feedingstuffs;

. . ."

3. However, a transitional derogation from the scheme described above is provided by Article 3 of Regulation No 986/68 as amended by Regulation No 637/71. The latter regulation authorized, until 30 June 1971, the Member State in which the skimmed-milk powder was produced to pay the aid even if the milk was denatured or used in the manufacture of compound feedingstuffs within the territory of another Member State.

4. If use was made of the authorization thus laid down the system for the grant of the aid had to comply with the rules laid down by Article 7 of Regulation No 1106/68 of the Commission of 27 July 1968 on detailed rules for granting aid for skimmed-milk powder for use as feed and skimmed milk processed into compound feedingstuffs (Journal Officiel L 184 of 29 July 1968, p. 26) as amended by Article 1 of Regulation No 332/70 of the Commission of 23 February 1970 (Official Journal, English Special Edition 1970 (I), p. 117), and with the rules laid down by Regulation No 2315/69 of the Commission of 19 November 1969 on the use of Community transit documents for the purpose of applying Community measures for verifying the use and/or

destination of goods (Official Journal, English Special Edition 1969 (II), p. 515). Article 7 of Regulation No 1106/68, as amended, provides:

"...

(1) Aid shall be given by the forwarding Member State only when the skimmed-milk powder has been placed by the importing Member State under customs control or equivalent administrative control involving the lodging of a deposit equal in amount to the aid granted under Community provisions in the forwarding Member State.

(2) Proof of control by the importing Member State shall be the control copy provided for in Article 1 of Regulation (EEC) No 2315/69.

Sections 101, 103 and 104 of the control copy shall be completed. Section 104 shall be completed by deleting what does not apply and inserting in the second indent one of the following statements:

...

'to be placed under control with a view to denaturing or processing under Regulation (EEC) No 1106/68'.

..."

Section 101 relates to the Common Customs Tariff heading of the goods while section 102 concerns the net weight.

The person concerned must complete on the original document and on at least one copy of the control copy the three sections mentioned above and the other sections on the front of the document. The customs office of the exporting Member State (hereinafter referred to as "the office of departure") is to retain the copy of the document. The original is to accompany the goods. It is for the competent customs office of the importing Member State (hereinafter referred to as "the office of destination") to carry out or cause to be carried out under its responsibility the control as to the use or destination provided for. In this respect when the goods cross a frontier the office of destination must complete the fifth section on the back of the original of the control copy. It is to delete what does not apply, state the date, append the official stamp and sign the document. The office of destination transmits the original to the office of departure. The latter subsequently delivers to the person concerned the copy which it had retained after having recorded on the back thereof the statements which the office of destination appended to the back of the original.

In France the aid is paid on presentation of the copy of the control copy to the Fonds d'orientation et de régularisation des marchés agricoles (Fund for the guidance and stabilization of agricultural markets, hereinafter referred to as the FORMA).

The deposit is to be returned only for the quantities of skimmed-milk powder in respect of which the processor furnishes proof that those quantities have been denatured or processed in accordance with the provisions in question.

After the end of the operation the control copies are to be preserved. In France the copy is preserved by FORMA and the original by the office of departure.

5. The competent French authorities made use of the option given, on a transitional basis, by Article 3 (1) of Regulation No 986/68 and granted aid in a certain number of cases relating to exports to Italy of skimmed-milk powder which, it was declared, was to be denatured within the territory of the latter State.

6. For the purpose of the discharge of the annual accounts of the Member States for 1972 relating to expenditure financed by the EAGGF the French Government submitted an amount representing the expenditure resulting from those operations.

7. By its aforementioned decision of 2 December 1975 the Commission held that it could not charge to the EAGGF the sum of FF 1 240 514 which, in its view, had not been granted in accordance with Community rules.

8. In a telex message of 27 October 1975 the Commission explains the reasons for its action. It states *inter alia* that it appeared from the audit on the spot that FF 31 250 815 had been paid on the basis of copies which did not provide proof that the goods had been placed under customs control in Italy.

It goes on to observe that the staff of the EAGGF asked to check the original copies which, in most cases, was posssible. However, some documents had already been destroyed in spite of the provisions of Article 4 (2) of Regulation No 1723/72 of the Commission of 26 July 1972 on making up accounts for the EAGGF, Guarantee Section (Official Journal, English Special Edition, Second Series III, p. 109).

Examination of the originals which were available revealed infringements of Community rules namely:

"1. The absence of the stamp of the Italian customs office, validation of the document being confined to a signature which was sometimes illegible or missing (proof required by Article 2 (1) of Regulation No 2315/69).

2. The lack of a statement in Section 104 intended to apply for denaturing in Italy (so justifying the refund) thus distinguishing the operation from mere exportation (proof required by the second indent of Article 1 (2) of Regulation No 332/70).

3. The failure of the Italian customs authorities to record the placing under control (proof required by Article 5 (1) of Regulation No 2315/69)."

In its telex message the Commission emphasizes that the expenditure which was not recognized as chargeable to the EAGGF relates to about 4% of the copies.

As evidence of its spirit of understanding it adds, first, that the payment of the aid on the basis of copies which did not give proof that the goods had been placed under customs control was in itself sufficient reason for rejecting all the relevant expenditure and, secondly, that the originals which had been duly stamped by the customs had been accepted even if the signatures were missing; the signatures on their own, without the obligatory stamp, would have been held to be insufficient.

As regards the French Government's request to supplement or correct the documentary evidence which had been held to be insufficient, the Commission states that the only form of proof which it recognizes for the proper conduct of the operation is production of the control copy.

The present proceedings are directed against the Commission's decision of 2 December 1975.

B — Conclusions of the parties

The *applicant* claims that the Court should:

— Declare that by refusing to agree that, even after payment, Member States may produce additional sup-

porting documents in connexion with expenses disbursed on behalf of the Community, the Commission has failed to fulfil its obligations;

— Declare that the anomalies affecting the control copies amounted to defects of form of minor importance;

— Annul the decision descharging the accounts for the 1971 financial year in so far as it does not take into account the expenditure to which the documents in question relate;

— Order the Commission to pay the costs.

The *Commission* contends that the Court should:

— Dismiss the application as being without foundation;

— Order the applicant to pay the costs.

C — Submissions and arguments of the parties

1. Admissibility

The *Commission* submits that the first two conclusions of the applicant are inadmissible as the Court cannot make findings of law in the context of proceedings for annulment.

2. The substance

(a) The *French Government* does not deny the existence of the anomalies but it takes the view that they are not sufficient to justify, in law, the Commission's attitude.

The Commission is relying on a mistaken conception of the proper role of administrative formalities.

In this respect the French Government draws atention to French administrative case-law which has always drawn a distinction according to whether the formalities in question must be regarded as essential or subsidiary: in the first case, but not in the second, failure to comply with formalities results in the act's being void. In line with that case-law in the present instance the formality should be regarded as one of substance if failure to comply with it was such as to have enabled expenditure to be incurred in error. If, on the other hand, the formal defect had no influence on the character of that expenditure it should be regarded as subsidiary and therefore as not affecting the regularity of the measure.

As regards the nullity of a measure in respect of which essential procedural requirements have not been followed, the French Government states that although failure to comply with an essential procedural requirement has the effect of depriving the administrative document in question of its value as proof of the regularity of the operation to which it applies, it nevertheless does not necessarily mean that the operation itself was irregular. In this respect the Court should rule that any evidence that an operation such as that in question was regular should be held admissible.

(b) According to the French Government the anomalies mentioned by the Commission in its telex message of 27 October 1975 concern for the most part only formal requirements of purely subsidiary importance.

(1) The anomaly referred to by the Commission under point 1 is explained by the wish of certain customs offices to simplify their particularly arduous task: they must complete by hand the fifth section on the back of the original of the control copy and authenticate that statement by appending an official stamp (round stamp) and the signature of the competent officer.

In place of that they have devised a special stamp (a rectangular stamp) which contains all the information required by the Community rules as it includes the following statement: "The consignment was placed under control on ... as being intended for the destination indicated overleaf. An appropriate security was lodged to guarantee the destination", followed by the signature and the name of the officer authorized to sign. Contrary to what the Commission states the appending of that rectangular stamp was always followed by the signature of the competent officer. Quite simply, in some cases the customs authorities believed that they were authorized to dispense with appending, in addition, the round stamp.

(2) As regards the second anomaly mentioned by the Commission under point 2 of its telex message the French Government makes the following observations:

The essential requirement is to produce evidence that the denaturing in fact took place. The statement made by the exporter in Section 104 on the front of the control copy serves that end; it is not, however, absolutely indispensable since the Italian customs authorities have stated in the fifth section on the back that they have placed the goods under control. It is, moreover, absurd to carry out such control if the product is not to be denatured; indeed, in the French Government's view the very provision of the control copy is justified in intra-Community trade only if it involves control of the use or destination of the goods which, in this instance, could only be denaturing.

(3) As regards the anomaly mentioned under point 3 of the Commission's telex message the French Government states that in fact all the formalities required by Community rules have been complied with; however, the information required was inserted not in the section provided for that purpose but in an adjacent section.

(c) Before entering into the discussion on the merits, the *Commission* criticizes the French Government for having paid the aid on presentation of the copy of the control document. If Article 7 of Regulation No 1106/68 is applied strictly only presentation of the original can authorize payment of the aid.

(d) As regards the mandatory nature of the conditions for the grant of aid the Commission argues that Community law recognizes a distinction between essential procedural requirements and subsidiary procedural requirements, for example in Article 173 of the Treaty. Everything suggests, however, that strict compliance with the conditions laid down by Community rules for the payment of aids in the present instance must be regarded as essential.

(1) The mandatory nature of the requirements in question appears first from Article 7 of Regulation No 1106/68, as amended by Regulation No 332/70. The control copy may constitute the proof referred to in Article 7 only if it was completed and used correctly.

(2) A certain formalism is inherent in the nature of the control copy document and in the nature of the Community transit procedure in the framework of which it is issued. The very purpose of the Community transit arrangements is to facilitate the movement of goods within the Community. The conditions for their proper functioning are mutual confidence between the administrative authorities involved and uniform application throughout the Community.

The necessary counterpart and guarantee of the advantages of the Community transit procedure, the mutual confidence, the need for uniform application, are strict compliance by all concerned with the requirements and formalities laid down by the Community rules. Any laxity in the application of the procedure or in the completion and use of the documents destroys the scheme and nullifies its advantages.

(3) The need for strict compliance with the conditions laid down its particularly evident with regard to measures taken under the common agricultural policy. If an intervention agency paid the aid while failing to comply with the requirement of ensuring that the milk powder was in fact denatured or processed or that it was placed under control for that purpose in the event of its being sent to another Member State, it would give the persons concerned opportunities for easy frauds which would subsequently be difficult to detect. Dishonest traders would be able to reintroduce products into normal market channels. In extreme cases, it is possible that a continuous circuit might be created.

(4) Reliance on means of proof other than production of the control copy is ruled out by the very wording of Article 7 of Regulation No 1106/68. It is moreover inherent in the concept of documentary proof of public expenditure that the control copy must serve its evidential function at the time when it forms the basis for the expenditure incurred. In addition, serious doubts may arise as to the practical possibility of making the necessary findings in a proper manner so long after the operations in question took place. There can be no question of the discharge of the accounts being the occasion for reopening the examination of the file on each individual operation. If such were the case a permanent situation of legal uncertainty would be established. Finally, it is not acceptable that the Commission should thus be required to replace the national authorities or to duplicate their work in assessing such cases.

(5) Community law contains other examples of similar requirements both in legal provisions (for example, Article 2 (2) and Article 7 (3) of Regulation No 542/69 of the Council of 18 March 1969 on Community transit — Official Journal, English Special Edition 1969 (I), p. 125) and in the case-law of the Court. The Commission refers in this respect to the judgment of 22 October 1970 in Case 12/70 (*Craeynest* v *Belgium* [1970] 2 ECR 905). Although there was no provision at issue as unambiguous as Article 7 of Regulation No 1106/68 the Court ruled in that case that DD4 movement certificates must be used in a strictly identical manner in all the Member States and that the administrations must not jeopardize that requirement by relying on other evidence.

(e) The Commission states that the defects mentioned in its telex message of 27 October 1975 are not merely subsidiary formal requirements. On the contrary, those defects deprive the copies of their value as evidence that the milk powder in question was placed under control. Consequently, the FORMA is not entitled to pay the aid on the basis of those copies.

(1) In the view of the Commission, in the absence of the original control copies it is impossible to verify whether the milk powder concerned was in fact placed under control by the Italian authorities. The position is aggravated by the fact that in most cases the copies submitted to the intervention agency contained no note from the French customs authorities to the effect that the milk powder was to be placed under control when they were issued to the persons concerned.

(2) As regards the absence of the official stamp of the Italian customs authorities the Commission states that it has nothing against the stamping procedure applied by the Italian customs as a method of annotation but that that procedure cannot replace the official stamp. The purpose of the stamp is to authenticate the signature of the competent officer and thus to make it impossible or at least very difficult to falsify the documents. It is thus an important element in authenticating those documents. The Commission adds to the statements made by it in its telex message that sometimes the annotation made by the Italian customs consists merely of a barely legible mark and that often the indication of the date on which the goods were placed under control is missing.

(3) As regards the absence of a statement relating to the denaturing or processing of the products concerned in Section 104 of the control copies the Commission states that in eleven cases Section 104 is completely blank or contains only the word "Italy". In seven other cases Section 104 contains only the name of an Italian undertaking. Reference to the documents produced by the French Government shows that the notes made by the Italian authorities relating to the placing of the goods under control can really constitute sufficient proof only when read together with a correctly completed Section 104. First, of the 18 documents submitted 16 are merely copies. It is therefore not possible to verify the existence of a note by the Italian customs relating to the placing under control. Even if one accepts in place thereof the note by the French customs authorities which held the original control copies that note is of little evidential value. In fact that note merely mentions the date on which the original of the control copy was returned to the office of departure and indicates that the goods "have been dealt with as indicated overleaf" or "have been used as specified overleaf". However, there is no indication overleaf as to how the goods have been dealt with nor is it specified how they were used as Section 104 has not been correctly completed. The same applies to the two original control copies bearing the rectangular stamp of the Italian customs authorities. Once again there is no precise indication of how the goods have been dealt with. The form merely states that the goods have been dealt with as indicated on the front of the document. In both cases Section 104 on the front of the document merely contains the name of the consignee of the goods.

(4) As regards the failure of the Italian customs authorities to record on the documents the placing under control the Commission complains that the documents in question not only fail to indicate the date of the placing under control or contain a mistake as to the section used for such indication, but also lack any indication by the Italian customs authorities that the goods were placed under control. The documents in question have merely been initialed and

stamped overleaf with an official stamp of an Italian customs office and carry a date and a reference number, but the initials and the stamp by no means certify that the goods in question were placed under customs control.

III — Case 16/76

A — Facts

1. Regulation No 816/70 of the Council of 28 August 1970 laying down additional provisions for the common organization of the market in wine (Official Journal, English Special Edition 1970 (I), p. 234) lays down *inter alia* the arrangements for intervention in the wine sector. The essential components of those arrangements are aids to private storage and the distillation of table wine.

Article 7 (1) of the regulation provides that where the granting of aid to private storage alone is unlikely to be effective in restoring price levels the Council is to adopt measures for distillation.

2. As regards the 1971/72 marketing year, despite the fact that aids to private storage were granted from the beginning of the marketing year for wines of the R I, R II and A I types the prices for those wines continued to be less than the activating prices.

The option of concluding storage contracts for a period of nine months between 27 December 1971 and 15 February 1972 for the same types of wine did not restore price levels appreciably.

Having regard to that situation and to the fact that the abundance of the 1970/1971 harvest had created supplies which substantially exceeded normal requirements at the beginning of the 1971/1972 wine year the Council decided, in Regulation No 766/72 of 17 April 1972 laying down general rules governing the distillation of table wines during the period from 24 April 1972 to 27 May 1972 (Journal Officiel L 91 of 18 April 1972, p. 1), to open a distillation season in order to restore price levels.

As in other years distillers were given financial inducements to have recourse to the distillation measures on condition, first, that they purchased the wine from producers at at least the price fixed by the regulation and, secondly, that they distilled the wine thus purchased.

In order to benefit from the public intervention measures distillation had to take place between 24 April and 27 May 1972. Subsequently, that date was replaced by 31 July 1972, laid down by Regulation No 1098/72 of the Council of 30 May 1972 extending until 31 July 1972 the period for the distillation of table wines (Journal Officiel L 125 of 31 May 1972, p. 1).

The minimum purchase price for table wines for distillers was fixed at 1;10 units of account (FF 6.10) per degree and per hectolitre (Article 3 of Regulation No 766/72). The aid paid to distillers for the distilled wine was fixed at 0.52 units of account and 0.43 units of account per degree and per hectolitre respectively for the products of the distillation having an alcoholic strength of 86° or more or 85° or less (Articles 5 and 6 of Regulation No 766/72).

3. The French Government took the view that the minimum price fixed by Regulation No 766/72 was insufficient to induce wine growers to have their wine distilled and that the Community intervention would therefore be largely ineffective.

Consequently it granted additional aid to distillers on condition that they

guaranteed producers a price of FF 6.50 per degree and per hectolitre. Shortly afterwards it raised the minimum purchase price to FF 7.10 per degree and per hectolitre by means of a corresponding increase in the aid to distillers. The measures was confined to a volume of two million hectolitres and was reserved to producers at least 30% of whose production was subject to short or long-term storage contracts. Subsequently the volume was increased to 2 800 000 hectolitres.

4. Following an exchange of letters between the French Government and the Commission, the latter, by letter of 27 July 1972, initiated the procedure under Article 169 of the Treaty for failure to fulfil an obligation.

In that letter the Commission stated that the measures adopted by France were not laid down in the distillation arrangements established by Regulation No 766/72 and extended by Regulation No 1098/72. The distillation rules set out therein were exhaustive and did not permit the Member States to adopt other measures in that context.

By letter of 4 May 1973, however, the Commission informed the French Government that as the measures in question related to the past it had decided not to pursue the procedure under Article 169 which had been initiated. It stated that if similar infringements were repeated that procedure would be reopened. It added that "the decision taken in the context of the procedure in respect of a failure to fulfil an obligation does not prejudge the final closure of the accounts to be carried out annually by the Commission on behalf of the EAGGF".

5. For the purpose of the discharge of the accounts for 1972 the French Government submitted, for the distillation season in question, expenditure amounting to FF 72 590 447.69 which is the product of the multiplication of 2 976 175 hectolitres of distilled wine by the alcoholic strength of the wine and by the amount of the aid to distillers laid down in Article 6 of Regulation No 766/72.

6. In its decision of 2 December 1975 the Commission held *inter alia* that it could not recognize the above-mentioned sum as chargeable to the EAGGF.

In a letter of 17 December 1974 the Commission gave the reasons for its decision in greater detail. It stated in particular that in the operation undertaken it is not possible to draw a distinction between, on the one hand, the effect of the Community measure and, on the other, the effect of the national intervention measure. If it were to prove possible to make such a distinction the incompatibility with Community law of the national measure would not prejudice the charging to the EAGGF of the expenditure relating to the Community measure. The level of prices guaranteed *a priori* by the French authorities, which was higher than that laid down by the Community provisions, determined the conduct of producers who relied on that level in order to decide whether, and if so in what quantities, they would send their wine for distillation.

7. The present proceedings have been brought against the Commission's decision of 2 December 1975.

B — Conclusions of the parties

The *applicant* claims that the Court should:

— Declare that in leaving the expenditure resulting from Regulation No 766/72 chargeable to the French Republic the Commission has failed to fulfil its obligations under Community law;

— Annul the decision concerning the discharge of the accounts of the EAGGF relating to the 1972 financial year in so far as it leaves chargeable to the French Government expenditure incurred in error;

— Order the Commission to pay the costs.

The *Commission* contends that the Court should:

— Dismiss the application as being without foundation;

— Order the French Government to pay the costs.

C — Submissions and arguments of the parties

1. Admissibility

The Commission argues that the French Government's first conclusion is inadmissible as it is not possible in the context of an action for annulment to ask the Court to declare that certain conduct of an institution constitutes a failure on its part to comply with its obligations.

2. Merits

(a) In its application the *French Government* claims, in reply to the Commission's argument to the effect that in the final analysis the national aid alone determined the amount of the expenditure chargeable to the EAGGF that the Commission ignored the obligation laid down by Regulation No 816/70 as regards the objective to be attained.

In fact the aid laid down by the Commission was sufficient to ensure that a certain amount of wine would be sent for distillation. Consequently, the French aid could, in the applicant's view, only have an additional effect to that of the Community premium.

The French Government takes the view that a fair solution would be to reimburse to it only the sums paid by it in the name of and on behalf of the Community without reimbursing to it the amounts corresponding to its national premium.

(b) Furthermore, the French Government states that even if the aid in question was in fact in conflict with its Community obligations the Commission should have penalized that infringement of Community law by means of the procedure under Article 169 of the Treaty. The Commission began to make use of that procedure but subsequently discontinued it and it should therefore regard the case as closed. By reopening the matter on the occasion of the discharge of the accounts the Commission misused the procedure.

(c) As regards the question whether it is possible to distinguish the effect of the national measure from that of the Community measure the *Commission* refers to its previous arguments and adds that it might possibly have been feasible to distinguish between the effects of the two measures if, for example, after the end of the distillation operations and without any possibility of foreknowledge on the part of producers, the French Government had adopted measures to increase the profits obtained from distillation by producers who had undertaken it, on the basis of the quantities which had in fact been distilled.

(d) As regards the illegality of the national aid the Commission argues that the French measures gave rise to intervention which was fundamentally different from that envisaged in Regulation No 729/70. In its opinion the objective pursued by the Community in fixing the minimum purchase price for wine is not only to determine the financial consequences of the intervention but also to achieve an economic balance: a balance between producers and consumers, a balance

between producers in the various Member States which must be placed in the same conditions of competition, a balance between the market for wine and the market for alcohol and the desire not to encourage production of poor-quality wine whose outlet is distillation.

The Commission takes the view that that complex balance, as conceived by the Community legislature, was endangered by the measures adopted on a national level in France for the benefit of French wine growers. Apart from absorbing excessive quantities of wine by way of distillation the measures in question, together with the poor harvest of 1972, were a contributory cause of the very sharp rise in prices in the 1972/1973 marketing year.

(e) As regards the French Government's argument that the decision of 2 December 1975 constitutes a misuse of procedure the Commission states that the fact that it did not continue the procedure under Article 169 cannot have the effect of amending Article 3 of Regulation No 729/70. The Commission adds that in the context of the procedure under Article 169 it enjoys a margin of discretion which it does not have in the procedure for the discharge of the accounts.

It follows that the Commission would itself have infringed the provisions relating to the financing of intervention expenditure by the EAGGF, Guarantee Section, if it had agreed to charge the expenditure in question to the Community budget.

IV — Procedure

The applications were lodged on 13 February 1976.

The written procedure followed the normal course.

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

The procedure was suspended from September 1976 to enable the parties to enter into negotiations for a settlement. As those negotiations were unsuccessful the procedure was reopened in December 1977.

By order of 7 August 1978 the two cases were joined for the purposes of the oral procedure.

The French Government, represented by its Agent, Guy Ladreit de Lacharrière, and the Commission, represented by its Legal Advisers, Mr Amphoux and Mr Paulin, acting as Agents, presented oral argument at the hearing on 25 October 1978.

The French Government lodged, in Case 15/76, documentary evidence showing that the formalities relating to proof had in fact been complied with in most cases. The Court fixed a period of two weeks to enable the Commission to submit its observations. The Commission, however, did not make use of the opportunity to make its views known.

In Case 16/76 the Court invited the Commission to submit information concerning the budgetary estimates relating to Regulation No 766/72.

The Commission replied that the budget for the 1972 financial year contains no estimate relating to that regulation. It added, however, that the letter transmitting to the Council the proposal which subsequently became Regulation No 766/72 was accompanied by the following observations:

"In view of the information which may be drawn from the results of similar operations applied during the past wine growing year it can be estimated that the following quantities of table wine may be distilled during the period in question:

France: 1 500 000 hectolitres

Italy: 1 500 000 hectolitres."

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

Decision

1 By two applications lodged on 13 February 1976 the Government of the French Republic seeks the partial annulment under the first and third paragraphs of Article 173 of the EEC Treaty of Commission Decisions 76/142 and 76/148 of 2 December 1975 concerning the discharge of the accounts in respect of the European Agricultural Guidance and Guarantee Fund, Guarantee Section, expenditure for 1971 and 1972 (Official Journal L 27 of 2 February 1976, p. 5 and p. 17).

2 As the two cases have been joined for the purposes of the procedure they should also be joined for the purposes of the decision.

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

3 The applicant Government complains that the Commission refused to charge to the EAGGF for the 1971 financial year the amount of FF 1 240 514 paid by the French authorities as aid to skimmed-milk powder exported from France to Italy and intended for use as animal feed on the ground that the formal requirements as to proof laid down by the relevant Community rules had not been complied with.

4 Under Regulation (EEC) No 986/68 of the Council of 15 July 1968 laying down general rules for granting aid to skimmed milk (Official Journal, English Special Edition 1968 (I), p. 260), as amended by subsequent Council regulations, and under Commission regulations on detailed rules for the grant of that aid:

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

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

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

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

5 The amounts in issue relate to cases in which the Commission held that the aid had been paid by the competent French agency even though the originals of the control copies of the Community transit document had not been produced or had not been completed in the prescribed manner.

6 The applicant Government challenges the legality of the Commission's refusal to accept financial responsibility for those amounts, arguing that the anomalies found to exist contravene only subsidiary formal requirements and that they were, moreover, rectified subsequently.

7 As regards the relevance of subsequent rectification it should be observed that in the context of an application for annulment under Article 173 of the Treaty the legality of the contested measure must be assessed on the basis of the elements of fact and of law existing at the time when the measure was adopted.

8 Rectification subsequent to that date cannot therefore be taken into account for the purposes of such an assessment.

9 With regard more particularly to the assessment of the legality of decisions of the Commission concerning the discharge of accounts presented by the Member States in respect of expenditure financed by the EAGGF it should be recalled that the objective of such a decision is to assess whether it may be accepted that the expenditure was incurred by the national authorities in accordance with Community provisions.

10 In cases where the Community rules authorize payment of an aid only on condition that certain formalities relating to proof are complied with at the time of payment, aid paid in disregard of that condition is not in accordance with Community law and the related expenditure cannot, therefore, in principle be charged to the EAGGF when the accounts for the financial year in question are discharged, without prejudice to any possibility on the part of the Commission to take account, during another financial year, of the subsequent production of the requisite proof.

11 It follows that the rectification of the formal requirements relating to proof following payment of the aid by the competent national agency is not such as to invalidate the Commission's refusal to charge the expenditure to the EAGGF.

12 It is further necessary to examine the applicant Government's argument that the anomalies are merely subsidiary and should not therefore be relied on to refuse to allow Community financing of the aid granted.

13 In this respect it should be observed that whatever the importance in Community law of the distinction between essential and subsidiary administrative formalities the distinction is not applicable to the proof required in this case.

14 The Community rules in this field are drawn up in terms which do not give the national authorities the option of accepting any other proof that the goods have been placed under control in the importing country than the formal proof provided by the control copy of the transit document correctly completed and stamped.

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

16 Without going into a detailed analysis of the anomalies noted by the Commission it may be stated that they all involve a disregard of the strict requirements as to proof laid down by Community rules.

17 It must therefore be concluded that the Commission's refusal to charge the expenditure in question to the EAGGF is not unlawful.

Aids for the distillation of wine

18 The applicant Government complains that the Commission refused to charge to the EAGGF for the 1972 financial year the sum of FF 72 590 447.90 paid by the French authorities as aid for the distillation of wine on the ground that that expenditure was not incurred in accordance with the relevant Community rules.

19 Article 7 of Regulation (EEC) No 816/70 of the Council of 28 April 1970 laying down additional provisions for the common organization of the market in wine (Official Journal, English Special Edition 1970 (I), p. 234) provides that where the granting of aid to private storage of table wines alone is unlikely to be effective in restoring price levels measures may be adopted for distillation.

20 Taking the view that that condition was fulfilled following the abundant harvest of 1970/1971 the Council decided, in Regulation No 766/72 of 17 April 1972 laying down general rules governing the distillation of table wines during the period from 24 April 1972 to 27 May 1972 (Journal Officiel L 91 of 18 April 1972, p. 1), to open a distillation season and to set up a system of aids for that purpose.

21 The French Government took the view that the minimum price and the amount of the aid fixed under that scheme were insufficient and, as a national measure, made provision for additional aids.

22 The Commission regarded that measure as incompatible with the relevant Community rules and in July 1972 it initiated against France the procedure under Article 169 of the Treaty for failure to fulfil an obligation under the Treaty.

23 However, in May 1973 the Commission informed the French Government that as the measures in question related to the past it had decided not to pursue the procedure under Article 169 which had been initiated, whilst adding that that decision did not prejudge the final closure of the accounts to be carried out annually by the Commission on behalf of the EAGGF.

24 In the course of the present proceedings the French Government argued that the Commission misused the procedure by reopening the matter on the occasion of the discharge of the accounts once it had discontinued the procedure for failure to fulfil Treaty obligations.

25 That argument, however, cannot be upheld.

26 In fact the two procedures are independent of each other as they serve different aims and are subject to different rules

27 The procedure under Article 169 of the Treaty on the ground of failure to comply with Treaty obligations is for the purpose of obtaining a declaration that the conduct of a Member State infringes Community law and of terminating that conduct; the Commission remains at liberty, if the Member State has put an end to the alleged failure, to discontinue the proceedings but such discontinuance does not constitute recognition that the contested conduct is lawful.

28 As Community law now stands the procedure for the discharge of the accounts, on the other hand, serves to determine not only that the expenditure was 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 rules regulating the allocation of expenses.

29 The sum in question which, in the opinion of the French Government, should be charged to the EAGGF, represents, in respect of all the quantities of wine which have been distilled, that proportion of the aid granted which corresponds to the rates fixed by Community rules whilst the proportion corresponding to the additional national aid should be borne by France.

30 The Commission objects to such a calculation, arguing that the national measure had the effect of distorting the distillation operation by extending it, in France, to far greater quantities of wine than would have been distilled on the basis of the Community measure alone.

31 In applying Community rules the Member States cannot unilaterally adopt additional measures which are such as to compromise the equality of treatment of traders throughout the Community and thus to distort competitive conditions between the Member States.

32 As the French national measure in question is therefore incompatible with Community law it is impossible to ascertain to what extent the total effect of the combined national and Community measures is due to one or other component part.

33 It is, in particular, impossible to establish with certainty what quantities of wine would have been distilled in France if the national measure had not been adopted.

34 Consequently neither the method of calculation used by the French Government nor a method based on the distillation estimates relied on by the Commission when setting up the operation makes it possible to apportion the expenses chargeable to the Community and to the Member State respectively.

35 In those circumstances the Commission had no choice but to refuse to charge to the EAGGF the expenditure incurred by the French authorities.

36 The application for annulment lodged by the French Government must therefore be dismissed.

Costs

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

38 The applicant Government has been unsuccessful in its submissions.

39 It should therefore be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Dismisses the applications.**

2. **Orders the applicant Government to pay the costs.**

Kutscher Mertens de Wilmars Mackenzie Stuart Donner Pescatore

Sørensen O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 7 February 1979.

A. Van Houtte
Registrar

H. Kutscher
President