REPORT FOR THE HEARING
delivered in Joined Cases 305/85 and 142/86 *

I — Legislative background

The common organization of the market for sheepmeat and goatmeat was established by Council Regulation No 1837/80 of 27 June 1980 (Official Journal 1980, L 183, p. 1).

The basic regulation, which divided the Community into regions and designated the United Kingdom as region 5, was amended on several occasions during a four year transitional period, in particular by Council Regulation No 871/84 of 31 March 1984 (Official Journal 1984, L 90, p. 35), by virtue of which region 5 comprises only Great Britain, and Northern Ireland is region 6.

The purpose of the common organization was progressively to bring together the markets of the various regions so as to achieve a single market. Under Regulation No 1837/80, a single seasonalized basic price was fixed for the whole Community, but a different reference price was fixed for each of the five original regions. After the amendment made by Regulation No 871/84, the reference price is merged with the single basic price.

In addition to market support machinery (private storage aid and intervention purchases), the regulations provided for a system of production premiums. Two types of premiums are envisaged: an annual premium per ewe, intended to compensate for any loss of income which might derive from the establishment of the common organization of the market, and a weekly variable slaughter premium.

A — *The annual premium per ewe*

Article 5 of Regulation No 1837/80, as amended by Regulation No 871/84, provides *inter alia* that, in order to offset any loss of income during a marketing year, an annual premium shall be determined without delay after the end of the marketing year in question. That loss of income corresponds for each 100 kilograms of carcass weight to any difference between the basic price and the arithmetical mean of the market prices recorded for each region. The amount of the premium payable per ewe is obtained by multiplying the loss of income by a coefficient representing for each region the normal average annual production of lambmeat per ewe expressed per 100 kilograms of carcass weight.

Finally, Article 5 provides that it is the responsibility of the Commission to fix, where appropriate, after the marketing year in question the premium payable per ewe and per region but that, in certain circumstances, Member States may make a payment on account to producers in less-favoured farming areas.

B — *The weekly variable slaughter premium*

Article 9 of Regulation No 1837/80 provided that, in regions where intervention measures (intervention purchases) were not

* Language of the Case: English.

applied, a variable slaughter premium might be paid each week. The United Kingdom is the only Member State in which recourse has been had to this possibility. After the amendment made by Regulation No 871/84, such a premium may be granted only to the United Kingdom and only in the new region 5 (Great Britain). The premium may be granted where the prices recorded in the representative markets of the region fall below a 'guide level' corresponding to 85% of the basic price. The premium is equal to the difference between the seasonally adjusted guide level and the market price.

Finally, it is provided that where the premium is paid the Commission is to adopt the necessary measures to facilitate collection, when the products (namely sheepmeat or live animals) leave the region, of an amount equivalent to the premium actually granted (the 'clawback').

Under the 'management committee' procedure, the Commission adopted detailed arrangements for applying the variable slaughter premium for sheep in Regulation No 1633/84 of 8 June 1984 (Official Journal 1984, L 154, p. 27).

The first article of that regulation provides that the premium may be granted either at the time of slaughter or when the animal is first placed on the market, subject in the latter case to supervision to ensure that the animals are slaughtered or consigned to a location outside the region within 21 days.

In addition, the regulation provides that the animals must have originated in region 5 or have been raised in that region for at least two months.

The regulation also lays down quality standards, but allows the United Kingdom to choose from among the animals which meet those standards those which are eligible for the premium.

The United Kingdom generally excludes ewes from the premium. For ewes intended to be exported live or as carcasses which, upon exportation, will be subject to a 'clawback' of premium, the premium is nevertheless granted by offsetting the equivalent amount; those animals or carcasses are subject to a supervisory system known as 'special export certification' (SEC).

C — *The relationship between annual premiums per ewe and variable slaughter premiums*

Regulation No 1837/80, as amended by Regulation No 871/84, provides in Article 5 (6) in relation to region 5 (that is, Great Britain) that the weighted average of the variable premiums actually granted is to be deducted from the loss of income which is the basis for calculating the annual premium. That weighted average, expressed per 100 kilograms of carcass weight, is to be obtained 'by dividing the total amount of the premiums actually granted by the production of the animals for which the variable premium may be paid when slaughter takes place or, as the case may be, when they are first put on the market'. It is the interpretaion of that provision which is disputed by the parties.

D — *The regulations at issue*

On 18 July 1985, the Commission adopted Regulation No 1989/85 determining for the

Member States the loss of income and the level of the premium payable per ewe for the 1984/85 marketing year (Official Journal 1985, L 186, p. 22). By virtue of the first article of that regulation, the Commission established a loss of revenue during the 1984/85 marketing year which, as regards region 5 (Great Britain), is fixed as ECU 47.311 per 100 kg. By virtue of Article 2 (1) of the regulation, the premium payable per ewe for that region was fixed as ECU 7.570. In Article 2 (2), the Commission fixed as ECU 4.822 the balance of the annual premium payable to producers located in less-favoured farming areas in that region, which had already received a payment on account of the annual premium.

By Regulation No 728/86 of 11 March 1986 determining for the Member States the loss of income and the level of the premium payable per ewe for the 1985 marketing year (Official Journal 1986, L 69, p. 6), the Commission fixed the loss of income for the new marketing year as ECU 73.977 for region 5 (Article 1) and fixed the annual premium payable per ewe for the same region and the balance as ECU 11.836 and ECU 8.442 respectively (Article 2).

II — Procedure before the Court

By decision of 28 January 1987 the Court, after hearing the views of the Advocate General, joined Cases 305/85 and 142/86 for the purposes of the oral procedure and the judgment in accordance with Article 43 of the Rules of Procedure, in view of their related subject-matter.

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 inquiries.

III — Conclusions of the parties

The United Kingdom seeks in Case 305/85:

(a) a declaration that Commission Regulation (EEC) No 1989/85 is void in so far as concerns the calculation of the amount of annual premium payable per ewe for region 5 (Great Britain), namely ECU 7.570 set out in Article 2 (1) of the said regulation and in so far as concerns the dependent calculation in Article 2 (2), namely ECU 4.822;

(b) a declaration that the Commission shall recalculate on a fair and lawful basis the amount of annual premium in respect of region 5 for the marketing year 1984/85;

(c) an order that the Commission should pay the costs of and incidental to the application.

The United Kingdom seeks in Case 142/86:

(a) a declaration that Commission Regulation (EEC) No 728/86 is void in so far as concerns the calculation of the amount of annual premium payable per ewe for region 5 (Great Britain), namely ECU 11.836 set out in Article 2 (1) of the said regulation and in so far as concerns the dependent calculation in Article 2 (2), namely ECU 8.442;

(b) a declaration that the Commission shall recalculate on a fair and lawful basis the amount of annual premium in respect of region 5 for the marketing year 1985/86;

(c) an order that the Commission should pay the costs of the application.

The Commission contends in both cases that the Court should:

(1) Dismiss the application as unfounded;

(2) Order the applicant to pay the costs of the proceedings.

IV — Submissions and arguments of the parties

(a) *The wording of Article 5 (6) of Regulation No 1837/80 as amended by Regulation No 871/84*

The United Kingdom states by way of introduction that the contested regulations do not disclose the method actually used by the Commission to calculate the 'weighted average' of the variable premiums within the meaning of Article 5 (6) or the reasoning underlying that method. In the first place, the Commission included the premiums granted under the SEC arrangements when calculating 'the total amount of the premiums actually granted' and, in the second place, excluded the production corresponding thereto when calculating 'the production of . . . animals for which the variable premium may be paid when slaughter takes place or, as the case may be, when they are first put on the market'.

The United Kingdom is of the opinion that the Commission's approach is wrong in principle. If the result of the calculation of the average variable premium is to have any meaning then the components of the calculation must be consistent.

By including the amount of premiums to which entitlement arose under SEC arrangements on one side of the calculation but excluding the corresponding production of meat on the other side, the Commission has produced an anomalous result, effecting an arbitrary reduction in the annual premium available to farmers in region 5.

The result of that illogical approach is that the 'average' variable premium is larger than it would otherwise have been; since that 'average' is required to be deducted from the 'loss of income' which forms the basis of the annual premium, the resultant annual premium payable to farmers in region 5 is therefore significantly smaller than it should have been.

The United Kingdom considers that the production covered by the SEC arrangements constitutes production for which 'the variable premium may be paid when slaughter takes place or, as the case may be, when [the animals] are first put on the market'. It emphasizes that actual exportation is not a prerequisite for certification under the SEC arrangements. Naturally, in the event of exportation not taking place, the SEC certificate would be cancelled and the right to obtain a variable premium would be forfeited, but entitlement to the variable premium arises on certification in all cases, including those processed under the SEC arrangements. In all cases, payment could in principle be made at that time. In practice, however, in non-SEC cases the premium is normally paid four weeks after certification. In SEC cases payment is made by offsetting the 'clawback' charge imposed on export.

Even if there is anything contained in Community legislation which is capable of providing some support for the Commission's approach, the United

Kingdom is of the opinion that very clear words indeed would be required to justify such a radical departure from basic principles of logic and arithmetic, particularly where it produces a significant adverse effect upon the financial interests of individual producers in a particular part of the Community.

The Commission is of the opinion that the United Kingdom's criticisms of Regulation No 1989/85 do not take into account the exact wording of the second subparagraph of Article 5 (6) of Regulation No 1837/80 in its present form.

That subparagraph describes how the weighted average, to be deducted from the loss of income in region 5, is to be calculated. The weighted average consists of a dividend ('total amount of premiums actually granted') and a divisor ('the production of the certified animals for which the variable premium may be paid when slaughter takes place or, as the case may be, when they are first put on the market'). The words used by the Council in the two elements of the division are different. In the divisor it would have been perfectly possible for the Council to refer to 'the total production of the certified animals for which the variable premium may be paid' or simply to adopt the wording used by the Commission in its initital proposal: 'the production which gave rise to the payment of those premiums'. In those circumstances, it would have been necessary to apply the calculation method advocated by the United Kingdom. But the Council did not adopt that course and thus must be taken to have intended to make a difference between the elements of the divisor and those of the dividend. Ewe-meat receiving payment of the variable premium under the SEC arrangements does not fall within the wording of the divisor, according to which the payment is not to be subject to other conditions than the animals being slaughtered or put on the market. Under the SEC arrangements, the grant of the premium is subject to a further condition, namely exportation. It is impossible to determine at the time of slaughter and, in the vast majority of cases, at the time of the first putting on the market, whether the ewes will be exported.

(b) *The history of the regulation*

The United Kingdom claims that the departure from the wording in the initial draft of Regulation No 871/84 is the result of comments made by its representatives. When the matter was discussed by the Council, the United Kingdom delegation considered that, in the proposed version, the words defining the divisor ('the production which gave rise to the payment of those premiums') could have the effect of distorting the calculations in question by excluding from the divisor the weight of the animals/meat certified in any week when, because the average market price in that week was above the guide price, the rate of the variable premium was zero.

The Commission denies that the change of wording of Article 5 (6) is the result only of comments made by the United Kingdom representatives on the proposed regulation. The United Kingdom raised an objection which related to the weeks when the variable premium was at zero, whereas the French Government asked whether ewes, which were eligible for premium only if

exported, ought also to be included. The Commission took that question to refer only to the definition of the divisor. In its amended proposal sent to the Council on 22 March 1984, the Commission therefore proposed a new text which in its opinion covered the problem of the weeks when the premium was zero and excluded exported ewes from the divisor.

(c) *The general principles of law*

The United Kingdom claims that the Commission's approach is also inimical to the objectives of the Treaty and of Regulation No 871/84. The precise method used in the regulation is to maintain the total return to Community producers of EEC slaughter sheep at a level which is at or above a 'basic price' designed to ensure a fair standard of living for the agricultural community. Whereas the average level of support in each of the other regions is at or above the basic price, the approach adopted by the Commission in respect of region 5 will result in a level of support for producers in that region which is below the basic price. On the other hand, if the calculation of annual premium is carried out including the production of animals certified under SEC arrangements, then the level of support in region 5 achieves the basic price. In such circumstances, the annual premium for the 1984/85 marketing year would have been ECU 8.344 instead of ECU 7.570, and for the 1985/86 marketing year it would have been ECU 12.269 instead of ECU 11.836.

By adopting an arbitrary method of calculation and thereby reducing, for producers in region 5 alone, the level of support available, the Commission has discriminated against producers in that region and thereby infringed the principle of equality, both generally and as specified in Article 40 (3) of the Treaty.

The Commission claims that if the correct application of the Council regulation leads to a breach of the principle of non-discrimination provided for in Article 40 (3) of the Treaty, it is the Council regulation which is at fault and which the United Kingdom should have sought to have annulled.

Moreover, the new method of calculating the premium introduced by Regulation No 871/84 had varying effects on the level of the preimium granted in 1985 compared with that granted in 1984, but those variations can be largely explained by fluctuations in the market price in the various regions. Producers in Great Britain are far from being those who have suffered the largest loss of income. The Commission adds that if the former method of calculating the ewe premium were applied to the market situation in 1984/85, whilst at the same time taking account of the general amendment decided upon by the Council in adopting regulation No 871/84 according to which it is the total production of lambmeat which is taken into account instead of all sheepmeat, the result would be, for region 5, an annual premium of ECU 6.866, instead of a premium of ECU 7.57 under the new method. On the other hand, for all the other regions, the new method and the modified old method give virtually the same result.

Furthermore, account must be taken of the fact that United Kingdom producers receive the variable slaughter premiums to which they are entitled under Article 9 of the regulation at issue on a weekly basis. Any calculation which does not take that advantage into account is positively misleading.

O. Due
Judge-Rapporteur