# OPINION OF ADVOCATE GENERAL ALBER

delivered on 14 March 2002 [1]

## I — Introduction

1. In the present reference for a preliminary ruling the Oberster Gerichtshof (Supreme Court) of the Republic of Austria has referred questions relating to the validity and interpretation of Council Regulation (EEC) No 2078/92 of 30 June 1992 on agricultural production methods compatible with the requirements of the protection of the environment and the maintenance of the countryside [2] ('Regulation No 2078/92'), together with questions concerning the recovery of aid granted on the basis of that regulation. One issue raised by the six questions is whether Regulation No 2078/92 has the correct legal basis. They also seek clarification of whether a farmer who has received co-funded aid as part of a national programme on the basis of Regulation No 2078/92 can rely on the protection of legitimate expectations in the event of a claim for recovery of that aid if he was not aware of the conditions he was required to satisfy.

## II — The legal framework

### A — *Community law*

2. Regulation No 2078/92 was adopted on the basis of Article 42 of the EC Treaty [3] (now Article 36 EC) and Article 43 of the EC Treaty (now Article 37 EC) with the objective, *inter alia*, of promoting the use of farming practices that reduce the polluting effects of agriculture, which also contributes, by reducing production, to an improved market balance (see Article 1(a) of the regulation). The use of fertilisers and plant protection products was to be sub-

1 — Original language: German.

2 — OJ 1992 L 251, p. 85, as amended by the Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded, Annex I — V. Agriculture — C. Agricultural structures and measures accompanying the Common Agricultural Policy — Fig. 5 (OJ 1994 C 241, p. 129), repealed by Article 55 of Council Regulation (EC) No 1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain Regulations (OJ 1999 L 160, p. 80).

3 — The version applicable is the one introduced into the EEC Treaty by the Single European Act. This is the version referred to hereinafter.

stantially reduced and less intensive production methods encouraged. [4] For that purpose, a 'Community aid scheme' part-financed by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund was instituted as a supporting measure within the framework of the common organisation of the market (see Article 1 of Regulation No 2078/92).

3. Article 2 of Regulation No 2078/92 (since repealed) [5] provided as follows:

'1. Subject to positive effects on the environment and the countryside, the scheme may include aid for farmers who undertake:

(a) to reduce substantially their use of fertilisers and/or plant protection products, or to keep to the reductions already made, or to produce or continue with organic farming methods;

...'

4. Article 3 of Regulation No 2078/92 provided that the Member States were to implement multiannual zonal programmes covering the objectives referred to in Article 1. Such programmes had to contain, *inter alia*, the conditions for the granting of aid and the arrangements made to provide appropriate information for agricultural and rural operators (see Article 3(3)(d) and (f) in particular).

5. Under Article 7(2) of Regulation No 2078/92 the Commission examined the multiannual programmes submitted by the Member States in order to determine their compliance with the regulation, and decided on their approval.

6. Article 10 of Regulation No 2078/92 allowed the Member States to implement additional measures, provided that those measures complied with the objectives of the regulation and with Articles 92, 93 and 94 of the EC Treaty (now Articles 87 EC, 88 EC and 89 EC).

7. Under Article 8 of Regulation (EEC) No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy [6] (hereinafter Regulation

4 — See also the recitals.

5 — See the details in footnote 2.

6 — OJ, English Special Edition 1970 (I) p. 218, since repealed by Article 16 of Council Regulation (EC) No 1258/1999 of 17 May 1999 on the financing of the common agricultural policy (OJ 1999 L 160, p. 103).

No 729/70), the Member States were required in their legislation, amongst other things, to take the measures necessary to recover sums lost as a result of irregularities or negligence. In accordance with Article 8(2), the Community was in principle to bear the financial consequences of any incomplete recovery; that did not apply to irregularities and negligence attributable to the administrative authorities or other bodies of the Member States.

B — *The Austrian programme for the encouragement of extensive agriculture compatible with the requirements of the protection of the environment and the maintenance of the countryside (ÖPUL)*

8. In order to implement Regulation No 2078/92 the Austrian Federal Ministry of Agriculture and Forestry adopted the 'Special directive for the Austrian programme for the encouragement of extensive agriculture compatible with the requirements of the protection of the environment and the maintenance of the countryside (ÖPUL)' (hereinafter 'the ÖPUL Special Directive'). The Commission approved the programme by a decision of 7 June 1995. Notification was given in the Official Gazette published with the *Wiener Zeitung* that the ÖPUL Special Directive had been adopted and that it was available for inspection at the Federal Ministry of Agriculture and Forestry. [7]

9. The ÖPUL Special Directive is divided into a general section containing, *inter alia*, extensive conditions for the granting of support and the way in which it is administered, as well as rules on the reimbursement of support where the conditions for its grant have not been complied with (point 1.9 of the Special Directive), and a practical section setting out specific conditions for the various elements of the programme. The Special Directive also contains a number of annexes, including Annexes 3.5 and 3.6 which give instructions for integrated controls on fruit and wine production.

10. Under Austrian law, directives like the ÖPUL Special Directive are not general, abstract rules, but only come into force between contractual partners, as statements incorporated when a contract is concluded, for example.

## III — Facts and procedure

11. On 21 April 1995 the farmer Martin Huber, the defendant in the main proceedings (hereinafter 'the defendant'), applied

7 — Official Gazette published with the *Wiener Zeitung* of 1 December 1995.

for support under the ÖPUL Special Directive, which was granted on 12 December 1995 in the sum of ATS 79 521 by Agrarmarkt Austria in the name and on the account of the Republic of Austria, the plaintiff in the main proceedings (hereinafter 'the plaintiff'). The ÖPUL Special Directive was not sent to the defendant.

12. When the defendant received a letter from Agrarmarkt Austria — a legal person under public law set up by the Federal Ministry of Agriculture and Forestry to administer support under the ÖPUL Special Directive — seeking recovery of the support, he assumed that he had made a mistake and proposed to Agrarmarkt Austria repayment of ATS 5 000 per month. On 13 May 1998 the Finanzprokuratur (representing the Federal Ministry of Finance), which had been instructed by Agrarmarkt Austria in that regard, demanded from the defendant payment of ATS 90 273 (including interest).

13. The plaintiff, represented by the Finanzprokuratur, subsequently brought a judicial claim for recovery of the support in the sum of ATS 79 521 plus interest from 12 December 1995. It pleaded that the defendant had acted contrary to the Special Directive in that he had used plant protection products (the fungicides Euparen, Orthophaldan, Delan and Folit) which were banned under its provisions. In addition he had admitted the claim for recovery.

14. The defendant contended that the plaintiff's claim should be dismissed and pleaded that by the use of those products, which ultimately was acknowledged, he had not acted contrary to directives, nor had he committed himself by an admission to make repayment. Specifically, he had been informed only that he could not use herbicides in fruit growing and wine growing, and he had renounced the use of those plant protection products but not the products named by the plaintiff. He had not entered into any further obligation. The specific directives were not annexed to the application or ever brought to his knowledge. The wording of the application also lacked clarity, a fault to be borne by the plaintiff who had drafted it. The plaintiff was aware of the use of the products and nevertheless paid the support. Any admission by the defendant as to the position was attributable to a mistake caused by the plaintiff.

15. At first instance the court dismissed the action because the directives of the plaintiff had not become part of the contract, nor was there an admission creating a right to recovery.

16. The appeal court allowed the plaintiff's appeal and remitted the case to the court at first instance for decision. While it found that there was no admission creating a right to recovery, it proceeded on the basis that it had not yet been made sufficiently clear whether the products used by the defendant fell within the concept of herbicides or what the precise content was of the docu-

ments made available to him. The directives adopted by the plaintiff did not, in the view of the appeal court, become part of the contract, since they had not been the subject of general notification but were only referred to in the Official Gazette. The references in the undertaking were also not sufficiently clear.

17. The appeal court granted the plaintiff leave to appeal to the Oberster Gerichtshof because there was an absence of case-law on the question of the validity of domestic directives adopted pursuant to Community regulations.

## IV — Reference for a preliminary ruling

18. The Oberster Gerichtshof referred the following questions to the Court of Justice for a preliminary ruling:

'1. Was Council Regulation (EEC) No 2078/92 of 30 June 1992 on agricultural production methods compatible with the requirements of the protection of the environment and the maintenance of the countryside (OJ 1992 L 215, p. 85) validly adopted?

2. Does a decision on the approval of a programme under Article 7 of Council Regulation (EEC) No 2078/92 of 30 June 1992 on agricultural production methods compatible with the requirements of the protection of the environment and the maintenance of the countryside also encompass the content of the programmes submitted by the Member States for approval?

3. Are farmers who apply for aid under that programme also to be regarded as persons to whom the decision is addressed and is the form of the notification chosen in that regard, in particular the obligation on the Member States to provide farmers with appropriate information, sufficient to make the decision binding on those farmers and any conflicting contracts granting support ineffective?

4. May a farmer in this instance, irrespective of the content of the programme within the meaning of Regulation No 2078/92 approved by the Commission, rely on the statements of the administrative bodies of the Member States so that a claim for recovery is precluded?

5. Are the Member States free under Regulation No 2078/92 to implement programmes within the meaning of

that regulation either by private-sector measures (contracts) or by forms of State action?

6. In assessing whether restrictions on the possibilities of claiming recovery on grounds of the protection of legitimate expectations and legal certainty accord with the interests of Community law, is only the respective form of action to be taken into account or also the possibilities of claiming recovery which exist in other forms of action and particularly favour the Community interests?'

19. Observations on the questions referred were submitted to the Court by the Republic of Austria as the plaintiff, represented by the Finanzprokuratur, the defendant Martin Huber, the Commission, the Council (Question 1 only) and the Republic of Austria, exercising its right to give its opinion as a Member State.

## V — Legal assessment

### A — *Question 1*

20. In Question 1 the national court asks whether Regulation No 2078/92 is valid even though it is based on Articles 42 and 43 of the Treaty and not, despite its environmental objectives, Article 130s of the EC Treaty (now Article 175 EC).

#### (1) Submissions of the parties

21. All of the parties regard Article 43 of the Treaty as the correct legal basis and assume that Regulation No 2078/92 is valid.

22. The Council and the Commission submit that the Court has consistently held that the choice of legal basis must be founded on objective factors which are amenable to judicial review, including in particular the aim and content of the instrument. It is to be inferred from the content of Regulation No 2078/92 and the aims of the Community aid scheme set out in Article 1(1) of that regulation, together with the measures provided for in Article 1(2) in order to achieve those aims, that the regulation falls within the scope of the common agricultural policy.

23. The regulation serves to achieve the aims of Article 39 of the EC Treaty (now

Article 33 EC), as is clear from the 1st, 5th and 12th recitals in particular, which indicate that the structural measures contained in the regulation are intended to counter the situation of overproduction and overexploitation of natural resources in European agriculture. In giving preference to less intensive and more environmentally-friendly production methods, the aim, particularly in a situation of considerable production surplus, is to rationalise agricultural production and ensure the optimum utilisation of the factors of production (Article 39(1)(a) of the Treaty) and to stabilise markets (Article 39(1)(c) of the Treaty).

24. Such measures help to reduce the supply of agricultural products and to improve their quality, thus helping to adjust the supply of agricultural products to demand. Compensating for income lost as a result of the drop in production and increases in costs helps to ensure a fair standard of living for farmers (Article 39(1)(b) of the Treaty).

25. The Commission also refers to the aim set out in the first indent of Article 1(1) of Regulation No 2078/92, which is 'to accompany the changes to be introduced under the market organisation rules'. The measures proposed in Article 1(2)(a) to (g) range from new production methods to extensification and the set-aside of agricultural land. Although they contain an environmental element, they predominantly relate to the practice of farming production and methods and therefore pursue mainly agricultural objectives.

26. The Council and the Commission take the view that the fact that a measure under Community law serves to protect the environment as well as to pursue the objectives of the common agricultural policy has no decisive influence on the legal basis. The 'integration clause' contained in the second sentence of Article 130r(2) of the Single European Act version of the EC Treaty — now given prominence in Article 6 EC — makes it compulsory to integrate environmental protection requirements into the definition and implementation of all Community policies. Thus many measures in other areas of policy contribute to protecting the environment without needing to be based on Article 130s of the Treaty purely on that account.

27. Furthermore, the introduction of Article 130s of the Treaty by the Single European Act has left intact the powers

held by the Community under other provisions of the EC Treaty, including Article 43. [8]

28. The Council adds that in only one case has the Court found that measures should have been based on Article 130s instead of Article 43. [9] However, the Court took the view that the forestry protection measures at issue in that case pursued primarily environmental objectives and essentially related to products not listed in Annex II to the Treaty. Regulation No 2078/92, which is relevant in the present case, is fundamentally different from the regulations that were the subject of the *Parliament* v *Council* case cited. There is no parallel exceptional situation in the present case from which it might be inferred that Articles 42 and 43 were not the correct legal basis for the regulation.

(2) Assessment

29. The Court has consistently held that the choice of an instrument's legal basis does not depend simply on an institution's conviction as to the objective pursued. Instead, the relevant legal basis is to be determined using objective factors which are amenable to judicial review, in particular the aim and content of the instrument. [10] Where a measure pursues more than one aim, the main aim determines the appropriate basis. [11] Only where there is no single principal objective can two legal bases, exceptionally, be used at the same time. [12]

30. Reference must therefore be made to the version of the EC Treaty in force when Regulation No 2078/92 was adopted in order to examine whether the regulation was correctly based on Articles 42 and 43 of the Treaty — more precisely, the enabling basis is the third subparagraph of Article 43(2) of the Treaty — or whether Article 130s of the Treaty would have been the proper legal basis instead. It is also ultimately conceivable that both provisions could have been used together.

31. It is clear from the provisions of Regulation No 2078/92 that the regulation pursues partly agricultural and partly environmental aims. In such an instance, the

8 — The Council refers in this connection to Case C-405/92 *Mondiet* [1993] ECR I-6133.

9 — Joined Cases C-164/97 and C-165/97 *Parliament* v *Council* [1999] ECR I-1139.

10 — Case C-300/89 *Commission* v *Council* [1991] ECR I-2867, paragraph 10 ('*Titanium dioxide*') and Case C-269/97 *Commission* v *Council* [2000] ECR I-2257, paragraph 43.

11 — Joined Cases C-164/97 and C-165/97 *Parliament* v *Council*, cited in footnote 9, paragraph 14 with further references, and Opinion 2/00 [2001] ECR I-9713, point 23.

12 — Opinion 2/00, cited in footnote 11, point 23.

appropriate legal basis must be determined by considering to which area of policy the relevant measures mainly relate and which area is only incidentally or indirectly affected.

32. In the relationship between the common agricultural policy and environmental policy, neither is usually to be given precedence. [13] According to the second sentence of Article 130r(2) of the Treaty 'environmental protection requirements shall be a component of the Community's other policies', and so a measure cannot be classified as serving to protect the environment merely because it takes account of those requirements. [14]

33. The Court has consistently held that Articles 130r and 130s of the Treaty confer powers on the Community only to take specific action on environmental matters. However, they leave intact the powers held by the Community under other provisions of the Treaty, even if the measures to be taken pursue environmental objectives at the same time. [15]

34. Article 43 of the Treaty, on the other hand, is the appropriate legal basis for any legislation on the production and marketing of agricultural products listed in Annex II to the EC Treaty (now Annex I to the Amsterdam Treaty version of the EC Treaty) which contributes to the achievement of one or more of the objectives of the common agricultural policy set out in Article 39 of the Treaty. [16]

35. The main purpose of the support measures provided for in Regulation No 2078/92 is to control the production of agricultural products within the meaning of Annex II to the Treaty, as implemented in an appropriate manner by the Commission and the Council. Farmers are to be induced to move to more extensive farming and produce smaller quantities of better quality products. The rules on aid compensate for possible financial losses incurred.

36. The production methods supported also generate less environmental pollution than with more intensive farming, but this is only a secondary aim of the measures. The main aims of the regulation are agricultural, and it takes account of environmental protection as a component of the common agricultural policy, as required

13 — Case C-62/88 *Greece* v *Council* [1990] ECR I-1527, paragraph 20, and Joined Cases C-164/97 and C-165/97 *Parliament* v *Council*, cited in footnote 9, paragraph 15.

14 — *Mondiet*, cited in footnote 8, paragraph 27, and *Titanium Dioxide*, cited in footnote 10, paragraph 22.

15 — *Mondiet*, cited in footnote 8, paragraph 26.

16 — Case 68/86 *United Kingdom* v *Council* [1988] ECR 855, paragraph 14, Case C-180/96 *United Kingdom* v *Commission* [1998] ECR I-2265, paragraph 133, and Case C-269/97 *Commission* v *Council*, cited in footnote 10, paragraph 47.

under Article 130r of the Treaty. The Council was thus right to base the regulation on Article 43 of the Treaty.

37. Because the agricultural objectives take priority, there is no further need to examine whether Article 130s of the Treaty should have been invoked in addition to Article 43 of the Treaty.

38. The answer to Question 1 must therefore be that Articles 42 and 43 of the Treaty were the correct legal basis for the adoption of Regulation No 2078/92, and there can thus be no doubt as to the validity of Regulation No 2078/92.

B — *Questions 2 to 5*

(1) Preliminary remark on the jurisdiction of the Court of Justice

39. As the Court has consistently stressed in its case-law, it is for the national court to determine the relevance of the questions it refers to the Court. [17] However, the Court is not competent to give a ruling on a question where it is quite obvious that the ruling sought on the interpretation of Community law bears no relation to the actual facts of the main action or its purpose, or where the problem is a hypothetical one. [18]

40. Although none of the parties has challenged the Court's competence to give a ruling on Questions 2 to 5, nevertheless there are grounds for examining whether those questions are not actually a hypothetical problem within the meaning of the case-law cited.

41. Questions 2 to 5 concern the interpretation of Regulation No 2078/92 and of the general legal principles involved, in relation to the following situation. The defendant used fungicides which were not permitted under the ÖPUL Special Directive. However, it is unclear whether this requirement was actually imposed on the defendant in the contract granting the aid. The Oberster Gerichtshof appears to assume that the national courts need not

17 — See Case C-36/99 *Idéal tourisme* [2000] ECR I-6049, paragraph 20, and Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59.

18 — *Idéal tourisme*, cited in footnote 17, paragraph 20, and *Bosman*, cited in footnote 17, paragraph 61.

clarify this circumstance if the ÖPUL Special Directive can be cited against the defendant as directly applicable Community law, regardless of whether it was included in the contract. Questions 2 and 3 therefore ask whether the approval of a national programme makes it tantamount to an instrument of Community law addressed to the farmers receiving aid.

42. In Questions 4 to 6 the Oberster Gerichtshof requests clarification of various aspects of the protection of legitimate expectations in the recovery of agricultural aid. Those questions too ultimately relate to the defendant's use of prohibited plant protection products, since the defendant argues that he relied on the information provided by the Austrian authorities when he submitted his application, from which, in his view, he could not have inferred that fungicides were banned.

43. The Finanzprokuratur, representing the plaintiff in the main proceedings, argued in its written opinion before the Court that the defendant had failed to fulfil the aid conditions not just in his use of fungicides, but also by ceasing to farm the land for which the aid was granted before the end of the five-year period. It submitted letters dated 30 April 1996 from Agrarmarkt Austria, on which the defendant had noted (undated) that he had ceased the fruit and wine growing for which the aid had been granted.

44. In the oral procedure the defendant submitted that no infringement of the five-year farming requirement had been invoked in the main proceedings and that it could therefore not be covered by the proceedings before the Court. In fact neither the order for reference nor the excerpts from the documents in the main proceedings which the Oberster Gerichtshof forwarded contained any reference to the fact that this circumstance had been mentioned before the national courts.

45. However, the minimum farming period is laid down not just in the ÖPUL Special Directive (point 1.4.2), but also and above all in the first sentence of Article 4(1) of Regulation No 2078/92 itself.

46. If we assume that the facts described by the Finanzprokuratur are correct and might yet be invoked in the main proceedings, [19] the use of prohibited plant protection products and the points of law relating to the assessment of that fact would then be

19 — Should national procedural rules preclude a presentation of the facts in question, the extent to which this is compatible with the principles set out by the Court in its judgments in Joined Cases C-430/93 and C-431/93 *van Schijndel and others* [1995] ECR I-4705, paragraphs 19 to 22, and Case C-312/93 *Peterbroeck* [1995] ECR I-4599, in particular paragraphs 12 to 14 and 21, would have to be examined.

irrelevant for the decision in the main action. Questions 2 and 3 would become redundant because, in the assumed case, there would be an infringement not only of the ÖPUL Special Directive, but also of Regulation No 2078/92 itself, which is directly applicable in all Member States.

47. However, Questions 4, 5 and 6, which deal more generally with the admissibility of certain forms of action in granting and recovering agricultural aid and with the principle of the protection of legitimate expectations, could still be relevant. Where there is a clear infringement of the minimum requirements of Regulation No 2078/92, however, it is difficult to conceive of reasons which might preclude a duty to repay the aid, [20] whatever forms of action the national authorities use in granting or recovering it.

48. Notwithstanding those circumstances, the Court should not leave the questions unanswered. Because the infringement of the 5-year farming requirement has not been established by the national court, the Court of Justice cannot take it for granted in the preliminary ruling proceedings. The Court has consistently held that:

'... Article 177 of the Treaty is based on a clear separation of functions between the national courts and the Court of Justice, so that, when ruling on the interpretation or validity of Community provisions, the latter is empowered to do so only on the basis of the facts which the national court puts before it'. [21]

49. The Court can, in order to interpret and supplement the reference for a preliminary ruling, refer back to the parties' submissions during the preliminary ruling procedure. [22] However, it cannot, on the basis of their submissions, establish new facts which place the main proceedings in a completely different light. [23]

50. Finally, it must also be borne in mind that the circumstance invoked for the first time before the Court might no longer be submissible under national procedural law, in so far as the latter is consistent with

20 — For further details, see point 137 below.

21 — Case C-435/97 *WWF* [1999] ECR I-5613, paragraph 31 with further references.

22 — See, for example, Case C-67/96 *Albany* [1999] ECR I-5751, paragraphs 43 and 44.

23 — See *WWF*, cited in footnote 21, paragraph 31. The Court here refused to take into consideration that the facts presented by the national court were disputed by one of the parties before the Court.

Community law.[24] There were two proceedings prior to the action before the Oberster Gerichtshof, without the plaintiff invoking failure to comply with the minimum farming period. If it were precluded from making that submission, it would be able to base its claim for recovery only on the use of prohibited plant protection products.

51. Therefore, since it is not certain that the problems raised in Questions 2 to 5 are hypothetical and obviously not relevant to the decision in the main proceedings, the Court is competent to answer them.

(2) Question 2

52. In Question 2 the national court asks whether a decision on the approval of a programme under Article 7 of Regulation No 2078/92 also encompasses the content of the programmes submitted by the Member States for approval.

53. As is clear from the explanatory details provided by the national court, the thinking behind this question is that, in being approved by the Commission in accordance with Regulation No 2078/92, the ÖPUL Special Directive might itself have become an instrument of Community law. Because of the precedence that the programme would then be accorded as Community law, aid contracts that deviated from it would be ineffective, in so far as the form of notification of that 'instrument of Community law' was sufficient to make it binding on the farmers.

(a) Submissions of the parties

54. The parties that have submitted opinions on this question largely agree on how it should be answered. It is generally accepted that the Commission's decision under Article 7(2) of Regulation No 2078/92 establishes that the content of the national programme is consistent with the requirements of Community law. The Commission stresses in particular that the approval covers only the sections of the programme which are relevant here.

55. None of the parties takes the view that the ÖPUL Special Directive itself became Community law as a result of the Commission's approval.

24 — See the judgments cited in footnote 19.

(b) Assessment

56. National law and Community law constitute different legal systems which different legislatures are responsible for and capable of adopting. The Commission would only be able to incorporate national provisions in an instrument of Community law and thus make the EC Treaty the legal basis for those provisions if it was empowered to do so. In the field of agriculture, Article 43 of the EC Treaty confers on the Council alone direct powers to introduce legislation. Any powers held by the Commission could therefore only be derived from relevant subordinate legislation, in this case Regulation No 2078/92.

57. Article 7(2) and (3) of Regulation No 2078/92 clearly state that the Commission examines the national programmes in order to determine their compliance with the regulation, the nature of the measures eligible for part-financing and the total amount of expenditure involved, and decides on their approval. There is nothing to suggest that the Commission can adopt the draft programmes submitted by the Member States as instruments of Community law.

58. The Commission exercised its powers accordingly in its decision of 7 June 1995. In Article 1 of the decision it approves the ÖPUL Special Directive. In Article 3 it makes it clear that the approval relates only to those provisions of the programme which are relevant for the programme's compatibility with the regulation and for the eligibility of the measures to receive aid. It does not follow from the decision that the ÖPUL Special Directive was transformed into Community law.

59. It is not unusual in Community law for a national measure to be approved by the Commission without thereby losing its status as national law. Under Article 93(3) of the Treaty, new State aid requires approval, to which the Commission may attach conditions and requirements. Such conditions were involved, for example, in *British Airways* v *Commission*, [25] to which the national court referred. However, in that case they were not conditions of national law governing the granting of aid, but conditions which were imposed by the Commission and which, as a component of the approval decision addressed to the Member State, were Community law, as the Austrian Government rightly points out. However, the Commission decision did not transform the national aid scheme into Community law.

60. It is also not unusual for requirements of Community law to be transposed by national law without the national trans-

25 — Joined Cases T-371/94 and T-394/94 [1998] ECR II-2405, paragraph 290.

posing instrument thereby itself becoming Community law in any way. The directive as an instrument is instead based precisely on the separation of the Community's and the Member States' legal systems.

61. Moreover, the Commission's limited scope of appraisal is a further argument against the notion that the national programme is transformed into Community law. Since the Commission applies only three particular criteria in examining the national programme for compliance with Regulation No 2078/92, its approval decision could only transform the part of the programme which it had examined into Community law. This partial transformation would have the effect of making the programme a sort of 'legal hermaphrodite', part Community law and part national law, resulting in unacceptable legal uncertainty.

62. The ÖPUL Special Directive therefore did not itself become Community law, and thus does not have the effect of an instrument of Community law and does not take precedence over provisions of national law. The consequences of deviations from the Special Directive in the conclusion of an aid contract governed by private law must be assessed under national law. However, account must be taken of the aims and requirements of Regulation No 2078/92 when interpreting and applying national legislation, as will be explained later. [26]

63. The answer to Question 2 must therefore be that the Commission's approval of a national programme under Article 7(3) of Regulation No 2078/92 relates to those parts of the programme which are appraised under Article 7(2) of the regulation. A programme does not itself become an instrument of Community law through that approval.

(3) Question 3

64. Question 3 asks whether farmers who apply for aid under the programme are also to be regarded as persons to whom the Commission's approval decision is addressed, and whether the form of notification chosen in that regard, in particular the obligation on the Member States to provide farmers with appropriate information, is sufficient to make the decision binding on those farmers and any conflicting contracts granting support ineffective.

26 — See point 135 et seq below.

65. The national court does not specifically relate this question to the hypothesis that the ÖPUL Special Directive has become part of the system of Community law through the Commission's decision to approve it. However, that is the only situation in which the question would be relevant.

66. As already established in connection with Question 2, the ÖPUL Special Directive was not transformed into Community law by the Commission's approval. Where a specific aid measure deviates from the requirements of the Special Directive, therefore, consequences arise not from the Commission's decision, but primarily from national law. It is therefore irrelevant whether the defendant is to be regarded as a person to whom the Commission's decision was addressed.

67. The question of whether the ÖPUL Special Directive was notified in such a way that it can be cited against the defendant is also determined according to national law. However, it might be considered whether requirements for publication can be inferred from Article 3(3)(f) of Regulation No 2078/92, which states that the programme must take steps to provide appropriate information for the groups concerned. The purpose of this rule is to ensure that those involved are informed in general terms. It is not, however, intended to set out specific rules regarding the inclusion of conditions for granting aid in the support contract. The issue is thus solely a matter for national procedural law.

68. In view of the answer to Question 2, therefore, Question 3 need not be answered.

(4) Question 5

69. Since the answer to Question 4 depends on the answers to Questions 5 and 6, those two questions will be examined first.

70. Question 5 asks whether the Member States are free under Regulation No 2078/92 to implement programmes within the meaning of that regulation either by private-sector measures (contracts) or by forms of State action.

(a) Submissions of the parties

71. The defendant, the Austrian Government, supported by the Finanzprokuratur,

and the Commission agree that the Member States are free to decide which form of action they use to implement the programme. The regulation itself, they argue, does not prescribe any form of action, in accordance with the principle of subsidiarity.

72. The Republic of Austria points out that the legal form chosen must not make implementation virtually impossible, and that there must be no differences from procedures for deciding similar but purely national disputes.

73. The Commission takes the view that private contracts between the Member State and the aid recipient appear appropriate for the implementation of structural programmes. The scope which the Member States enjoy to choose the legal form is only limited where the content of a measure provided for in the national programmes, such as the application of prohibitions and penalties, requires a form of State action.

(b) Assessment

74. In so far as Community law, including its general principles, does not include common rules, according to settled case-law, the national authorities when implementing Community regulations, including in particular under the common agricultural policy, must act in accordance with the procedural and substantive rules of their own national law. [27]

75. However, as the Court has already found, recourse to rules of national law is possible only in so far as it is necessary for the implementation of provisions of Community law and in so far as the application of those rules of national law does not jeopardise the scope and effectiveness of that Community law, including its general principles. [28] The application of national law must not make it virtually impossible or disproportionately difficult to implement Community regulations, or result in discrimination compared to procedures for deciding similar but purely national disputes. [29]

76. Since Regulation No 2078/92 does not contain any procedural rules, the relevant rules of national law must be applied for the implementation of the ÖPUL Special Directive. The Republic of Austria is free in principle to implement the programmes through private-sector measures (contracts).

27 — Joined Cases C-80/99, C-81/99 and C-82/99 *Flemmer and Others* [2001] ECR I-7211, paragraph 55, and Joined Cases 205/82 to 215/82 *Deutsche Milchkontor* [1983] ECR 2633, paragraph 17.

28 — *Flemmer*, cited in footnote 27, paragraph 55; see also Joined Cases 146/81, 192/81 and 193/81 *BayWa and Others* [1982] ECR 1503, paragraph 29.

29 — Case C-298/96 *Oelmühle Hamburg and Others* [1998] ECR I-4767, paragraph 19, and *Deutsche Milchkontor*, cited in footnote 27, paragraph 19.

77. The national court has explained that the private-sector form of action is also applied in similar situations in Austria. There is no indication that the choice of the private-sector form of action makes it virtually impossible or disproportionately difficult to implement programmes under Regulation No 2078/92.

78. The national court's misgivings therefore appear to concern the fact that the legal form in which the aid is granted also determines how, if necessary, it is recovered. Under domestic law the recovery of aid granted by private contract appears to be more difficult than the recovery of aid granted by a form of State action.

79. Where there are national rules making it virtually impossible or very difficult to recover aid granted under private law, that does not necessarily mean that the aid must not be granted under private law at all and that the Member State must use forms of State action instead. It is for the Member State to decide how it makes Community law effective in practice. Any provisions precluding the recovery of aid granted under private law would be inapplicable because they infringe Community law.

80. The answer to Question 5 must therefore be that the Member States are free to choose whether to implement programmes under Regulation No 2078/92 by private-sector measures (contracts) or by forms of State action, provided that it is guaranteed that the form of action is not discriminatory compared to similar but purely national situations and that it does not make it virtually impossible or disproportionately difficult to implement the regulation.

(5) Question 6

81. In Question 6 the national court asks whether, in assessing whether restrictions on the possibilities of claiming recovery on grounds of the protection of legitimate expectations and legal certainty accord with the interests of Community law, account must be taken only if the respective form of action, or also of the possibilities of claiming recovery which exist in other forms of action and particularly favour the Community interests. The explanations given in the statement of reasons contained in the order for reference indicate that the national court considers this question important primarily for examining possible instances of discrimination.

(a) Submissions of the parties

82. All of the parties essentially share the view that, in recovering aid, the Member State may take account of national legal criteria for protecting legitimate expectations and legal certainty in the context of the subsidy relationship, provided that the interests of Community law are sufficiently taken into consideration and situations with and without a link with Community law are treated equally.

83. The applicant (the Finanzprokuratur) adds that budget regulations (particularly Regulation No 729/70) and the principles established by the Court for the recovery of aid granted under Community law must remain unaffected. It submits that the case-law is very restrictive with regard to limiting recovery on grounds of the protection of legitimate expectations.

84. The plaintiff and the Austrian Government argue that, according to case-law, a person who has received aid granted unlawfully cannot rely on the disproportionality of the claim for recovery.

(b) Assessment

85. Just as with the form of the procedure for granting aid, the procedure for recovering aid is also determined by national law if there are no relevant provisions of Community law.[30] Restrictions on claiming recovery on grounds of the protection of legitimate expectations or legal certainty are therefore permitted in principle in so far as is provided for under national procedural law for the respective form of action.

86. However, the national procedural rules — regardless of whether they relate to recovery under private law or by administrative instrument — are subject to the limits described in the assessment of Question 5, in other words they must not make it virtually impossible or disproportionately difficult to implement Community law. In addition, recovery in a case which has a connection with Community law must not be subject to stricter conditions than in similar but purely national cases.

87. Such discrimination would occur, for example, if a private-sector form of action were usually used for aid with a Commu-

30 — See the case-law cited in footnote 27.

nity connection, making recovery possible only under strict conditions, whilst provisions of public law were applied in similar but purely national situations, making recovery easier. However, if a Member State usually chooses the private-sector form of action for both national and Community aid, as appears to be the case in Austria according to the statements of the national court, there is no discrimination if, when claiming recovery, it also applies the requirements of the chosen private-sector form of action without distinction.

88. Where there are a number of forms of action which satisfy the requirements of Community law and which are available under national law for recovering aid, the Member State may choose the form which is also applied in similar national situations. It does not have to use the form which theoretically most favours Community interests.

89. However, that does not release the Member State from the obligation to do everything it can to take account of Community interests when applying the form of action chosen. Where aid is granted under private law, for example, the contracts must be designed in such a way that, if the conditions for granting the aid are not met, the Member State is entitled to claim recovery of the payments made from the recipients. Should the Member State fail to fulfil this obligation, making it impossible to reclaim the aid successfully, it may be accused of negligence within the meaning of the second sentence of Article 8(2) of Regulation No 729/70 and have to bear the financial consequences.

90. The answer to Question 6 must therefore be that, when claiming recovery, it is not contrary to Community law for grounds of the protection of legitimate expectations and legal certainty to be taken into account in the manner provided for in national law for the respective form of action; Community law does not require the form of action used to be the one which particularly favours Community interests, although it must be ensured that it is not made virtually impossible or disproportionately difficult to implement Community law, and that a situation with a Community connection is not discriminated against compared with similar purely national situations.

(6) Question 4

91. Question 4 essentially asks whether and to what extent, in the event of a claim for recovery of aid, a farmer can rely on the protection of legitimate expectations, legal certainty and good faith if he receives aid under a national programme within the

meaning of Regulation No 2078/92, but the conditions which he assumes to apply under the programme are different from those approved by the Commission.

(a) Submissions of the parties

92. The parties disagree as to the conditions under which the aid was granted.

93. The defendant first submitted that, in so far as he was notified of it when he made his application, the draft of the ÖPUL Special Directive contained different conditions from the version later approved by the Commission. In particular, the ban on fungicides was not included. In the oral procedure the defendant then argued that the aid contract had not been concluded on the basis of the ÖPUL Special Directive at all, because the programme had not yet been approved and was not available in its final form when he made his application. The aid in question was actually State aid, and was to be assessed according to the general rules of the Treaty.

94. The Austrian Government, however, stated in the oral procedure that the ÖPUL Special Directive had not been changed between the time of the application and the programme's approval by the Commission. When questioned, it further explained that the text of the draft special directive had not been available to applicants when they made their applications, but that the content, including the lists of permitted and prohibited plant protection products, had been notified using various information measures.

95. The Republic of Austria takes the view that the question does not need to be answered, since the circumstances described in the order for reference contain nothing to suggest that the aid contract derogated from the programme. On the contrary, the extent to which the parties to the contract should have been able to rely on statements by the other party was a question of the interpretation of the private-law aid contract, which was for the national court to assess.

96. The Finanzprokuratur argues that the aid agreement between the Republic of Austria and Martin Huber was entirely consistent with Regulation No 2078/92 and the ÖPUL Special Directive, and puts forward detailed arguments on the incorporation of the directive into the contract in accordance with national law. Regarding reliance on the protection of legitimate

expectations, the Finanzprokuratur considers that the defendant farmer had a duty of care to obtain exact knowledge of the contract conditions on his own initiative before concluding the contract.

97. The defendant relies on the principles of legal certainty and the protection of legitimate expectations, which are also a component of the Community's legal system. In his submission there were unusual circumstances in this case — the confusion as to the content of the ÖPUL Special Directive — which justified his reliance on the protection of legitimate expectations. He had accepted and used the aid in good faith.

98. Because the programme had been inadequately notified, in that it had merely been available for inspection at the relevant ministry in Vienna, it was only at disproportionate expense that he had been able to obtain information about the precise content of the ÖPUL Special Directive after it was adopted. As a 'small farmer' he was primarily occupied with cultivating his land, not dealing with various administrative matters.

99. In this case, the defendant argues, there can be no public Community interest in recovery which takes precedence over the protection of legitimate expectations. Under Article 8(2) of Regulation No 729/70 the Member State, not the Community, has to bear the financial consequences of negligence.

100. In addition, Commission Regulation (EC) No 746/96 of 24 April 1996 laying down detailed rules for the application of Council Regulation (EEC) No 2078/92 on agricultural production methods compatible with the requirements of the protection of the environment and the maintenance of the countryside [31] requires aid to be recovered only in cases of intent and gross negligence. However, the defendant argues that he cannot be accused of this; the error was the responsibility of the plaintiff, which had drafted the application form used by the defendant.

101. The Commission submits that the principle of the protection of legitimate expectations in Community law protects economic operators from the subsequent reassessment of legal positions they have acquired or arrangements they have made in reliance on the existing legal situation. It must be examined how the national authorities were able to create a situation of reliance, even though when the application was submitted in April 1995 the pro-

31 — OJ 1996 L 102, p. 19.

gramme, which was later approved, was available only in draft form and no secure legal position could be offered, nor could any definite information even be provided.

102. In the Commission's view, a farmer cannot rely on statements of the administrative bodies of the Member States completely irrespective of the content of the programme approved by the Commission; as a recipient of Community aid it was his duty to obtain information. However, that duty is on a different scale from the duty to obtain information which, according to case-law, major economic operators with their own legal departments have under legislation on aid. The assessment of possible restrictions on claims for recovery must weigh up the administration's negligence and the extent to which the legitimate expectations deserve protection.

(b) Assessment

(aa) Preliminary remark on the facts

103. I cannot accept the argument of the Republic of Austria and the Finanzprokuratur that the question need not be answered because there is no reason to suppose that the aid contract derogates from the ÖPUL Special Directive. It is for the national courts to establish this, and unfortunately they do not yet appear to have done so conclusively.

104. The consequent lack of clarity as to which obligations became a component of the aid contract makes it difficult to answer this question. It is particularly unclear whether the ÖPUL Special Directive was included in the contract in its entirety, in part — in so far as the defendant was actually informed when he submitted his application — or not at all. It is of fundamental importance for the question of the protection of legitimate expectations, legal certainty and good faith whether the defendant can rely on contractually agreed conditions which derogate from the ÖPUL Special Directive and/or Regulation No 2078/92, or whether he has infringed an aid contract which is entirely consistent with the programme.

105. The Austrian Government argues that it can in any event be assumed that the draft version of the ÖPUL Special Directive available when the defendant submitted his application was no different from the version finally approved. However, this is not much of an advantage, since the draft itself was not made available to the defendant and had not been generally notified

when he submitted his application. The ÖPUL Special Directive runs to several hundred printed pages with some very detailed information on the plant protection products which are permitted or prohibited in the various sections of the programme, and it is therefore highly doubtful whether it can be assumed that its content was known solely on the basis of other information measures.

(bb) The significance of the principle of the protection of legitimate expectations and legal certainty in the recovery of part-financed Community aid

106. As the Court has established, under Article 5 of the EC Treaty (now Article 10 EC) it is for the Member States to ensure that Community regulations, particularly those concerning the common agricultural policy, are implemented within their territory. [32] The cases decided by the Court on that subject have usually concerned implementing measures which formed part of the common organisation of an (agricultural) market.

107. The present case is different in that Regulation No 2078/92 is not itself directly applicable to Community aid. Instead, it provides for the adoption of corresponding national regulations, which must be approved by the Commission. The aid measures created by that cooperation are jointly funded by the Member State and the Community.

108. Although the Member State grants aid directly on the basis of a national programme, it is nevertheless thereby indirectly implementing Community law and is therefore subject to the same obligations as when implementing the common organisation of a market. As has already been established, a national programme does not itself become Community law through the Commission's approval. However, the Community interest in compliance with the aid conditions of the national programme approved by the Commission is the same as in the implementation of the common organisation of a market, since only compliance with the approved aid conditions guarantees that the measure meets the objectives of Regulation No 2078/92. The Commission accordingly approves the Community's financial contribution only on condition that the approved aid conditions are satisfied.

109. The principle of the protection of legitimate expectations, which is a component of Community law, and the general

32 — *Milchkontor*, cited in footnote 27, paragraph 17, and in Case C-366/95 *Steff-Houlberg Export and Others* [1998] ECR I-2661, paragraph 14.

principles of Community law are binding on all national authorities entrusted with the implementation of Community provisions. [33] This applies to the direct implementation of Community law and to the application of national programmes approved on the basis of a Community regulation and part-funded by the Community.

110. Just as with the granting of Community (or part-funded) aid, in the absence of provisions of Community law, national law is applicable in disputes concerning the recovery of such aid, but subject to the limits established by Community law. That means that the rules of national law must not have the effect of making it virtually impossible or disproportionately difficult to implement Community law, and national law must be applied in a manner which is not discriminatory compared to procedures for deciding similar but purely national disputes. [34]

111. Article 8(1) of Regulation No 729/70 provides that, in accordance with national laws, regulations and administrative action, Member States must take the measures necessary to recover sums lost as a result of irregularities or negligence. [35]

112. However, the principle of the protection of legitimate expectations, as enshrined in national legislation, may oppose recovery here. As we said, the Member States' authorities are, in any event, obliged to observe the principles of the protection of legitimate expectations and assurance of legal certainty, which are part of the Community legal order. The fact that national legislation provides for the same principles to be observed in a matter such as the recovery of unduly-paid Community aid cannot, therefore, be considered contrary to that legal order. [36]

113. As a result, the interest in recovering aid where the conditions for granting it have been infringed must be weighed in each individual case against the protection of the defendant's legitimate expectations and the principle of legal certainty. In doing so, the interests of the Community must be taken fully into consideration. [37]

114. That does not mean, however, that the Community interest in recovery should take precedence over the protection of legitimate interests in every case. Account must be taken of the fact that the granting

33 — Joined Cases C-31/91 to C-44/91 *Lageder and Others* [1993] ECR I-1761, paragraph 33.

34 — *Milchkontor*, cited in footnote 27, paragraph 19, and *Steff-Houlberg*, cited in footnote 32, paragraph 15.

35 — *Milchkontor*, cited in footnote 27, paragraph 18, and *Steff-Houlberg*, cited in footnote 32, paragraph 14.

36 — *Milchkontor*, cited in footnote 27, paragraph 30, and *Flemmer*, cited in footnote 27, paragraphs 59 and 60.

37 — *Milchkontor*, cited in footnote 27, paragraph 32.

of Community aid does not usually entail a distortion of competition, as is the case with the granting of State aid within the meaning of Article 92 of the Treaty. [38]

115. These interests can ultimately be weighed up only by the national court once all the actual facts have been established. The Court can, however, advise that court as to which facts might be relevant with reference to the principles mentioned. In its previous case-law it has deemed the following factors in particular to be important:

— the good faith of the person receiving the aid, [39]

— the disappearance meanwhile of the unjust enrichment, [40]

— possible co-responsibility on the part of a national authority, provided that there is no infringement of a clear provision of Community law. [41]

(cc) The good faith of the person receiving the aid

116. It should first be pointed out that Regulation No 746/96, from which the defendant infers that a claim for recovery is permissible only where there has been gross negligence or intent, is not applicable ratione temporis, and in any event does not place any corresponding restriction on recovery. [42]

117. However, in *Oelmühle*, [43] the Court considered it an essential condition for granting protection of legitimate expectations that the aid recipient should have acted in good faith in receiving the undulypaid aid. In the present case it is not clear whether the aid recipient even infringed a contractual obligation arising from the aid contract in his use of the fungicides Euparen, Orthophaldan, Delan and Folit. Even if that were the case, because the ÖPUL Special Directive was effectively included in the contract under national law, it must be assumed that the defendant in any event acted in good faith in infringing the ÖPUL rules and was merely negligent in committing the infringement

38 — See the Opinion of Advocate General Léger in Case C-298/96 *Oelmühle Hamburg and Others* [1998] ECR I-4769, points 47 to 51.

39 — *Oelmühle*, cited in footnote 29, paragraph 29.

40 — *Oelmühle*, cited in footnote 29, paragraph 31.

41 — *Milchkontor*, cited in footnote 27, paragraph 31, and Case 316/86 *Krücken* [1988] ECR 2213, paragraphs 23 and 24.

42 — Article 20(3) of Regulation No 746/96 merely provides that a farmer may be excluded from receiving aid if he makes a false declaration intentionally or as a result of gross negligence.

43 — Cited in footnote 29, paragraph 29.

because he did not have precise knowledge of the content of the ÖPUL Special Directive.

118. While the Court imposes very strict requirements for granting protection of legitimate expectations in the case of subsidies under competition law,[44] it has established that the principles of competition law can be transposed in only a limited manner to agricultural policy measures, since the competitive advantage given to undertakings which is a feature of State aid does not exist in the context of Community subsidies.[45]

119. According to the defendant's submission, it must also be taken into consideration that a farmer cannot be expected to fulfil his duty to obtain information independently in the same way as major economic undertakings under competition law. In competition law it is also relatively easy for undertakings to find out whether or not an aid has been approved, since payment of State aid requires a prior decision by the Commission.

120. The ÖPUL Special Directive was, admittedly, approved by the Commission, but the individual aids paid to the farmers were not the subject of a Commission decision of which the farmer should have made certain.

121. More specific conditions concerning the use of plant protection products were not to be found either in the aid application or in the instructions accompanying the application documents; only the ban on the use of herbicides was specified. The instructions also indicated that the lists of permitted and prohibited plant protection products had to be observed for integrated fruit and wine growing, but they failed to mention any sources from which the applicant might obtain those lists. In order to determine the precise nature of his responsibilities, the defendant would have had to travel to Vienna and consult the ÖPUL Special Directive which was available for inspection at the Federal Ministry for Agriculture and Forestry there, which he obviously did not do. However, it would be too much to expect all farmers to obtain information on their responsibilities in that manner.

(dd) Disappearance of the unjust enrichment

122. The defendant asserts that he has used the aid payment and that the enrichment therefore no longer exists. As the Court

44 — See Case C-24/95 *Alcan II* [1997] ECR I-1591, paragraphs 41 and 49 to 54.

45 — See *Oelmühle*, cited in footnote 29, paragraph 37, and the Opinion of Advocate General Léger in the same case, points 47 to 51.

also ruled in *Oelmühle*,[46] the national court may, when examining the question of the protection of legitimate expectations, take into consideration that the recipient of the aid is no longer enriched, having acted in good faith. Should the conditions be met under national law for the defendant not to be required to reimburse the aid on the ground that the enrichment has disappeared, that might be taken into consideration.

(ee) Possible co-responsibility on the part of the national authorities

123. The Court has already established in *Milchkontor*[47] that it is not contrary to Community law for account to be taken, in the recovery of unduly-paid sums, of grounds for excluding recovery where these are related to the administration's own conduct and it could therefore have prevented them from occurring.[48]

124. The national court's appraisal might thus also take into consideration the possibility that the national authorities were jointly responsible. It must particularly examine whether the national authorities might not have adequately fulfilled their obligation under Article 3(3)(f) of Regulation No 2078/92 to provide appropriate information for agricultural and rural operators if they did not adequately notify the aid recipient of the ÖPUL rules when the application was made or when the aid was granted.

125. The Court has also established that the principle of legal certainty requires that legal rules be clear and precise, and that it aims to ensure that situations and legal relationships governed by Community law remain foreseeable.[49]

126. In this connection the national court may take into consideration that the national authorities encouraged farmers to apply for part-funded aid at a time when the final version of the national programme on which the aid was to be based either was not yet available or at any rate had not yet been approved by the Commission, so that — even if the application form referred to the programme that was later to be approved by the Commission — the defendant farmer could not, at the time when he made his application, find out about the requirements he ultimately had to fulfil.

46 — Cited in footnote 29, paragraph 31.

47 — Cited in footnote 27, paragraph 31.

48 — See also *Steff-Houlberg*, cited in footnote 32, paragraph 31.

49 — Case C-63/93 *Duff and Others* [1996] ECR I-569, paragraph 20; see also Case T-73/95 *Oliveira* v *Commission* [1997] ECR II-381, paragraph 29.

127. Finally, the national court must examine whether the ÖPUL Special Directive is sufficiently clear in prohibiting the use of certain plant protection products. For example, the directive on integrated controlled fruit growing, which forms Annex 3.5 of the ÖPUL Special Directive, contains, inter alia, an Annex 5 (List of all preparations permitted for controlled, near-natural fruit growing). That Annex 5 lists Delan as 'green' (a permitted product) and Euparen as 'yellow' (a product permitted under certain conditions). Annex 4 (Special production requirements and indicators and permitted products for controlled and near-natural stone fruit growing), which is relevant for the defendant's peach-growing, gives a list of 'registered' fungicides, in other words preparations which are probably permitted. However, that list does not include any of the products used by the defendant. A list of permitted, conditionally permitted and prohibited products is also attached to the directive on integrated controlled fruit growing, but mentions only the active substances, not the trade names (such as Euparen and Delan).

128. It is for the national court to judge whether the ban on using the fungicides Euparen, Orthophaldan, Delan and Folit in the circumstances in which the defendant used them could be deduced sufficiently clearly from the ÖPUL Special Directive by the groups concerned.

(ff) Limits of the protection of legitimate expectations

129. The Court has, however, established a limit for taking into consideration the principle of the protection of legitimate expectations, which is 'that the principle of the protection of legitimate expectations cannot be relied upon against a precise provision of Community law'. [50]

130. With reference to the co-responsibility of the Commission or a Member State for the undue payment of aid, the Court has held on a number of occasions that neither a wrongful act on the part of the Commission or its officials, nor the conduct of a national authority responsible for applying Community law which acts in breach of that law, can constitute grounds for an economic operator to have legitimate expectations of treatment which is contrary to Community law, if a precise provision of Community law would otherwise be infringed. [51]

131. It is open to question whether that principle is applicable in the present pro-

50 — *Lageder*, cited in footnote 33, paragraph 35, *Krücken*, cited in footnote 41, paragraph 24, and *Oliveira*, cited in footnote 49, paragraph 28.

51 — See Case 5/82 *Maizena* [1982] ECR 4601, paragraph 22, Case 188/82 *Thyssen* [1983] ECR 3721, paragraph 10, and *Lageder*, cited in footnote 33, paragraph 35.

ceedings. The accusation that the defendant used prohibited fungicides does not constitute an infringement of a precise provision of Community law, but only perhaps of provisions of the national programme, which it will be for the national court to establish.

132. Regulation No 2078/92 merely provides in general terms for aid to be granted to reduce the use of plant protection products (Article 2(1)(a)). The support does not have to be linked to the relinquishing of the fungicides used by the defendant. The relinquishing of herbicides alone, which was indisputably agreed, would also promote the aims of the regulation. It would thus not contradict the purpose and substance of the regulation even if the defendant had infringed the ÖPUL Special Directive, which was included in the contract.

133. It is still unclear, and it is for the national court to decide, whether the aid contract refers to the ÖPUL Special Directive in the form approved by the Commission, making that form the subject of the contract (first scenario), or whether the parties concluded an agreement which derogated from the ÖPUL Special Directive in the form approved by the Commission and which did not include the ban on fungicides (second scenario).

134. In the first scenario the farmer would have breached his contractual obligations and received the aid unduly, so that the grantor of the aid would, in principle, be entitled under national law to recover it. However, as already stated, Community law does not oppose the application of the principles of protection of legitimate expectations and good faith in such cases.

135. In the second scenario, there would be a contractually agreed derogation from the (national) ÖPUL Special Directive in the form approved by the Commission. There are two possible legal consequences of such a divergence between a national programme for the implementation of Regulation No 2078/92 which has been approved by the Commission and an aid contract concluded on the basis of that programme:

— If it were a substantial divergence which was contrary to the aims and substance of Regulation No 2078/92, the aid would have to be treated as if it

had been granted outside the national programme. That would have the effect of its no longer being covered by Regulation No 2078/92, and the general rules on aid (Articles 92, 93 and 94 of the Treaty) would apply in accordance with Article 10(1) of the regulation.

— On the other hand, if it were a minor divergence and the aid were not contrary to the aims and substance of Regulation No 2078/92, the aid would still be covered by the regulation and the national programme.

136. Since Regulation No 2078/92 provides in general terms for aid to be granted to reduce the use of plant protection products, an aid contract which linked the granting of aid (solely) to the relinquishing of herbicides would not be contrary to the aims and substance of the regulation, so that, despite the divergence from the national programme, the aid would be covered by the regulation. The principles involved in *Maizena* [52] and *Thyssen* [53] would thus not apply, since there was no infringement of a precise provision of Community law.

137. The situation would be different, however, if the defendant had, contrary to Article 3(1) and (3) and Article 4(1) of Regulation No 2078/92, grubbed out his peach trees and vineyards before the end of the five-year period provided for therein. That would constitute an infringement of a precise provision of Community law, and would have to be held to the farmer's disadvantage by the national court when weighing up interests in order to decide whether to grant protection of legitimate expectations.

138. On the basis of the above observations, the answer must be that the person receiving the aid can rely on the principle of the protection of legitimate expectations against the recovery of aid granted under Regulation No 2078/92. When weighing up the Community interest in the recovery of unduly received aid and the protection of the recipient's legitimate expectations, criteria such as the recipient's good faith, negligent conduct on the part of the national authorities and the fact that the enrichment has since disappeared may be taken into account, provided that the same conditions apply as for the recovery of purely national aid and that the interests of the Community are taken fully into consideration.

52 — Cited in footnote 51, paragraph 22.
53 — Cited in footnote 56, paragraph 10.

## VI — Conclusion

139. In the light of the foregoing I propose that the Court give the following answers to the national court's questions:

(1) Examination of Question 1 has not produced anything prejudicial to the validity of Regulation (EEC) No 2078/92 of 30 June 1992 on agricultural production methods compatible with the requirements of the protection of the environment and the maintenance of the countryside.

(2) The approval of a national programme pursuant to Article 7(3) of Regulation No 2078/92 relates to those parts of the programme the examination of which is referred to in Article 7(2) of the regulation; however, the approval does not transform the programme itself into an instrument of Community law.

(3) The Member States are free to decide whether to implement programmes within the meaning of Regulation No 2078/92 by private-sector measures (contracts) or by forms of State action, provided that it is ensured that the form of action is not discriminatory compared to similar but purely national situations, and that it does not make it virtually impossible or disproportionately difficult to implement Regulation No 2078/92.

(4) It is not contrary to Community law, in a claim for recovery, for grounds of the protection of legitimate expectations and legal certainty to be taken into consideration in the manner provided for in national legislation for the relevant form of action. Community law does not require the form of action chosen to be one which particularly favours Community interests, although it must be ensured that it does not make it virtually impossible or disproportionately difficult to implement Community law, and that a situation which has a connection with Community law is not treated in a manner which is discriminatory compared with similar but purely national situations.

(5) The person receiving the aid may rely on the principle of the protection of legitimate expectations against the recovery of that aid. When weighing up the Community interest in the recovery of unduly received aid and the protection of the recipient's legitimate expectations, criteria such as the recipient's good faith, negligent conduct on the part of the national authorities and the disappearance of the recipient's enrichment may be taken into account, provided that the same conditions apply as for the recovery of purely national aid and that the interests of the Community are taken fully into consideration.