collection of payments earmarked for the EAGGF or at the level of expenditure for the financing of which the EAGGF is responsible.

2. The principle of the observance of the right to a fair hearing does not require, for the adoption of decisions concerning the monthly advances against expenditure financed by the EAGGF, that the complex procedure, ensuring that the audi alteram partem rule is observed, applied during the annual clearance of national accounts must be complied with; it is sufficient, in order to satisfy the requirements of that principle, that the decisions are not taken until after the Member State concerned has been able to present its point of view. Those decisions are merely interim and temporary in nature and remain subject to review until the adoption of the decision on the annual clearance of the accounts, which alone may determine conclusively the Member State's financial position in relation to the EAGGF.

REPORT FOR THE HEARING
in Case C-346/89 *

I — Facts

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 1(2), 2 and 3 that the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (hereinafter referred to as 'the EAGGF') is to finance refunds on exports to third countries and intervention intended to stabilize the agricultural markets.

The first and second subparagraphs of Article 4(2) of that regulation provide that the Commission is to make available to Member States the necessary credits for the payments to be made.

The third subparagraph of Article 4(2), added by Council Regulation (EEC) No 3183/87 of 19 October 1987 introducing special rules for the financing of the common agricultural policy (Official Journal 1987 L 304, p. 1), as amended by Council Regulation (EEC) No 2048/88 of 24 June 1988 amending Regulation No 729/70 (Official Journal 1988 L 185, p. 1), provides that:

'However, after the appropriations allocated to the EAGGF Guarantee Section for the financial year 1987 have been used up . . . the financial resources earmarked to cover the expenditure referred to in Article 1(2) shall be mobilized by the Member States in accordance with the needs of their disbursing authorities.'

* Language of the case: Italian.

Article 5(2)(a) of Regulation No 729/70 provides that the Commission, after consulting the Fund Committee, is to decide at the beginning of the year on an advance payment and during the year on additional payments. In the words of the final subparagraph of that paragraph, as added by Regulation No 3183/87 and amended by Regulation No 2048/88,

'From January 1988, the Commission shall decide solely on monthly advances against booking of expenditure effected from the financial resources referred to in the third subparagraph of Article 4(2) . . . .'

Article 5(2)(b) establishes the system for the annual clearance of the accounts of national authorities and bodies, the detailed rules for which are fixed by Regulation (EEC) 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).

The detailed rules for payment of the monthly advances are laid down by Commission Regulation (EEC) No 2776/88 of 7 September 1988 on data to be sent in by the Member States with a view to the booking of expenditure financed under the Guarantee Section of the EAGGF (Official Journal 1988 L 249, p. 9), replacing Commission Regulation (EEC) No 3184/83 of 31 October 1983 on the operation of the system of advances in respect of expenditure financed by the EAGGF Guarantee Section (Official Journal 1983 L 320, p. 1).

Article 3(1) of Regulation No 2776/88 provides that:

'Not later than the second working day of each week, the Member States shall telecopy to the Commission details of total expenditure effected since the beginning of the month until the end of the preceding week.'

Under Article 3(5),

'Each month for the 20th of the month, the Member States shall send to the Commission three copies of a set of documents permitting the booking to the Community budget of expenditure effected during the preceding month.'

Article 4(1) provides that the Commission is to pay the monthly advances on the basis of data sent in accordance with Article 3. The second subparagraph of Article 4(2) provides that:

'. . . the Commission shall have power after informing the Member States concerned to defer payment of the advances to any Member States which have failed to make the notifications referred to in Article 3 on time or where such notifications contain discrepancies which necessitate supplementary verification.'

Article 9(1) states that expenditure claimed in respect of a given month must fall with payments and receipts actually effected during that month.

Article 6 of Council Decision 88/377/EEC of 24 June 1988 concerning budgetary discipline (Official Journal 1988 L 185,

p. 29) provides that the Commission is to establish an 'early warning system' covering the development of expenditure of the EAGGF Guarantee Section; where the rate of development of expenditure is exceeding the forecast profile, or risks doing so, the Commission is required to use the management powers at its disposal.

The Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities (Official Journal 1977 L 356, p. 1) provides, in Article 97 on expenditure effected and the charging of payments to the EAGGF Guarantee Section, that that article is to apply without prejudice to the clearance of accounts provided for in Regulation No 729/70. Article 99 of the Financial Regulation, as amended by Council Regulation (ECSC, EEC, EURATOM) No 2049/88 of 24 June 1988 (Official Journal 1988 L 185, p. 3), states that the object of the clearance of accounts provided for in Article 5 of Regulation No 729/70 is to determine the amount of expenditure which must be recognized as being chargeable to the EAGGF.

Article 7 of Council Decision 88/377/EEC states that payment of the monthly EAGGF Guarantee advances is to be effected on the basis of the information supplied by the Member States.

2. By telex of 28 July 1989, the Commission informed the Member States that pursuant to Commission Regulation (EEC) No 1546/88 of 3 June 1988 laying down detailed rules for the application of the additional levy in the milk sector (Official Journal 1988 L 139, p. 12), the levies collected under the milk quota system for the 12-month period expired, that is, for the 1988/89 marketing year, were to be entered not later than 30 June 1989.

3. As it took the view that the Italian Republic, in breach of Regulation No 1564/88, had failed to collect certain levies during the 1988/89 marketing year, which ended on 31 March 1989, and to pay the amounts in question before 30 June 1989, the Commission, in its decision of 30 August 1989 concerning an advance against entry in the accounts of expenditure financed by the EAGGF Guarantee Section, deducted the amount of LIT 47 164 600 000 from the expenditure which the Italian Republic had indicated that it had incurred in July 1989.

In a memorandum dated 12 October 1989, the Commission stated the reasons on which that decision was based by setting out the following three arguments:

— in its communication published in the *Official Journal of the European Communities* (Official Journal 1983 C 318, p. 3), it had stated that it reserved the right to refuse to make EAGGF advance payments in respect of expenditure effected illegally by the Member States and directly affecting Community measures;

— according to the view consistently taken by the Court, only expenditure effected in accordance with the agricultural rules could be charged to the EAGGF Guarantee Section;

— Article 6 of Decision 88/377 entitled the Commission to use its management powers where there was a risk that expenditure would exceed the forecast profile.

II — Written procedure and forms of order sought by the parties

1. The application brought by the Italian Republic was lodged at the Court Registry on 9 November 1989.

2. 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.

3. The *Italian Republic*, the applicant, claims that the Court should:

— declare unlawful and annul the contested decision in so far as it reduced by LIT 47 164 600 000 the amount of the monthly advances against the booking of the expenditure effected by Italy in July 1989;

— order the Commission to pay the costs.

4. The *Commission*, the defendant, contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs of the proceedings.

III — Pleas in law and arguments of the parties

1. The *Italian Republic* states first of all that it is not a matter of examining whether Italy has been negligent in collecting the milk levies, but solely of ascertaining whether the Commission is empowered to reduce the monthly advances paid to the Member States. The precedents for reducing monthly advances referred to by the Commission are not relevant, since it is not a consistent administrative practice and still less a mandatory practice.

The Italian Republic reviews the arrangements for the financing of the EAGGF established by Regulation No 729/70, which provide, in particular, alongside the final clearance of the accounts established by Regulation No 1723/72, a system of advance financing governed by Regulations No 3183/87 and No 2776/88.

An analysis of those regulations shows, in particular, that the Commission is required to pay monthly advances to the Member States throughout the year on the basis of simple monthly communications forwarded by the Member States, and that it is not entitled to assess whether the expenditure declared was effected in accordance with Community rules; its only power consists in deferring payment of the advance on formal grounds.

The Commission's arguments, if accepted, would either mean that it would be allowed to determine unilaterally whether there had been any shortcomings on the part of the Member States, without their being entitled to defend themselves, or give rise to permanent disputes, stretching over several

years, with the risk of an unwarranted increase in litigation.

The Commission cannot interpret Regulation No 729/70, as amended, and in particular Articles 1 to 5 thereof, which provide that expenditure must have been effected in accordance with Community rules, as giving it the power to check that that was so within the framework of the payment of the monthly advances. Examination of Regulations No 729/70, No 1723/72 and No 2776/88 reveals clearly that, for the monthly advances, the check by the Commission of the communications submitted by the Member States should be a check of their simple formal correctness, while the check of the annual closing accounts, which takes place afterwards, will be a substantive check, subject to the principle of the Member State's right to be heard.

According to the Italian Republic, the supporting documents relied on by the Commission in its memorandum of 12 October 1989, referred to above, are irrelevant. The communication of 1983, apart from being devoid of any legal force, concerns a different sphere, namely that of State aids. The Court's case-law on the charging of expenditure to the EAGGF applies only to the annual clearance of accounts. The 'early warning system' established by Decision 88/377 is not applicable in view of the fact that the necessary conditions are not present.

In relation to expenditure effected under Article 4 of Regulation No 729/70, Article 97 of the Financial Regulation provides solely for an examination of the statements forwarded by the Member States in accordance with Regulation No 2776/88.

The Commission cannot claim that the refusal to recognize it as being empowered to reduce the advances to be paid to those Member States which have effected expenditure not complying with the Community rules would indirectly lead to adverse consequences for the other Member States. The fact that expenditure is not shown to have been effected in accordance with Community law until the annual clearance is definitely not of such a kind as to alter the equilibrium between Member States in the distribution of funds for the implementation of the common agricultural policy and to procure advantages for one State to the detriment of another.

2. The *Commission* stresses the significance of the proceedings in so far as it must be determined whether the Commission may verify, during the procedure of the advances, whether expenditure has been effected by the Member States in accordance with Community rules or whether it is not empowered to carry out that check until the clearance of the accounts.

It also refers to previous occasions on which it carried out reductions within the framework of the grant of the monthly advances.

Regulations No 3183/87 and No 2048/88 transformed the additional payments into monthly payments during the course of the year which no longer relate to estimated future expenditure, but to expenditure actually effected. In order to define that expenditure, the rules refer to Article 1(2) and Articles 2 and 3 of Regulation No 729/70, which provide that only payments granted in accordance with the Community rules may be financed. The change from the system of advances to one

in which the advances are decided against booking of expenditure effected implies that subsequent checks will be made to ensure that the expenditure was effected in accordance with Community law. Regulation No 2776/88 is not to be interpreted as meaning that it authorizes only formal checks; it must be applied in accordance with Article 5(2)(a), but also with Articles 2 and 3 of Regulation No 729/70, which allow only expenditure effected in accordance with Community law to be financed.

Articles 3(5) and 4(2) of Regulation No 2776/88 make possible a substantive check of the expenditure effected. Such an examination is expressly laid down by the Financial Regulation. In the same way, the fact that Article 5 of Regulation No 729/70 makes the Commission's decision on the payment of advances subject to consultation with the Fund Committee demonstrates that the procedure is not purely formal in character. Moreover, the Commission pointed out in its communication of 1983 that it would not take into account, in the procedure for granting advances, expenditure effected in breach of Community law.

Since 1988, the possibility of checking, during the procedure for granting advances, whether the expenditure declared was effected in accordance with Community law has become obligatory where there is a danger that the available budgetary resources will be exceeded.

Article 6 of Decision 88/377 concerning budgetary discipline expressly invests the Commission with management powers with a view to the stabilization of expenditure, including the reduction of monthly advances, if the expenditure was not effected in accordance with Community law. The question whether that decision constitutes an autonomous legal basis for such reduction measures is not relevant, since that basis is supplied by Article 5(2)(a) in conjunction with Articles 2, 3 and 4 of Regulation No 729/70. To adopt a different interpretation would mean not only that a Member State which has effected expenditure in breach of Community law would avoid the consequences of that breach until the annual clearance of accounts, but also that the Commission would have to impose undue burdens on other Member States which were not involved by reducing credits listed in other budgetary chapters or by proposing to strengthen the stabilizers.

F. A. Schockweiler

Judge-Rapporteur