OPINION OF MR ADVOCATE GENERAL MAYRAS DELIVERED ON 26 JANUARY 1978 [1]

Mr President
Members of the Court,

This case has certain similarities to the reference for a preliminary ruling in which the Court delivered judgment on 3 March 1977 *(Kerry Milk* [1977] ECR 425). It concerns the issues affecting the application of the law in point of time which are raised by changes in the amount of a Community aid resulting both from an alteration in the intervention price expressed in units of account and from the alteration of the rate to be applied for the conversion of those units into a national currency. The case calls in question the validity of a regulation of the Commission which is closely involved with the interpretation of a regulation of the Council and I am sorry that the Council did not see fit to make known its point of view.

Furthermore, as I said in my opinion in the *Lührs* case, without going into the material facts of the case it is difficult, on the occasion of a review of interpretation or validity carried out within the framework of Article 177, to rule on the "legitimate expectation" which the plaintiff might have as an individual in the maintenance of a given legal situation, arising in the present case from contracts made with an official intervention agency. Nevertheless I shall attempt to provide the national court with some guidelines to help it in deciding the case before it.

I — (1) It is first of all necessary to recall the circumstances in which Regulation (EEC) No 2517/74 of the Commission of 3 October 1974 appeared.

The marketing year for dairy products begins on 1 April each year and ends on 31 March in the following year. Generally speaking the decisions concerning the "common" prices and the "differential" prices and amounts for the new Member States in each marketing year are taken in March. This was the case in March 1974 (Regulation (EEC) No 663/74 of the Council of 28 March 1974); the "differential" intervention price for butter in Ireland was fixed at 163.40 units of account per 100 kg, that is to say — at the "green rate" applicable as from 1 February 1973 — £75.49 Irish per 100 kg (Regulation (EEC) No 222/73 of the Council of 31 January 1973).

In Regulation (EEC) No 2496/74 of 2 October 1974 the Council, exceptionally and by way of derogation from the principle of the annual fixing of prices, prescribed a further general increase in agricultural prices for the 1974/75 marketing year or for the remainder of that year; the "differential" intervention price applicable to butter in the case of Ireland with effect from 7 October 1974 was fixed at 170.43 units of account per 100 kg, representing an increase of 4.3% on the previous price.

In reality on account of the "representative exchange rate" to be applied in agriculture to the Irish pound, the increase was very much greater in actual national currency because Regulation (EEC) No 2498/74 of the Council, at the same date, laid down that the rate of exchange to be applied for the conversion of the prices and other amounts referred to in enactments concerning the Common Agricultural Policy would, again with effect from 7 October 1974, be £1 per 1.9485 units of account whereas it had previously been £1 per 2.1644 units of account.

1 — Translated from the French

The result, in terms of national currency, was an increase of 15.9% in the intervention price for butter in Ireland, which rose from £75.49 to £87.47 per 100 kg (or 4.3% representing the increase in the intervention price in units of account and 11.6% representing the devaluation of the "green" pound).

On 3 October 1974, the day after adoption of the two above-mentioned regulations, the Commission adopted Regulation (EEC) No 2517/74 on the adjustment of private storage aid for butter to take account of the changes in the buying-in price; it entered into force on *1 October 1974.*

The first comment which I must make is that these enactments form a whole and cannot be interpreted separately. The Commission was aware of what the Council had decided because it was the Commission which had submitted the drafts which became Regulations (EEC) Nos 2496/74 and 2498/74, and the Council knew of Regulation (EEC) No 2517/74 of the Commission because its own regulations did not enter into force until 7 October.

(2) Before describing the effect of these alterations on the *private* storage system for butter I must again briefly refer to the objectives and detailed rules of this system at the material time.

Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organization of the market in milk and milk products which, although amended on many occasions is still in force, provides for an intervention system for those products. In addition to intervention by the official agencies (in Ireland, the Department of Agriculture) which (under conditions laid down pursuant to Article 6 (6)) buys in at the intervention price Community-produced butter offered to them *(public* storage), Article 6 also provides that *aids* shall be granted for the storage in private cold storage depots *(private* storage) of Community-produced butter and cream, again under conditions laid down pursuant to paragraph (6), which reads:

"*General* rules governing the intervention measures provided for in this article and in particular the *conditions under which such measures may be applied* shall be determined by the Council in accordance with the same procedure" (that is to say, on a proposal from the Commission and in accordance with the voting procedure laid down in Article 43 (2) of the Treaty).

But paragraph (7) prescribes concurrent powers for the Commission, by providing as follows:

"Detailed rules for the application of this article, and in particular the *amount* of aid for *private* storage, shall be adopted in accordance with the procedure laid down in Article 30", that is to say in accordance with the procedure of the Milk and Milk Products Management Committee.

This rather vague wording was such as to give rise to different interpretations and it is in part the cause of the main action.

The general rules governing the intervention measures on the market in butter and cream, referred to in paragraph (6) were laid down by Regulation (EEC) No 985/68 of the Council of 15 July 1968.

Article 9 of that regulation prescribes the basic provisions for storage contracts concluded between holders of butter and private concerns.

Article 10 contains general rules for calculating the amount of the aids granted for private storage of butter and cream. The second subparagraph of Article 10 (1) provides that "In cases where, at the time of removal from store, the market has developed *unfavourably* under conditions *which could not be foreseen*, the amount of aid may

be increased", that is to say, taking this provision in conjunction with Article 6 (7) of Regulation (EEC) No 804/68, the Commission, with the assistance of the Management Committee, is empowered to effect this increase.

According to the recitals in the preamble to Regulation (EEC) No 804/68, "intervention measures [including those for butter and fresh cream] must be such that the proceeds of aggregate milk sales tend to correspond to the common target price for milk delivered to dairy" and, according to Regulation (EEC) No 985/68 of the Council, "intervention arrangements must take account of the development of the market situation ... provisions should be made for ... a uniform method of calculating the amount of aid according to the cost of storage and *market developments* ... private storage must contribute to the attainment of a balanced market". When the aid is split up into its component parts as set out in the regulations of the Commission, it is clear that, apart from the factors intended to compensate for the loss of quality of the product resulting from its being in store, all the other factors relate to that of the "buying-in price" applied by the intervention agency on the date when the contract is concluded.

The detailed rules for the application of the interventions on the market in butter and cream provided for in Article 6 (7) of Regulation (EEC) No 804/68 were adopted in Regulation (EEC) No 685/69 of the Commission of 14 April 1969 which has itself also been repeatedly amended.

Where a storage contract is sought, the butter or cream involved must have been produced during the 14 days preceding the date on which such butter or cream is taken into storage (Article 23). The storage contract shall not be concluded before the butter is stored (Article 2 of Regulation (EEC) No 603/70 of the Commission of 31 March 1970). Such aid for the private storage of butter (and of cream) may be paid in the form of payment on account (Article 24 (2)). Under Article 26, aid for private storage may be granted only if the duration of storage is at least four months. Under Article 28 the storage period shall begin on 1 April and end on 15 September of the same year. The period for removal from storage shall begin on 16 September and end on 31 March of the following year. These dates applied at the time when the events which gave rise to the main action took place but in the course of time they have frequently been changed.

As amended by Article 2 of Regulation (EEC) No 1064/69 of the Commission of 10 June 1969 and by Article 2 of Regulation (EEC) No 603/70 of the Commission of 31 March 1970, Article 29 of Regulation (EEC) No 685/69 provides as follows: "Should the buying-in price for butter *change, the aid specified* in Article 24 [that is to say, the aid for private storage provided for under Article 6 (2) of Regulation (EEC) No 804/68] in respect of quantities of butter and of cream expressed as butter equivalent covered by a storage contract and taken into store before the date on which the change in the buying-in price became effective and remaining in storage when the price changes shall be:

(a) *increased* by an amount equal to the decrease in the buying-in price, or

(b) *decreased* by an amount equal to that of the increase in the buying-in price".

In consequence, the Commission is empowered not only to increase but also to reduce the amount of aid.

(3) Regard was paid to these general rules in a series of contracts concluded between the plaintiff in the main action, a company comprising farmers' co-operatives whose business is to market milk and milk products, and the Irish Minister for Agriculture. The contracts

covered a very large tonnage of butter and cream; these products had been placed in store between 1 June and 14 September 1974 and the removal from store, which can begin on 16 September, actually took place before 6 February 1975.

Under paragraph 10 of these contracts, the amounts of aid were fixed on the basis of a parity of 2.1644 units of account per Irish pound; they were subject to adjustment *in the event of any variation in the exchange rate of the unit of account* (this "green" rate was 100 units of account per £46.2023 from 1 February 1973). *Paragraph 12 of the contracts reproduced the wording of Article 29 of Regulation (EEC) No 685/69 of the Commission.*

Under paragraph 13, the amount of aid must not be paid until the quantities in respect of which the aid was provided have left the store. Despite this, it was possible to make a payment on account for the periods of storage actually completed.

Since aid may be granted only if the duration of storage is at least four months and the plaintiff in the main action sought to withdraw his goods after 1 October 1974, the tonnages in question were still in store on 7 October 1974, the date of entry into force of the new buying-in intervention price.

(4) The measure of which the plaintiff in the main action complains is the decision of the Irish Minister for Agriculture that no aid was due under Regulation (EEC) No 2517/74 of the Commission for stocks of butter and cream kept in store between 10 June 1974 and 5 February 1975. While, until then, under Article 29 of Regulation (EEC) No 685/69 the only situation envisaged was that of a change in the amount of aid due to the effect of an alteration during the marketing year of the intervention price expressed in units of account, the Commission's regulation, which was based on Article 6 (7) of Regulation (EEC) No 804/68, laid down the principle of an adjustment of the amount of aid granted for private storage *also* in the event of this amount being changed as the result of an alteration in the representative rate for converting the intervention price into national currency (or in the exchange rate referred to in Article 2 of Regulation No 129 of the Council). In circumstances where the combination of these two changes (rise in the "differential" intervention price in units of account and an additional rise in price as the result of the new representative rate) produces an increase in the intervention price which is greater than the amount of aid, no aid is to be granted.

The plaintiff in the main action does not dispute that the amount of aid should be reduced in accordance with the provisions of Article 29 of Regulation (EEC) No 685/69 on account of the increase in the intervention price expressed in units of account but it refuses to accept that account should be taken of the additional increase in the intervention price as the result of its conversion into national currency at the new rate for the "green" pound or that the amount of aid which it legitimately expected to receive when storage began should be thus "skimmed off". It accordingly claims the payment of £457 475.87 Irish (at the level in force with effect from 7 October 1974); we have no precise breakdown of this figure.

II — In my opinion, Regulation (EEC) No 2517/74 of the Commission must undoubtedly be interpreted as the Irish Minister for Agriculture has interpreted it, that is to say, as meaning a new "adjustment" of aid, otherwise its wording would be meaningless and add nothing to the previous wording of Article 29.

I must now deal with the criticisms which the plaintiff or the national court have made of this regulation when given the interpretation which I have just placed upon it. I shall first go into the submissions relating to the formal validity of the regulation (failure to give a statement of reasons and the Commission's want of powers), then the submissions relating to its intrinsic validity (infringement of the Treaty and of the general principles of law) with special reference to the submission of "disappointment of legitimate expectation".

(1) The statement of reasons for Regulation (EEC) No 2517/74 of the Commission must be appraised in the light of all the regulations of which this enactment is one; I have already recalled that the preambles to Regulations (EEC) Nos 804/68 and 985/68 of the Council make clear both the object of the intervention operations and the specific purpose of private storage aid. When viewed in the context of the system of which it forms part, the "adjustment" of aid is clearly seen to be in furtherance of the aim pursued by the Council's regulations. Considered in the light of the considerations governing a change in the aid during the marketing year, the Commission regulation sets out adequate if concise grounds for the "adjustment" of aid compared with the other reference factor, represented by the increase in the buying-in price expressed in national currency; I shall deal with the correctness of this statement of reasons when I come to the question of infringement of the Treaty.

(2) The plaintiff in the main action contends that if the Council wished a change in the "green" conversion rate to have the same effect as a change in the buying-in price for butter, the normal procedure would have been for it to lay down general provisions for the future. Such an interpretation of Article 29 of Regulation (EEC) No 685/69 would have required a special regulation of the Council because Article 29 covers only the case of a change in the common price expressed in units of account. In September 1973, in the converse situation of the raising of the central rate of a national currency (in that case the Dutch guilder) producing a fall, in terms of national currency, in the intervention price received by Netherlands producers (but without the introduction of compensatory amounts) only a special measure by the Council (Regulation (EEC) No 2544/73 of 19 September 1973) had made it possible to grant, on occasion and in part, a Community aid to make good the loss of value caused, on and after 17 September, by this change in the "green" rate for Netherlands holders of butter who, on 15 September, were parties to a private storage contract. This argument carries little conviction. The measure in question had been introduced at the last minute (under the second paragraph of Article 149 (2)) in the wider context of the "measures to be adopted in agriculture following the raising of the central rate for the Dutch guilder", which could be adopted only by the Council after consulting the European Parliament. Its adoption demonstrates nothing more than that such a change in an upward direction of the "green" rate was accompanied by a change in the reverse direction in the amount of aid and that the Irish Government did not seek or obtain, for its holders of butter, the derogation which the Netherlands Government had obtained for its own in 1973, or which (Council Regulation (EEC) No 557/76 of 15 March 1976) the German Government obtained in March 1976 from the German intervention agencies for vendors of skimmed-milk powder.

The power to fix prices and certain amounts in connexion with the Common Agricultural Policy is

conferred both on the Council acting by a qualified majority on a proposal from the Commission and, in certain cases, on the Commission acting under the powers which it possesses under acts adopted by the Council pursuant to Article 43 of the Treaty or to the provisions adopted in implementation of these acts, in the light of the opinion of the Management Committee concerned. It is the Council which lays down the intervention price whereas the Commission fixes the amount of aid but, contrary to the contention of the plaintiff in the main action, the wording of Article 6 of Regulation (EEC) No 804/68 does not require that the conditions for grant of aid must be prescribed only in accordance with the procedure in Article 43 (2) of the Treaty, that is to say, by the Council acting on a proposal from the Commission. There is nothing in it to prevent these conditions from simultaneously arising from paragraph (7) of the same article, which means that the conditions for granting aid can be fixed by the Commission with the assistance of the Management Committee. Under paragraph (7) the Commission fixes *principally* but not exclusively the *amount* of aid in accordance with that procedure; this is shown by the fact that the subsequent regulations adopted by the Commission and quoted above, namely Regulations (EEC) Nos 1064/69 and 603/70, provided for a reduction of aid and the plaintiff has raised no objection to the validity of these enactments.

On the other hand, under Article 4 of Regulation (EEC) No 2496/74 of the Council, "Detailed rules for the application of Article 1 [which alters the 'differential' intervention price of butter for Ireland during the marketing year] ... and the alterations to be made as a result of this regulation to other prices and amounts fixed within the context of the Common Agricultural Policy shall be adopted in accordance with the procedure [of the Management Committee concerned] ... where appropriate *by derogation* from the rules for fixing contained in the regulations concerned to the extent and for the duration strictly necessary to take into account this regulation".

Although Regulation (EEC) No 2496/74 of the Council did not provide for the measures which it contains to be put into effect until 7 October 1974 it nevertheless stated that it should enter into force on the day of its publication in the Official Journal of the European Communities, that is to say, on 3 October 1974. On and after that date the Commission was, by virtue of the powers conferred on it by Article 4 of the Regulation, able to promulgate implementing measures. It is true that the entry into force of the Commission's regulation was fixed for 1 October 1974 whereas Regulation (EEC) No 2498/74 of the Council entered into force only on 7 October 1974 but this apparent back-dating was, in the circumstances, without effect since the goods were still in store on 7 October 1974.

To my mind, one further consideration which could be of interest in other contexts, convincingly demonstrates that the Commission did not act *ultra vires* when it decided that those who were holding butter in store when the new exchange rate was applied might not avail themselves of the additional increase in the buying-in price as a result of this fresh fixing of the rate.

As I pointed out, Regulation (EEC) No 2517/74 of the Commission could not have been adopted without the Council's being aware of its content. When the Management Committee had "not delivered an opinion within the time-limit set by its chairman", the traditional euphemism indicating that there had not been a sufficient majority to approve the Commission's draft, the measures adopted by the Commission *ought* to have been communicated by it forthwith to the Council. But the

Council did not take a different decision, although it could have done so under the last subparagraph of Article 30 (3) of Regulation (EEC) No 804/68, and has not denied itself this right in other circumstances, for example in connexion with the advance financing of export refunds in the case of malt.

(3) The intervention price for butter is a means and not an end in itself; it is designed to contribute to the attainment of the target price for milk. The idea behind the basic regulation, No 804/68 of the Council, is that the milk producer should get the full benefit of each and every increase in the intervention price. The Commission's argument is that, as the amount of private storage aid must faithfully reflect changes in the intervention price (itself closely linked with the market price) prevailing when goods are removed from store, no aid is granted if the difference between the intervention price, converted into national currency, in force when goods are taken into store and the intervention price when goods are taken out of store exceeds the amount of aid expressed in national currency. This is because storage, private or public, is not a productive process and the "legitimate interests" of the concerns which, like the plaintiff co-operative in the main action, make use of this facility are not so deserving of protection as those of milk or butter producers; moreover, the latter do not get a pennyworth of the benefit which in this way unexpectedly enures to the concern effecting the storage. This argument seems to me to be correct and the contested regulation does not infringe Article 10 (1) of Regulation (EEC) No 985/68 of the Council which reads: "The amount of private storage aid shall be fixed for the Community *with reference to* storage costs and *foreseeable price trends for fresh butter and stored butter.*"

The subsequent regulation of the Commission, No 837/75 of 26 March 1975 is on the same lines: the buying-in by the intervention agencies of butter produced during a period of two months preceding the day on which such agencies take over the butter must not take place during a period of two months following a change in the buying-in price (that is to say the intervention price) for butter *so as to prevent those holding butter from taking advantage of such a situation for speculative purposes.*

(4) The plaintiff in the main action refers to the "infringement of the principle of protection of legitimate expectation" and complains of interference by the Community, to be precise, by the Commission, with the contractual arrangements it entered into with the Irish Minister for Agriculture before the entry into force of Regulation (EEC) No 2517/74 under which it had in a way "fixed in advance" the aid to which it claims to be entitled.

(a) In the first place, the mere fact of placing in storage does not in itself confer any specified right to payment of a specific amount of aid. This right is created only if the butter, or cream, has remained in private storage for a specified minimum period and if it has been taken out of store, which can only be effected after notice in writing has been given to the intervention agency (paragraph 8 of the contracts).

In any event, the plaintiff cannot argue on the basis of acquired rights or legitimate expectation in relation to that part of the aid which corresponds to a rise in the intervention price and which has no connexion whatever with the objectives of the Council's regulations; this is so because the rise could not be foreseen when the aid was "fixed in advance" by storage contract and which, in consequence, could not conceivably have formed one of the reasons which induced the plaintiff to place its goods in private storage.

Although the contested regulation makes it impossible for advantage to be gained from an increase in the intervention price expressed in national currency, it also eliminates the possibility of loss in the event of a reduction in that price. The amendment of a provision which, because of its inflexibility, was liable to act to the detriment or to the advantage of those concerned, can scarcely be regarded as undermining their established rights. The Court will be aware of similar situations in connexion with advance-fixing certificates for export refunds.

(b) The plaintiff complains not of a loss but of failure to profit as a result of being deprived of the additional profit which a devaluation of the "green" rate provides for traders; it knew that the Irish "green" pound had been going down in value ever since the accession of Ireland to the European Communities and it is conceivable that it bore this trend in mind when it stored its products. The Commission has clearly demonstrated that, even when its regulation is applied to the plaintiff in the main action, the latter will make a net gain of £4.10, representing the difference between the amount of the increase in the intervention price which occurred on 7 October 1974, on the one hand, and the amount of aid at the rate in force until 7 October 1974, on the other hand, which broadly covers the necessary costs of storage properly so-called.

(c) A prominent feature of the milk market in the Community is a chronic and inherent surplus which, in the past, has compelled the Community to adopt substantial intervention measures relating to butter and skimmed-milk powder. Since 1973 butter stocks have risen to approximately 300 000 tonnes (not to mention skimmed-milk powder) and these stocks were still as high as 164 000 tonnes in December 1974. The contribution made by European taxpayers to the cost of these surpluses is steadily increasing.

The close relationship which exists between the selling price of fresh butter on the market, or of butter stored in public or privat depots, and the minimum buying-in price paid by the intervention agencies has been clearly demonstrated; as in the case of sugar, it is the intervention price which "makes" the price on the market, whether its influence is felt as the price rises or falls, with the result that even butter which holders prefer to store in private depots conforms to the rates on the market on the basis of the price of the butter bought in.

The object of the whole machinery is to ensure that the holder who makes use of private storage receives, at the end of the storage, a price at least equal to that which he would have obtained if, at the time when he stored his butter or his cream, he had preferred to sell to the intervention agency or directly on the market. Anything else is merely an additional gain.

To uphold the claims of the plaintiff in the main action would be tantamount to treating it differently from holders of butter who made use of public storage. Those concerned do not, apparently, make use of this mode of storage in Ireland, but the regulation applies to all the new Member States and not merely to Ireland.

In these circumstances, there is no need to answer the fourth question.

My opinion is that the Court should rule as follows:

(1) Regulation (EEC) No 2498/74 of the Council had the effect of increasing the buying-in price of butter within the meaning of Article 29 of Regulation (EEC) No 685/69 of the Commission.

(2) The provisions of Regulation (EEC) No 2517/74 simply met this situation in terms of adjustment of the aid for private storage of butter and consideration of the questions raised has disclosed no factor of such a kind as to affect its validity.

(3) Regulation (EEC) No 2517/74 is applicable to contracts which were entered into before the enactment of Regulations (EEC) No 2498/74 and 2517/74.