OPINION OF ADVOCATE GENERAL VAN GERVEN

delivered on 3 March 1993 *

Mr President,
Members of the Court,

1. In this case, Italy is seeking the partial annulment of Commission Decision 90/644/EEC of 30 November 1990 on the clearance of the accounts presented by the Member States in respect of the expenditure for 1988 of the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF). [1]

The annulment is sought of six parts of the decision in which Community funding is refused for expenditure incurred by Italy of LIT 83 977 318 963 in respect of the additional levy in the milk and milk products sector, LIT 53 438 771 788 in respect of premiums for producers of sheepmeat and goatmeat, LIT 711 001 829 and 1 554 528 324 in respect of tobacco taken into intervention storage, LIT 60 808 737 217 in respect of olive oil taken into intervention, LIT 38 034 266 760 in respect of processing aid for soya beans and LIT 67 501 305 800 in respect of aid for the production of durum wheat.

In so far as it is necessary to order to underpin my reasoning, I shall discuss the facts and relevant law for each of these points in dispute subsequently. The Report for the Hearing contains a fuller survey.

Before discussing the six points in dispute, I shall first consider in more general terms the system for the financing of the common agricultural policy, in particular the mechanism for the clearance of EAGGF accounts.

Preliminary general observations

2. The common agricultural policy is characterized by its very specific management structure, in which both the Member States and the Commission have important roles to play. As far as the financial side is concerned, the basic rules are laid down in Regulation (EEC) No 729/70 of 21 April 1970. [2] By virtue of Articles 1, 2 and 3 of that regulation, aid [3] under the common organization of the agricultural markets is to be financed by the EAGGF (Guarantee Section), that is so say, out of the Community budget. However, under Article 4 it is the authorities and bodies of the Member States which are to make

* Original language: Dutch.

1 — OJ 1990 L 350, p. 82.

2 — OJ, English Special Edition 1970(I), p. 218. See also Regulation (EEC) No 283/72, cited in footnote 8 below. These general rules have been supplemented by specific rules for the various agricultural sectors.

3 — Article 2(1) and Article 3(1) relate more specifically to refunds on exports to third countries and intervention to stabilize the agricultural markets, respectively. Article 1(3) is concerned with financing by the Guidance Section of the EAGGF.

the payments. Undoubtedly, this system has numerous advantages. But it can give rise to difficulties between the Member States. The payments made by a Member State directly benefit its own economic operators, whilst the financial burden is partly borne by the other Member States through the Community budget.

In order to avoid such difficulties resulting in the financing system being applied in a non-uniform manner and impairing trust as between the Member States, it is crucially important that there should be proper supervision to verify that the Community provisions on the grant of aid are strictly complied with and that only expenditure made in conformity with those provisions is charged to the Community budget. Regulation No 729/70 sets out the requisite provisions to this end.

3. As far as the first point is concerned, that is to say, strict compliance with the Community provisions, it is for the Member States to ensure that the payments which they make actually comply with the Community provisions. That supervision relates to the relationship between the recipients of aid and the Member States as parties executing the common agricultural policy.

Consequently, the first subparagraph of Article 8(1) of Regulation No 729/70 provides as follows:

'The Member States in accordance with national provisions laid down by law, regulation and administrative action shall take the measures necessary to:

— satisfy themselves that transactions financed by the Fund are actually carried out and are executed correctly;

— prevent and deal with irregularities;

— recover sums lost as a result of irregularities or negligence.'

Under the second subparagraph, the Member States must inform the Commission of the measures taken for those purposes. But it clearly remains the task of the Member States to exercise supervision with regard to the recipients of the aid.

4. As far as the second point is concerned, that is to say, the charging to the Community budget only of expenditure which has been made in accordance with the Community provisions, Regulation No 729/70 makes this dependent upon the Commission's approval. The resultant clearance of EAGGF accounts relates to the relationship between the Member States, as executing parties, and the Community, as the authority financing the common agricultural policy.

Article 5(2)(b) of Regulation No 729/70 provides in that regard that the Commission is to make up the accounts of the Member States' authorities and bodies responsible for making the payments. According to Article 8 of Commission Regulation No 1723/72, [4] the decision to make up the accounts is to cover: '(a) the determination of the amount of expenditure incurred in each Member State in the year in question, recognized as

4 — Regulation (EEC) No 1723/72 of the Commission of 26 July 1972 on making up accounts for the European Agricultural Guidance and Guarantee Fund, Guarantee Section (OJ, English Special Edition, Second Series, III. European Agricultural Guidance and Guarantee Fund, p. 109).

chargeable to the EAGGF, Guarantee Section; (b) ...'.

5. Consequently, both in the relationship between recipients of aid and the Member States and in the relationship between the Member States and the Commission, it is of essential importance that expenditure should comply with the Community provisions. Moreover, Articles 2 and 3 of Regulation No 729/70 expressly provide that only expenditure 'undertaken according to Community rules ...' may be charged to the Community budget. This rule is both objective and strict. It is couched in the following terms in the judgment in Case 326/85 *Netherlands* v *Commission*: [5]

'The Court has consistently held (see the judgment of 7 February 1979 in Case 11/76 *Netherlands* v *Commission* [1979] ECR 245) that those provisions permit the Commission to charge to the Fund only sums paid in accordance with the rules laid down in the various sectors of agricultural production while leaving the Member States to bear the burden of any other sums paid, and in particular any amounts which the national authorities wrongly believed themselves authorized to pay in the context of the common organization of the markets. That strict interpretation of the conditions under which expenditure is to be borne by the Fund is necessary, moreover, in view of the aims of Regulation No 729/70. In fact if the common agricultural policy is to be applied in a manner which ensures equality between traders in the Member States the national authorities of a Member State may not, by the expedient of a wide interpretation of a given provision, favour traders in that State to the detriment of those in other States where a stricter interpretation is applied.'

The only exception to the principle that Community financing must be refused for expenditure incurred contrary to Community law concerns the effects of conduct involving fault on the part of the Community institutions: expenditure incurred contrary to Community law can be charged to the Community budget only if the incorrect application of Community law can be attributed to a Community institution. [6]

6. A question of major importance for the practical operation of the system for the clearance of EAGGF accounts is that of the burden of proof having to be discharged by the Commission where it refuses to charge expenditure to the EAGGF on the ground that Community law has been infringed and how it may obtain the requisite evidence.

As far as the latter aspect is concerned, obtaining *evidence*, the answer is to be found in Article 9(1) of Regulation No 729/70:

'Member States shall make available to the Commission all information required for the proper working of the Fund and shall take

5 — Case 326/95 *Netherlands* v *Commission* [1987] ECR 5091, paragraph 7. It also follows from the objective, strict nature of the clearance of EAGGF accounts that there is no room for the application of a *de minimis* rule (Case C-335/87 *Greece* v *Commission* [1990] ECR I-2875) and that 'the Commission has no discretionary power to derogate from the rules regulating the allocation of expenses' (Joined Cases 15/76 and 16/76 *France* v *Commission* [1979] ECR 321, paragraph 28).

6 — Case 11/76 *Netherlands* v *Commission* [1979] ECR 245, paragraph 25. This exception is connected with the second paragraph of Article 215 of the EEC Treaty and Article 8(2) of Regulation No 729/70.

all suitable measures to facilitate the supervision which the Commission may consider it necessary to undertake within the framework of the management of Community financing, including inspections on the spot.'

Consequently, it appears from that provision, which is linked to Article 5 of the EEC Treaty, that the Member States are under a duty to provide the Commission with the necessary particulars. [7] In addition, they have to take all such measures to facilitate supervision and on-the-spot inspections as the Commission deems appropriate (see section 24 below). Officials of the Member State concerned may take part in such inspections (second and fourth subparagraphs of Article 9(2)). It appears from the third subparagraph of Article 9(2) that the Commission is also entitled to request the Member States to carry out inspections or inquiries in which Commission officials may take part. [8]

'The Court has consistently held that it is for the Commission to prove any infringement of the rules on the common organization of the agricultural markets (Case 347/85 *United Kingdom* v *Commission* [1988] ECR 1749, in Case 262/87 *Netherlands* v *Commission* [1989] ECR 225 and in Case C-335/87 *Greece* v *Commission* [1990] ECR I-2875). If the Commission establishes such an infringement, the Member State concerned must then, if appropriate, demonstrate that the Commission committed an error as to the financial consequences to be drawn from it'.

It is therefore for the Commission to prove the infringement of Community *law*, after which it is of course for the Member State, if it so wishes, to refute the Commission's point of view and to prove, by adducing evidence, that the financial consequences which the Commission drew from the alleged infringement and for which it made a case cannot be accepted.

7. More specifically as regards the *burden of proof* which the Commission has to discharge where it refuses to charge expenditure on the ground that Community law has been infringed, the judgment in Case C-281/89 *Italy* v *Commission* [9] states as follows:

8. However, that allocation of the burden of proof cannot be regarded as being a rigid rule, but must, where necessary, be adjusted to suit the actual circumstances of the case. The starting point is that the Member States, as the parties executing the common agricultural policy, bear the primary management responsibility and also have the best access to the *factual* evidence. [10] The judgment in Case C-281/89 *Italy* v *Commission* affords an example. The applicable Community law

7 — See also Article 5(1), Article 4(1) and the second subparagraph of Article 8(2) of Regulation No 729/70.

8 — The Commission is also entitled to require a Member State to set up an administrative inquiry in which members of the Commission's staff may take part under Article 6 of Regulation (EEC) No 283/72 of the Council of 7 February 1972 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organization of an information system in this field (OJ, English Special Edition 1972(I), p. 90).

9 — Case C-281/89 *Italy* v *Commission* [1991] ECR I 347, paragraph 19.

10 — The duty imposed on the Member States by Article 5 of the EEC Treaty and Article 9(1) of Regulation No 729/70 to provide the Commission with all the data necessary for control purposes is also relevant in this connection; see section 7 above.

placed the national intervention agencies under a duty to carry out a particular operation at minimum expense. The Commission took the view that the costs incurred by the Member State concerned were not the lowest possible and effected a correction on the occasion of the clearance of the EAGGF accounts. The Member State challenged this by arguing that the Commission had not adduced sufficient proof of the infringement of Community law. In the words of Advocate General Mischo, strict application of the aforementioned rule allocating the burden of proof would

'not only be contrary to the principle *actori incumbit probatio* but would also require the Commission to furnish negative evidence which would be very difficult to obtain, whereas it may reasonably be expected that a defendant Member State, being *ex hypothesi* familiar with the conditions under which it arranged for the operation in question to be carried out, would be in a position to produce positive evidence in that regard.' [11]

The Court therefore held as follows:

'Since the Member State concerned has all the information concerning the conditions under which the operation at issue was carried out, it has the burden of proving that the Community provision was complied with'. [12]

9. As far as the finding that Community law has been infringed is concerned, the Commission has only a limited *duty to state reasons* in its final decision refusing financing:

'[T] he Court has already stated (see the judgment of 27 January 1981 in Case 1251/79 *Italy* v *Commission* [1981] ECR 205) that decisions concerning the clearance of accounts do not require detailed reasons if the government concerned was closely involved in the process by which the decision came about and is therefore aware of the reason for which the Commission considers that it must not charge the sums in dispute to the EAGGF.' [13]

In the light of those rules I shall now consider the six points in dispute in this case between Italy and the Commission.

First point in dispute: LIT 83 977 318 963 in respect of the additional levy in the milk and milk products sector

10. This point in dispute is concerned with the calculation of the additional levy in the milk and milk products sector. That additional levy, which supplements the well-known co-responsibility levy, has to be calculated annually on the basis of the difference between the quantity of milk

11 — Opinion in Case C-281/89 *Italy* v *Commission* [1991] ECR I-354, section 18.

12 — Case C-281/89 *Italy* v *Commission* [1991] ECR I-347, paragraph 20.

13 — Case 347/85 *United Kingdom* v *Commission* [1988] ECR 1749, paragraph 60.

produced and a given reference quantity. [14] In order to determine the quantity of milk produced in 1988, the year in question, the Commission added to the figure for milk deliveries supplied by the Italian statistical institute ISTAT to EUROSTAT a figure to cover cheese deliveries. [15] Italy contests the addition of that figure, which increased the amount of the additional levy by LIT 83 977 318 963.

It is unquestionable that, in order to calculate the additional levy, not only milk deliveries from farms must be taken into account, but also cheese deliveries (in terms of milk equivalent). [16] However, Italy contests the Commission's calculation by means of three pleas. First and foremost, Italy argues that the ISTAT figure already covers cheese deliveries, with the result that the Commission counted them twice over. Secondly, it submits that the Commission set to work incorrectly in so far as it added figures of different kinds, more specifically ISTAT figures and figures from an Italian Ministry to which I shall be referring later. Thirdly, it maintains that the Commission decision is insufficiently reasoned.

11. As far as the first of those pleas is concerned, the Commission defends itself by stating that in the previous year, 1987, and in the subsequent year, 1989, it also added a figure for cheese deliveries to the ISTAT figure for milk deliveries. Yet Italy raised no objection in regard to those years. Moreover, the figure for cheese deliveries added by the Commission was obtained from figures of the Italian Ministry for Agriculture and Forestry which were used in all three years. The Commission argues that it is clear from all this that Italy acknowledged the correctness of the Commission's calculation. For its part, Italy maintains that it never accepted the Commission's point of view. The fact that it did not contest the decisions of 1987 and 1989 (which is not definitive as regards 1989) is attributable to an assessment of expediency on its part, from which no conclusion may be drawn. The Commission should accept the ISTAT figures without any addition or else prove that they are incorrect.

12. I would consider those arguments in the light of the general rules on the clearance of EAGGF accounts, more specifically the rules on the burden of proof. As has already been stated (section 7), as a rule it is first for the Commission to prove that Community law has been infringed, after which it is for the Member State to prove the contrary by means of conclusive evidence or, in an appropriate case, to show that the Commission has committed an error as to the financial consequences to be drawn from the infringement. The application of that rule is simple as regards 1987, that is to say, the

14 — The additional levy was introduced by Council Regulation (EEC) No 856/84 of 31 March 1984 amending Regulation (EEC) No 804/68 on the common organization of the market in milk and milk products (OJ 1984 L 90, p. 10). Article 5c(5) of Regulation No 806/68, as amended by Regulation No 856/84, provides that the additional levies 'shall be regarded as intervention measures designed to regulate agricultural markets ...'. Accordingly, they come within the financing rules laid down by Regulation No 729/70, which I discussed earlier; see footnote 3 above.

15 — The third paragraph of sub-section (a) of section 4.3.10.3 of the summary report on the results of the checks carried out for the purposes of the clearance of the accounts of the Guarantee Section of the EAGGF for 1988 (Commission document VI/220/90, definitive version, including all addenda and amendments, of 23 November 1990); hereinafter 'the summary report'.

16 — This is clear from Article 5(1) of Regulation No 804/68, cited in footnote 14, and from the second recital in the preamble to amending Regulation No 856/84. I can find no indication in the written or oral procedure in this case that Italy might contest this point.

preceding year, when the Commission added the contested amount for the first time. In that year, Italy omitted to impose any additional levy. Consequently, the infringement of Community law was unquestionably established. In order to correct that omission, the Commission itself had to estimate milk production. In order to do this, it added to the ISTAT figure an amount to cover deliveries not included therein which it derived from data from the Italian Ministry. Italy has not challenged that decision or that approach.

As regards 1988, the year at issue — in which Italy did apply the additional levy —, the situation is less clear. In its defence, the Commission argues that the infringement of Community law in respect of that year relates to Articles 15 and 16 of Regulation No 1546/88. [17] Those provisions, which are concerned to implement the system of the additional levy, require milk producers to provide a statement, not only of deliveries of milk, but also of deliveries of milk products. [18] However, that argument of the Commission does not assist in resolving the dispute relating to the double counting of milk and cheese. It makes no difference whether the dispute relates to whether the ISTAT figures also include deliveries of cheese or to whether or not cheese deliveries are included in Italian milk producers' statements (on which, I assume, the ISTAT statistics are based).

As I mentioned earlier (section 8), it is admittedly first for the Commission to allege that Community *rules* have been infringed, which it has done in this case by arguing that cheese deliveries are not included in the ISTAT figures. Italy maintains that they are included in those figures. This is a *factual* dispute, to which the rule set out in the judgment in Case C-281/89 *Italy* v *Commission* applies; that is to say, the burden of proof has to be discharged by the party which has the easiest access to the factual evidence. This is unquestionably the Member State, which, however, has failed to show that there has been double counting in this case.

13. I can be briefer on the second plea, which alleges that the Commission incorrectly added disparate figures. As the Commission stated in response to this plea, the figures provided by ISTAT, like all statistics, are only approximate data. I cannot see why such data may, even must, not be supplemented by concrete figures provided by the competent Italian authorities.

14. The third plea, alleging that the decision is insufficiently reasoned, also fails to persuade me, having regard to the aforementioned rules on the obligation of the Commission to state reasons (section 9).

17 — Commission Regulation (EEC) No 1546/88 of 3 June 1988 laying down detailed rules for the application of the additional levy referred to in Article 5c of Regulation (EEC) No 804/68 (OJ 1988 L 139, p. 12).

18 — Article 16(1) *in fine* of Regulation No 1546/88: 'This statement shall also cover sales of milk products produced on the farm to wholesalers, cheese curers or retailers'.

Second point in dispute: LIT 53 438 771 788 in respect of premiums for producers of sheepmeat and goatmeat

15. What is in dispute is part of a total of LIT 70 billion in premiums paid out by Italy to producers of sheepmeat and goatmeat [19] which the Commission refused to charge to the EAGGF. However, Italy does not contest the refusal to charge approximately LIT 3 billion on account of late payment. Of the remaining LIT 67 billion, which the Commission refused to charge to the EAGGF on the grounds that there were no or insufficient controls, LIT 14 billion has been only provisionally refused to the charged, subject to Italy's providing further evidence. The instant case is concerned solely with the LIT 53 438 771 788 which the Commission has definitively refused to charge to the Fund.

Italy has put forward two pleas. First, it argues that the Commission has not provided sufficient proof that there were no or insufficient controls in place in Italy. Secondly, it submits that the Commission unduly extrapolated the results of its inquiry conducted in particular geographical areas to other areas.

16. I shall start with the first of the two pleas. In section 4.6.7.5 of the summary report, the Commission sets out exhaustively on what basis it deemed it necessary to carry out a financial correction on the ground that there were no or insufficient controls. The Commission carried out an audit of the mechanisms and procedures for the grant of the premiums in question in Italy. [20] In the course of that audit, it became clear that the documentary evidence used by the Italian authorities was insufficient and, in some cases, completely lacking. It further appeared impossible to verify whether, as the applicable Community rules require, the premiums had been granted only in respect of animals which had been kept on the farm for at least two months. Italian officials informed the Commission and the Commission's on-the-spot inspections showed that the animals were often slaughtered earlier, the producers kept no documentary evidence (in order to evade tax) and the inspectors often forwent carrying out any controls. Lastly, discrepancies in the figures raised the suspicion that the figures relating to the number of animals had been artificially inflated. Moreover, the Commission had not only investigated procedures in the various regions, but had also directly checked a number of files selected at random. Those checks brought some extremely remarkable information to light. For instance, an on-the-spot inspection of farms in Sicily showed that the number of animals present came to only 1.5% of the number of animals for which premiums had been granted!

Italy does not deny those findings of the Commission or at least has not contradicted them. [21] Italy merely argues that the findings constitute only evidence which is objectively

19 — The premiums are granted pursuant to Council Regulation (EEC) No 1837/80 of 27 June 1980 on the common organization of the market in sheepmeat and goatmeat (OJ 1980 L 183, p. 1).

20 — The manner and methodology of the audit are described in section 3.3.6.2.3 of the summary report.

21 — This emerges both from Italy's arguments in the written procedure and at the hearing and from documents produced by the Commission, in particular a letter dated 22 September 1990 from the Italian intervention agency AIMA to the Commission.

uncertain and cannot afford any basis for far-reaching financial consequences, and that the shortcomings found are attributable to difficulties for which it is not to blame.

17. The argument that the Commission's findings are too uncertain to be associated with far-reaching financial consequences is not convincing. The Commission's findings as they are set out in the summary report are amply sufficient to form the basis for refusing to grant financing. The Commission manifestly set to work methodically [22] and succeeded in gathering a variety of evidence.

By its argument that the Commission based itself solely on indicia and not on objectively certain facts, [23] Italy seems to be suggesting that the Commission may refuse to finance premiums only where it proves individually and specifically that they were wrongly granted. Such a claim testifies to an incorrect interpretation of the basic rules on the financing of the common agricultural policy.

As I stated in my preliminary observations, it is for the Member State to satisfy itself of the legality of individual grants of aid. The Commission, which is bound to refuse financing in respect of expenditure carried out contrary to Community law, need only prove that Community law has been infringed, for instance by showing that no or inadequate controls were carried out by the national authorities. [24]

18. Italy also argues — albeit without much conviction — that the shortcomings found cannot be imputed to it, given that it did its best within the limits of the possibilities afforded by existing legal means, regard being had to the objective social and economic situation and the characteristics of sheep and goat farming in Italy. That argument is not convincing either. If the mechanism for the clearance of EAGGF accounts allows of such arguments at all — which is doubtful in view of its objective, strict nature (see section 5 above) —, they have an unconvincing ring in this case. It appears from the Italian authorities' letter of 22 September 1990, which was produced to the Court by the Commission, that the factors allegedly constituting *force majeure* include such matters as tax and accounting rules, on which the Italian authorities themselves have an influence, and that it is manifestly possible to improve the control mechanisms. [25]

19. I would now turn to the second plea relating to the allegedly unjustifiable extrap-

22 — This is true in particular of the method of ascertaining the age of the animals from their weight, which Italy contests. It appears from the documents appended to the Commission's defence that that method is prudent and reasonable and was sufficiently reasoned *vis-à-vis* the Italian authorities.

23 — The Commission has observed, and the summary report confirms, that it did in fact also make specific findings relating to a number of actual irregularities. However, this is not a requirement in order for the Commission to reach the conclusion that there are insufficient controls.

24 — Cf. the judgment in Case 214/86 *Greece* v *Commission* [1989] ECR 367 (summary publication only). In that case, the Member State argued that the Commission was not entitled to base a financial correction on an analysis of samples taken at the time when cereals were sold after two years in store, but should have examined the quality of the cereals at the time when they were taken into intervention. In paragraph 17 of the judgment, the Court held in response to that argument that it was for the Member States to satisfy themselves that transactions financed by the EAGGF were actually carried out and executed correctly. It was not the duty of the Commission to check the regularity of each intervention measure.

25 — The 11th paragraph of that letter reads as follows: 'It is clear that the card system used in other sectors will enable the aid granted under the measure concerned to be supervised fully and effectively'.

olation. The Commission carried out checks in seven regions representing on aggregate 77% of the expenditure declared by Italy. In each of those regions, the checks related to the most important province or provinces. In each case, the results of the checks were generalized for the whole of the region. In this way, the Commission arrived at the figure of LIT 53 438 771 788 for expenditure which it definitely refused to charge to the EAGGF.

For the regions where no checks were carried out, the average for the regions checked was extrapolated. However, the extrapolation holds good only subject to proof to the contrary from Italy. This affects the LIT 14 billion with which Italy is not taking issue in these proceedings (see section 15 above). Italy has created confusion on this point both in the written and in the oral procedure by putting forward arguments against extrapolation from checked regions to non-checked regions, yet that extrapolation is not the subject of these proceedings.

Extrapolation within each region checked, which is at issue in these proceedings, seems to me to raise little difficulty. To deny the Commission that possibility would be tantamount to accepting the argument set out above (in section 17) to the effect that the Commission may refuse expenditure only where it can prove individually and specifically that it was irregular. [26]

26 — See also as regards the use of extrapolation my Opinion in Case C-8/88 *Germany* v *Commission* [1990] ECR I 2334, sections 29 and 30, and the Opinion of Advocate General Gulmann of 17 March 1992 in Case C 385/89 *Greece* v *Commission*, [1992] ECR I-3225, sections 54 and 55.

Third point in dispute: LIT 711 001 829 and 1 554 528 324 in respect of tobacco in intervention storage

20. This point in dispute is concerned with two financial corrections made by the Commission. The first (section 4.9.2.1 of the summary report) followed an inspection carried out of tobacco in intervention storage in the course of which the Commission found that some of the tobacco did not satisfy the minimum quality characteristics prescribed by the Community rules. [27] The second correction (section 4.9.2.3 of the summary report) followed another inspection carried out on a particular lot during which the Commission found that some of the tobacco was of a lower quality than had been declared and that therefore too high a price had been paid.

Italy raises two pleas against those corrections. First and foremost, it argues that the inspections on which the financial corrections are based were unlawful since they were carried out by the Commission itself. Secondly, it makes a series of complaints about the checking method employed by the Commission and the conclusions it drew therefrom, and considers at the least that the Commission has given insufficient reasons for its refusal to grant financing.

27 — Article 5 of Regulation (EEC) No 1467/70 of the Council of 20 July 1970 fixing certain general rules governing intervention on the market in raw tobacco (OJ, English Special Edition 1970(II), p. 497) provides that 'Only tobacco corresponding to the minimum quality characteristics to be defined on the basis of classification by variety and quality shall be bought in by the intervention agencies.' Those characteristics are defined in Article 6(2) and Annex III of Regulation (EEC) No 1727/70 of the Commission of 25 August 1970 on intervention procedure for raw tobacco (OJ, English Special Edition 1970(II), p. 592).

21. I shall begin with the first plea. In Italy's view, the Court should annul the Commission's decision because it was based on the taking and analysis of product samples by Commission officials. Italy refers in this connection to the judgment in Case C-366/88 *France* v *Commission*. [28]

That judgment was given in an action brought by France for the annulment of internal instructions of the Commission relating to the taking and analysis of samples by Commission officials in connection with EAGGF supervision. France maintained that the instructions were in breach of Article 9 of the basic regulation, to which reference has already been made. [29] The Court accepted that argument and declared the instructions void. The second subparagraph of paragraph 22 of the judgment reads as follows:

'Under the system of supervision provided for by [Article 9], if the taking and analysis of samples prove necessary, those operations must be carried out by the Member State, either on its own initiative by virtue of the responsibility attributed to it by Article 8(1), or at the request of the Commission pursuant to the third subparagraph of Article 9(2).'

22. The way in which Italy is now relying on that *dictum* means that serious consideration should be given to the significance of the judgment in Case C-366/88 *France* v *Commission*. The Court has not referred to it in subsequent judgments. In another case, a Member State relied on it as Italy is now doing. [30] However, the Court did not go into that argument, since it held that the application was inadmissible on procedural grounds. [31] Advocate General Gulmann did pay some attention to the judgment in Case C-366/88, which he described as 'in my view somewhat surprising in this respect'. The judgment in Case C-366/88 *France* v *Commission* cannot be ignored in this case and, in my view, it must be concluded that limited importance should be attached to that judgment, or at least to paragraph 22 of it. If it were given a broad interpretation, it would be at odds with the many decided cases relating to EAGGF matters and also, to my mind, with the wording of Regulation No 729/70. If the judgment were given a wide significance, it would also seriously undermine the efficient management of the common agricultural policy. I shall explain, if you would allow me, each of those points.

23. The Court very regularly gives judgments on actions brought by Member States against the clearance of EAGGF accounts by the Commission. Generally, the dispute relates to a correction made by the Commission following some check which it has carried out. Often that check includes the taking and analysis of samples by Commission officials. The Court has never seen any snags in this. This is true not only of the period prior to the judgment in Case C-366/88 *France* v *Commission* but also of the subsequent period. Admittedly, in most of the cases the question of the Commission's competence to take and analyse samples was not raised directly, since it was not

28 — Case C-366/88 *France* v *Commission* [1990] ECR I-3571.
29 — See section 2 et seq., in particular section 6.
30 — Case C-385/89 *Greece* v *Commission* [1992] ECR I-3225.
31 — Paragraphs 20 and 21 of the judgment.

contested by the Member State concerned. [32] Yet a number of judgments contain wording which is hard to square with the *dictum* in Case C-366/88 *France* v *Commission*. This is true in particular of the judgment in Case 214/86 *Greece* v *Commission*, [33] in which it is stated incidentally (in paragraphs 17 and 18) that the Commission is entitled to use the power of supervision conferred on it by Article 9 of Regulation No 729/70 at any time and in particular when it receives information leading it to doubt the effectiveness of the national verifications. In that case, following complaints about the quality of durum wheat, the Commission asked the Greek intervention agency for samples and had them analysed itself by a laboratory in another Member State.

That judgment, in which it is stated, apparently without any difficulties, that the Commission is entitled to carry out analyses itself, seems hard to reconcile with the judgment in Case C-366/88 *France* v *Commission*.

The incompatibility is even more striking in the case of the judgment in *Petruzzi and Longo*, albeit given on 10 October 1991, that is to say, after the judgment in Case C-366/88 *France* v *Commission*. There, an Italian court made a reference for a preliminary ruling on the question as to whether the results of analyses carried out at the time when oil was offered for intervention could be refuted by a subsequent analysis. It appears from paragraph 7 of the Report for the Hearing that the later analysis was carried out by laboratories acting on the Commission's behalf. After quoting Article 8(1) and Article 9(1) of Regulation No 729/70 (see sections 4 and 7 above) in paragraph 15 of the judgment, the Court went on to hold as follows:

'16 It follows from those provisions, whose aim is to confer upon the authorities concerned the necessary powers in order to prevent the EAGGF from being burdened with the expenditure relating to intervention transactions carried out in a manner inconsistent with Community law, that a subsequent check on the initial classification of the oil is a matter for the Commission.

17 In that regard, furthermore, if subsequent checks on the initial classification of the oil are actually to be effective, the Commission must be entitled to apply any system of analysis enabling it to determine conclusively whether the classification of the oil at the time when it was offered for intervention complied with the designation criteria referred to in the relevant Community rules.

18 The answer to the national court's question must therefore be that Community law authorizes the Commission, for the purpose of verifying, according to strict conditions of reliability, that intervention transactions are executed correctly, to carry out a check which does not consist in a mere repetition of the analyses carried out when the oil was offered for intervention.'

Consequently, in that passage the Court is saying that it follows from Regulation No 729/70 that the Commission does *indeed* have the power to carry out analyses itself in

32 — Or in the judgment in Case C 385/89 *Greece* v *Commission*, cited in footnote 30, because the question could be avoided at the procedural level.

33 — Case 214/86 *Greece* v *Commission* [1989] ECR 367 (summary publication only).

order to check analyses previously carried out by the Member State concerned.

24. It also appears from careful scrutiny of Regulation No 729/70 [34] that the judgment in Case C-366/88 *France* v *Commission* may not constitute a precedent as far as the point under consideration is concerned. The Court's supervisory competence as regards the clearance of EAGGF accounts is set forth in Article 9 of the regulation, of which the first subparagraph of paragraph (1) reads as follows:

'Member States shall make available to the Commission all information required for the proper working of the Fund and shall take all suitable measures to facilitate the supervision which the Commission may consider it necessary to undertake within the framework of the management of Community financing, including inspections on the spot.'

In my view, it emerges from that provision that the Commission itself is entitled to carry out *any* checks which it considers appropriate within the framework of the management of Community financing, and that the Member States must facilitate this. Such checks include, *among other things*, inspections on spot, as that provision expressly states, and, according to Article 9(2), in particular — but not exclusively — inspections of administrative documents. In my view, the fact that those inspections are expressly mentioned in the first subparagraph of Article 9(2) only serves the purpose of making it clear that the Commission does *in fact* have access to the administrative documents of the national authorities, which constitutes a far-reaching interference by the Commission with national administration. However, the fact that the Commission's supervisory competence extends beyond such administrative inspections is clear from the second subparagraph of Article 9(2), where it is stated that officials of the Member State concerned may 'take part' in inspections carried out by the Commission. Those inspections can hardly be those relating to the administrative data of the Member State, since in such cases the national administration itself is the 'subject-matter' of the supervision and its officials will obviously be present. The wide scope of the Commission's supervisory competence is also clear from the last subparagraph of Article 9(2), which refers to 'inspections or *inquiries*' in which the Commission can involve, with the Member States' agreement, the national administrative authorities.

25. In the instant case, the Commission argues therefore that the judgment in Case C-366/88 *France* v *Commission* is confined to the relationship with recipients of aid and does not extend to the relationship between the Commission and the Member States. The Commission rightly draws attention to this distinction. As I have already mentioned (in section 3 et seq.), the Commission and the Member States have very different tasks. As the party executing the common agricultural policy, the Member State is as good as exclusively responsible for the relationship with the recipients of aid. In the light of the principle of administrative cooperation, as laid down by Article 5 of the EEC Treaty, it is naturally conceivable that the Member State might seek the Commission's assistance in this connection. Yet in this area the Commission plays at most a secondary role, in the background. The situation is very different as regards the relationship between the Member States and the Commission in

34 — See footnote 2.

the context of the clearance of EAGGF accounts. In this case, the Commission plays a central role as the guardian of the Community's interests (and, indirectly, of the interests of the other Member States), in the course of which it has to examine whether the expenditure incurred by the Member States was consistent with the provisions of Community law. Such 'second-line' supervision, that is to say, supervision of the Member States, presupposes in the first place that there will be administrative inspections, but may not be confined thereto. 'Second-line' supervision by the Commission must also be able to consist of analyses carried out by the Commission itself in order to check the analyses performed by the Member States in their relations with undertakings in receipt of aid.

26. To my mind, it appears both from the other case-law of the Court on the EAGGF and from the wording of Article 9 of Regulation No 729/70 that the interpretation given in the judgment in Case C-366/88 *France* v *Commission* relates solely to the Commission's power to lay down 'general rules concerning direct sampling of products at the premises of undertakings' (paragraph 14 of the judgment), in other words to involve itself in the relationship with undertakings in receipt of aid, [35] namely by adopting general rules. [36] The judgment holds in this regard that Regulation No 729/70 does not provide for a power

'to adopt provisions adding to the text of Article 9 ... and that, in any event, only the Council is empowered, under Article 9(3), to adopt general rules for the application of that article' (paragraph 24).

Consequently, in my view it is not possible to infer from the *dictum* quoted above (in section 21) from paragraph 22 of the judgment in Case C-366/88 *France* v *Commission* that the Commission itself is not entitled to take and analyse samples in order to check products in intervention storage and therefore in order to check, in the relationship between the Commission and the Member States, findings previously made by the Member State with regard to undertakings in receipt of aid. [37]

If the Commission were to be denied the opportunity to take samples and perform analyses itself — and this is the third argument for not giving the judgment in Case C-366/88 *France* v *Commission* broad significance — this would constitute a serious limitation on the Commission's ability to perform its supervisory task effectively. The facts of this case afford a good illustration of the seriousness of the problems with which the Commission is confronted in performing that task. In a recent judgment of 27 October 1992 the Court pointed out, as regards the possibility for the Commission to disqualify undertakings responsible for irregularities from any future financing, that the Commission must be able to act:

'against the numerous irregularities committed in connection with agricultural aid

35 — In paragraph 18 the Court refers to the fact that the annulled measure could impose financial burdens on the private persons concerned.

36 — In section 33 of his Opinion in Case C 366/88 *France* v *Commission* [1990] ECR I 3593, Advocate General Tesauro suggested that the operative part of the judgment should be based solely on Article 9(3) of Regulation No 729/70

37 — This does not mean that analyses carried out by the Commission in the context of the clearance of EAGGF accounts *vis à vis* the Member States can have no implications for the relationship with recipients of aid. It appears from the factual background to the judgment in *Petruzzi and Longo* that the Italian authorities used the findings made in the analyses carried out by the Commission in their relationship with the private parties involved.

which, by imposing a heavy burden on the Community budget, are likely to jeopardize the action taken by the institutions in this field in order to stabilize markets, support farmers' standard of living and secure reasonable prices in deliveries to consumers'. [38]

27. I shall now turn to the second plea relating to the method used by the Commission in carrying out its checks and the statement of reasons for its decision. In this connection, I shall draw a distinction as between the two financial corrections contested by Italy.

28. The first financial correction, in the amount of LIT 711 001 829, was made following an inspection carried out between 7 and 14 February 1988 (see summary report, section 4.9.2.1). Italy has made three complaints about that inspection: the samples taken were not representative (60 packages out of 50 459); the Commission made no allowance for the loss of quality of the tobacco as a result of the long time it spent in storage, and the samples were not carefully packed and transported. Those complaints were made against the Commission in the course of the procedure for the clearance of the EAGGF accounts, but were allegedly not taken sufficiently into account.

29. With its rejoinder the Commission lodged the requisite supporting documents; it appears from these that it examined these points in the course of an exchange of letters with the Italian authorities, in which it out across its point of view, and that, in view of the continuing lack of agreement, it asked the Italian authorities to a meeting on 9 January 1991. The Commission observes — and this emerges clearly from the summary report, too [39] — that it did in fact take account of the complaints relating to the natural ageing of the tobacco and the packaging and transportation of the samples. Italy has not submitted any more specific arguments which would enable issue further to be taken with the Commission's conduct in this regard. As regards the representative nature of the samples, the Commission described the method which it used, both in the summary report and in its rejoinder. Italy has not raised any other arguments, except for simply pointing to the number of samples, namely 60 packages out of 50 459. In my view, nothing can be inferred from that figure *per se*. The quality of a statistical finding depends on numerous factors and small samples taken at random may, depending on the circumstances, be sufficiently representative. Apart from the number of samples, Italy has not put forward any argument suggesting that the method used by the Commission was not reasonable or was not sufficiently reasoned *vis-à-vis* the applicant.

30. The second financial correction, in the amount of LIT 1 554 528 324, was effected following an inspection carried out between 15 and 19 January 1990 (see section 4.9.2.3 of the summary report). Italy puts forward various arguments against that correction. The inspection was carried out by the same expert and using the same method as the

38 — Case C-240/90 *Germany* v *Commission* [1992] ECR I-5383, paragraph 19.

39 — Section 4.9.2.1.5 reads as follows: '... It is accepted that leaves which are substantially less than whole and more than a third of whose surface is damaged should not be taken into account in calculating the correction because those defects could have occurred when the sample was being taken or during transport'. The financial correction was adjusted accordingly.

inspection which was carried out between 7 and 14 February 1988, and had the same defects. As the Commission has observed and as appears also from the summary report, that argument is factually incorrect. The inspection carried out between 15 and 19 January 1990 consisted not of taking then analysing samples, but of a physical (visual) on-the-spot inspection of the tobacco in store. In any event, Italy has not put forward any other factor such as to contest the soundness of the method followed by the Commission.

Next, Italy refers to minutes of 19 January 1990 drawn up following an inspection, in which the Commission's inspector stated that the results of the inquiry would not give rise to any financial correction. However, in a letter dated 27 February 1990, which it produced to the Court, the Commission repudiated that declaration. In the letter, it observes that an inspector manifestly has no authority to draw definitive conclusions with regard to financing. [40] His task and the function of the minutes drawn up following the inspection are limited to making findings of fact. This seems obvious to me. Having regard to the letter and the repudiation contained therein, Italy was therefore not reasonably entitled to attribute any importance to the statement contained in the minutes.

Lastly, Italy maintains that, by letter dated 18 July 1990, it asked for other inspections to be carried out and that the Commission took no account of that request whatsoever. The claim that the Commission did not react to Italy's request is factually incorrect, as is clear from the letter of 15 October 1990 which the Commission produced to the Court. In the absence of other arguments or more specific arguments, Italy's application must be rejected as regards this point.

Fourth point in dispute: LIT 60 808 737 217 in respect of olive oil taken into intervention [41]

31. This point in dispute can also be broken down into two. The first relates to the 1988 financial year. As far as that year was concerned, the Commission made a financial correction of LIT 34 172 079 373 following an inquiry showing that almost all the olive oil stored during that year was of quality inferior to that which had been declared when it was taken into intervention. [42] The second point at issue is concerned with another inquiry, referred to by the two parties as 'the ASSITOL inquiry', relating to the accounts for 1985, 1986 and 1987, which showed that some of the olive oil was of inferior quality. This is the reason for which the Commission made an overall financial correction of LIT 26 636 657 844.

40 — Article 5(2) of Regulation No 729/70 provides that the Commission, after consulting the Committee for the European Agricultural Guidance and Guarantee Fund, is to make up the accounts in accordance with the procedure laid down in Article 13 of that regulation.

41 — Section 5.1 of the summary report.

42 — According to Article 2(5) of Commission Regulation (EEC) No 3472/85 of 10 December 1985 on the buying-in and storage of olive oil by intervention agencies (OJ 1985 L 333, p. 5), intervention agencies are to check the quality of the olive oil offered for intervention against the quality characteristics set out in Article 35 of and the annex to Regulation No 136/66/EEC of the Council of 22 September 1966 on the establishment of a common organization of the market in oils and fats (OJ, English Special Edition 1965 1966, p. 221), as specified by Commission Regulation (EEC) No 1058/77 of 18 May 1977 on the characteristics of olive oil and of certain products containing olive oil and amending the Common Customs Tariff nomenclature as regards olive oil (OJ 1977 L 128, p. 6).

32. As far as the first point is concerned, there is in fact little in dispute. It appears from the originating application that Italy made a claim in this regard merely on a precautionary basis. Italy has never contested the 1988 inquiry; [43] on the contrary, it expressly accepted its financial consequences. [44] However, a problem emerged when Italy, basing itself on the results of the inquiry, sought reimbursement from private persons who had unduly been paid the relevant aid. Those private persons contested the legality of the Commission inquiry before a national court, which sought a preliminary ruling from the Court of Justice. At the time when the present proceedings opened, the Court had not yet given its preliminary ruling. In the meantime, it has done so and confirmed that the Commission's inquiry was lawful. [45] Consequently, this claim, as it is formulated in the originating application, is no longer of any purpose.

Counsel for the Italian Government averred at the hearing that Italy would maintain that claim on the ground of an allegedly unlawful interference by the Commission with the way in which the Italian intervention agency had subsequently disposed of the olive oil at issue. It is maintained that Italy suffered loss as a result. However, that allegation is not supported by any evidence and must therefore be rejected as unfounded. [46]

33. I shall now turn to the second point, which is concerned with the correction made following the so-called 'ASSITOL inquiry'. Italy has raised two pleas in this regard. The first plea is based on the fact that the Commission itself conducted the inquiry, whereas, on the basis of the judgment in Case C-366/88 *France* v *Commission*, it had no power to do so. That plea is identical to that which I have already considered in connection with intervention in favour of tobacco (section 21) and must be rejected for the same reasons. The second plea relates to the Commission's conduct and the grounds of its decision to effect a financial correction. Italy's arguments can be broken down into two points.

34. Italy maintains that the Commission made the financial corrections at issue on the basis of information provided by ASSITOL, the association of the Italian oils industry. It argues that such information from a private party which might have an interest cannot be used by the Commission as evidence to rebut and avoid the results of investigations carried out by the Italian authorities.

The Commission responded by stating that, whereas it had indeed received a complaint from ASSITOL, it subsequently carried out its own, completely independent inquiry and it was that inquiry on which the financial correction was based. In its reply, Italy claims that it was not informed of this. It is clear that that claim is factually incorrect from the documents which the Commission

43 — That inquiry seems moreover to constitute a praiseworthy example of collaboration between national authorities and the Commission.

44 — By letter of 2 November 1989, which the Commission has produced to the Court. Moreover, Italy confirmed its acceptance both during the written procedure and at the hearing.

45 — Judgment of 10 October 1991 in Joined Cases C-161/90 and C-162/90 *Petruzzi and Longo* [1991] ECR I-4845. This to the judgment to which I referred above (section 23).

46 — In the absence of proof that the plea is based on information which was not known until during the written procedure, that plea is also inadmissible under the first subparagraph of Article 42(2) of the Rules of Procedure.

produced to the Court as annexes to the rejoinder. [47] Those documents show that the Commission did in fact itself carry out an inquiry following ASSITOL's complaint and that it informed the Italian authorities, at each stage in the inquiry, of its intentions, actions and findings.

35. Next, Italy argues that the results of the Commission's inquiry — that is to say, that a large part of the olive oil was of inferior quality to that which had been declared — are refuted by the fact that the oil in question invariably achieved a price commensurate with its declared quality when it was sold from intervention store and that when such oil was exported, the customs did not find that the olive oil was of inferior quality. Italy claims that it informed the Commission of this but never received a satisfactory answer. Accordingly, it claims that the Commission's decision is insufficiently reasoned.

If Italy did in fact notify to the Commission factual data showing that the olive oil in question was successfully sold as oil of the quality declared and if that were confirmed by inspections carried out at the time of exportation, those facts would constitute a weighty argument, to which the Commission would have to respond. If that were the case, the Commission would be entitled to effect a financial correction only if it were in a position to prove that the findings made in its investigation reflected the true situation.

However, I must say that the Italian Government has not produced to the Court, in order to back up its complaints, any evidence relating to sales prices or inspections carried out by the customs authorities. Neither has it shown how it brought its arguments to the Commission's attention, [48] as a result of which it is impossible to check whether the Commission did in fact state sufficient reasons for its decision. Moreover and more generally, it appears from the documents produced by the Commission that it explained its conduct to the Italian authorities on various occasions and gave them opportunities to submit observations in writing or at a meeting. [49] This plea must therefore be rejected.

Fifth point in dispute: LIT 38 034 266 760 in respect of aid the processing of soya beans

36. The penultimate point in dispute relates to the aid which the Community grants for the production of soya beans. [50] The aid was introduced in order to step up the production of soya and protect it against competition from soya beans imported free of duty

47 — Telex messages from the Commission to the Italian authorities dated 10 June 1986, 10 October 1986 and 5 August 1988.

48 — Only one indication is on the file and it is contained in a document lodged, not by Italy, but by the Commission. This is a letter dated 2 November 1989 from the Italian authorities to the Commission, the fourteen paragraph of which reads as follows: 'The recapitulative table shows that all the lots were sold at prices corresponding to the declared quality of lampante virgin olive oil, which rules out any deterioration in quality due to bad storage or the presence of olive residue oil'. Apparently, the table in question was appended to the letter, but it is not in the file lodged with the Court. In any event, it is for Italy to substantiate its complaints by adducing evidence.

49 — See the telex message of 5 August 1988 from the Commission to the Italian Ministry of Agriculture appended to the Commission's rejoinder.

50 — The system is based on Council Regulation (EEC) No 1491/85 of 23 May 1985 laying down special measures in respect of soya beans (OJ 1985 L 151, p. 15).

from third countries (which is an extremely topical problem). An essential aspect of the system is that the aid may be granted only for soya beans which are produced and processed in the Community. In view of this, Article 6(1) of Regulation (EEC) No 2194/85 [51] provides as follows:

'Producer Member States shall set up a control system ensuring that only the products entitled to aid receive it. This system shall include, in particular, sample checking on the areas cultivated and on the stock records and, where appropriate, on the financial records of applicants for aid.'

Other rules relating to controls have been laid down by Commission regulation. [52]

37. In section 5.3 of the summary report, the Commission describes how it decided, on the basis of a inquiry conducted in two phases, to effect a financial correction of LIT 38 034 266 760 in respect of the aid granted by Italy in 1988. In the first phase, it carried out on-the-spot inspections at almost 400 farms. In the second phase, it examined the control procedures of the various public agencies involved and the operation of a processing undertaking. The Commission's inquiry sought to establish in particular whether sufficient checks were carried out in Italy on the Community origin of soya beans in respect of which aid was granted. The Commission reached, *inter alia*, the following conclusions with regard to this point (sections 5.3.1 and 5.3.2 of the summary report):

'... the controls carried out by the Italian authorities were formal but insufficient as the lots in question could not be traced through the system. The controls were inadequate to determine whether claims had been artificially inflated by inclusion of grains of non-Community origin. ... The Commission had observed in particular that controls on harvest centres were confined to inspection (visa) of the Entry/Exit register. No verification, without notice, was carried out as to the authenticity (weights or analysis) of transactions. In fact, AIMA, centrally, was not aware of the exact number of harvest centres.

In respect of Storage Centres the Commission found that such controls which did exist, were of no substance, and were never without notice. A formal AIMA declaration indicating the origin of lots from specified harvest centres proved to be false because a quantity of the said soya came from other harvest centres. ...

The Commission services had further observed, on the basis of audit information, that the Italian Customs did not concern

51 — Council Regulation (EEC) No 2194/85 of 25 July 1985 adopting general rules concerning special measures for soya beans (OJ 1985 L 204, p. 1).

52 — Commission Regulation (EEC) No 2329/85 of 12 August 1985 laying down detailed rules for the application of the special measures for soya beans (OJ 1985 L 218, p. 16).

themselves with the destination of imported soya.'

Ultimately, the Commission decided to effect a financial correction of 5% of the expenditure incurred by Italy in 1988. It appears from section 5.3.4 of the summary report that that percentage was estimated on the basis of checks carried out at farms which showed that over-declaration of the areas sown and the yields obtained varied from 1 to 15%.

38. Italy has put forward before the Court a whole series of arguments against that financial correction. First, it maintains that the correction is not based on any specific evidence but only on a 'general impression' on the part of the Commission that the Italian control system is inadequate. It is sufficiently clear from the passages of the summary report set out above that the Commission did in fact base itself on significant results yielded by the checks which it carried out.

In the final analysis, Italy seems to be complaining yet again that the Commission is entitled only to refuse to finance aid which is proven, individually and specifically, to have been wrongly granted. I have already refuted that view (section 17).

39. Next, Italy claims that it convincingly refuted the Commission's findings during the procedure for the clearance of the EAGGF accounts. As a result, the Commission decided to refuse to charge expenditure to the EAGGF only in respect of 1988, and then only to the extent of 5%. However, Italy considers that the Commission should have refrained from making any correction at all. I am unable to accept that reasoning. It seems in fact to have been the case that, after giving Italy an opportunity to put across its complaints, the Commission effected a correction lower than it had originally intended to make. But it does not follow *ipso facto* that the lower correction was wrongly or insufficiently reasoned. In my view, the summary report provides a coherent, acceptable explanation of the correction which was ultimately made. In order to contest that correction Italy should have contested the reasons underlying it, which it has failed to do.

40. Italy argues incidentally that, in the absence of any findings of any substantive irregularity, it cannot claim repayment of the amount of the financial correction from the parties which received the aid. This means that the correction may not be imposed on it. That argument confuses clearance of EAGGF accounts with the relationship with the recipients of the aid. Refusal to grant Community financing does not depend on whether it is practically possible to recover the aid from the recipients. Moreover, it is the responsibility of the Member State itself not to grant unlawful aid (see section 3 above).

41. Lastly, Italy argues that the shortcomings found in the controls are due to inadequate provisions of Community law. It claims that the Commission admitted this by

amending the provisions relating to controls in 1989. [53] The Commission contests this argument by referring, rightly, to the judgment in Case C-8/88 *Germany* v *Commission*. In that judgment the Court held as follows:

'With particular regard to the correct utilization of Community resources, ... Member States are required to set up comprehensive administrative checks and on-the-spot inspections thus guaranteeing the proper observance of the substantive and formal conditions for the grant of the premiums in question'. [54]

That obligation arises under Article 5 of the EEC Treaty and Article 8 of Regulation No 729/70, independently of any specific provisions on controls. Moreover, there was certainly not a complete absence of such provisions even in 1989.

Sixth point in dispute: LIT 67 501 305 800 in respect of aid for the production of durum wheat

42. This, the final point in dispute, relates to the grant of aid for the production of durum wheat. [55] According to section 5.4 of the summary report, during the clearance of accounts for 1985, doubts arose about the consistency between the areas actually cultivated in Italy and the areas in respect of which aid was granted. Consequently, in 1987 the Commission asked the Italian authorities to carry out an administrative inquiry pursuant to Article 6 of Regulation No 283/72. [56] A sample of 3 500 applications was checked. According to the Italian authorities, the inquiry disclosed irregularities of 8%. The Commission took the view that that percentage did not tally with the data at its disposal, and carried out its own statistical analysis of the findings made by the Italian authorities, arriving at a percentage of irregularities of (at least) 12%. In the summary report, the Commission goes on to mention the shortcomings which it found in the procedures used to check applications for aid: lack of written guidelines, insufficient coordination of controls, insufficient land measurement and lack of effective sanctions. On those grounds, the Commission decided that Italy had failed to fulfil its obligations and made a 12% financial correction for the 1987 and 1988 financial years.

43. The Italian Government contests that correction on the basis of three pleas. The first plea relates to the retroactive nature of the financial correction. That argument starts out from the fact that the Commission made no financial correction for years prior to 1987. It is claimed that the reasons for this emerge from a Commission memorandum dated 19 November 1990, which Italy has produced to the Court: 'Since Italy asked the Commission to organize an inquiry pursuant to Article 6 of Regulation No 283/72 and the relevant inquiry started in 1987, the

53 — Commission Regulation (EEC) No 2537/89 of 8 August 1989 laying down detailed rules for the application of the special measures for soya beans (OJ 1989 L 245, p. 8).

54 — Case C-8/88 *Germany* v *Commission* [1990] ECR I-2321, paragraph 20.

55 — The aid was introduced by Article 10 of Regulation (EEC) No 2727/75 of the Council of 29 October 1975 on the common organization of the market in cereals (OJ 1975 L 281, p. 1).

56 — Cited in footnote 8.

Commission's departments consider it to be fair that the amounts declared by Italy in respect of the measure in question should be corrected as from 1987'. [57] According to Italy, that memorandum confirms the principle that no financial correction may be made retroactively in respect of the period prior to the inquiry. By the same token, it argues that the Commission was not entitled to effect a correction for 1987 and 1988 either, since the administrative formalities for those years had already been carried out at the time when the Commission notified the results of its inquiry to Italy. This reasoning seems to me to be wrong.

44. As I have already mentioned in my preliminary observations, EAGGF financing of expenditure incurred by national authorities is governed by the strict, objective rule that only expenditure 'undertaken according to Community rules' [58] may be charged to the Community budget.

As Advocate General Mischo wrote in an Opinion delivered in 1987,

'the nature of the procedure for the clearance of EAGGF accounts is such that the Commission does not examine then until the expenditure set out therein has been incurred'. [59]

A form of retroactivity is therefore inherent in the system. [60] The Commission has no discretion in this regard:

'Until the accounts have been duly cleared, the Commission is required by Article 2 of Regulation No 729/70 to refuse to charge to the EAGGF refunds which have not been granted in accordance with the Community rules.' [61]

Where the Commission finds that there has been an infringement of Community law and the accounts have not yet been duly cleared, it is *under a duty* to effect a financial correction. [62] Consequently, the Commission was not entitled to have refrained from imposing the corrections at issue in respect of 1987 and 1988.

45. The second plea (or series of pleas) raised by Italy relates to the statistic method

57 — A similar form of words, albeit fairness is not mentioned, also appears in section 5.4.3 of the summary report.

58 — Articles 2 and 3 of Regulation No 729/70, considered above.

59 — Opinion in Case 347/85 *United Kingdom* v *Commission* [1988] ECR 1768, section 76.

60 — In itself, this does not raise any problem of legitimate expectations or legal certainty, since the Member States assume the fundamental responsibility at management level and are involved throughout the procedure for the clearance of EAGGF accounts; see my Opinions in Case 267/87 *Netherlands* v *Commission* [1989] ECR 225, section 12, and in Case C-8/88 *Germany* v *Commission* [1990] ECR I-2334, sections 21 and 22.

61 — Case 349/85 *Denmark* v *Commission* [1988] ECR 169, paragraph 19. See also the judgment in Joined Cases 15/76 and 16/76 *France* v *Commission*, cited in footnote 5, where it is stated that 'the Commission has no discretionary power to derogate from the rules regulating the allocation of expenses'. I am therefore unable to agree with the view which has on occasions been expressed by the Commission in this case to the effect that, by not effecting a financial correction, it granted a favour in respect of the financial years prior to 1987. The Commission is not entitled to grant favours at the expense of the Communities' budget.

62 — In contrast, the Commission does have a 'margin of discretion' in *evaluating the amount* of the financial correction (Case C-281/89 *Italy* v *Commission* [1991] ECR I-347, paragraph 24).

employed by the Commission in arriving at the refusal to charge 12% of the expenditure to the EAGGF. In the first place, Italy reiterates its general complaints about the use of extrapolation. As I have already stated (section 17), Italy bases itself in this connection on an incorrect interpretation of the basic rules on the financing of the common agricultural policy. [63]

46. Next, Italy complains that, at the time when it requested the opening of an administrative inquiry, the Commission did not inform it that the results of the inquiry might have financial implications. *A priori*, an inquiry could be carried out either for purely statistical purposes or for control purposes. Had Italy known in this case that the inquiry was to be carried out for control purposes, it would have insisted on the sample's having been more representative and, more generally, on better safeguards to ensure the reliability of statistical inferences drawn from the data obtained in the inquiry. It maintains that in that respect the Commission failed to fulfil its obligation to cooperate in good faith with the Member State.

The relationship between the Commission and the Member States is in fact based on the duty of cooperation in good faith laid down by Article 5 of the Treaty. [64] What this means as far as the Commission is concerned is that it must inform the Member States of its intentions and findings at all stages in the procedure for the clearance of EAGGF accounts. Where it requests information from the Member States, therefore, it must normally — with the exception of very special circumstances warranting non-disclosure — make its intentions known with regard to that information. However, that obligation of disclosure does not preclude the Commission from subsequently altering its intentions and notifying the Member State concerned. It is possible to conceive, for example, of a situation in which the Commission requests information from a Member State or even obtains information itself for general statistical purposes without any supervisory intent. However, if examination of the data concerned discloses an irregularity, the Commission may use that information in the context of the clearance of EAGGF accounts, regard being had to the normal rules on burden of proof. What is more, the Commission is under a duty to refuse to grant financing wherever it learns, in any manner whatsoever, of the existence of an irregularity. I am therefore unable to accept Italy's argument that the Commission is entitled to attach financial consequences only to findings made in inquiries which were expressly initiated to that end. [65]

47. Specifically as regards the present proceedings, Italy's arguments are not sufficiently substantiated by the facts. The administrative inquiry in question was requested by the Commission in a letter dated 12 June 1987, which Italy has

63 — In its reply, Italy refers more specifically to an internal Commission document (No VI/325/83) on the use of extrapolation. The Commission has correctly pointed out in its defence that the document does not cover situations in which defects have been found in the control machinery of a Member State.

64 — See my Opinion in Case C-8/88 *Germany* v *Commission*, cited in footnote 26, section 21, and the judgment in that case, paragraph 20.

65 — Moreover, the clearance of EAGGF accounts cannot be regarded as a penal operation. It is an objective procedure conducted in a more general context of joint management. See, *inter alia*, the Opinion of Advocate General Mischo in Case 347/85 *United Kingdom* v *Commission*, cited in footnote 59, section 77, and the judgment in that case, at paragraph 57.

produced to the Court. The first paragraph of that letter clearly shows that the Commission is assuming from the outset that it will uncover irregularities:

'... the Commission has indications suggesting possible fraud to the detriment of the aid paid out of Community funds for the production of durum wheat'.

In view also of what is stated later in that letter, Italy would be hard placed to claim that it could not have expected that the inquiry might result in a financial correction.

48. A further complaint made by Italy relates to the different percentages of irregularities at which it and the Commission arrived. On the basis of their examination of 3 500 applications, the Italian authorities came to a figure of 18% of irregularities. Using the same figures, the Commission arrived at a percentage of (at least) 12% by means of statistical analysis. Italy alleges that the Commission has not provided sufficient proof that its percentage is the correct one.

Apart from the factual details which the Commission has provided in its defence, that argument must be rejected on the ground that it is based on an incorrect allocation of the burden of proof. Where the Commission has found that Community law has been infringed and evaluated the financial consequences having to be associated therewith, it is for the Member State concerned, where appropriate, to demonstrate that the Commission committed an error as to the financial consequences to be drawn from it. [66]

It is therefore for Italy to prove that the Commission's calculations were wrong.

49. Lastly, Italy's third plea relates to shortcomings in the provisions of Community law relating to controls, as witnessed by the subsequent adoption of new provisions relating thereto. [67] Italy's arguments in this context are identical to those put forward with regard to the provisions on supervising the aid for the processing of soya beans (see section 42 above) and must be rejected for the same reasons.

Conclusion

50. In view of the foregoing, I propose that the Court should dismiss the application in its entirety and order the applicant to pay the costs.

66 — See section 7 above and also footnote 62.

67 — Italy refers in this connection to Commission Regulation No 1738/89 of 19 June 1989 laying down detailed rules on production aid for durum wheat (OJ 1989 L 171, p. 31), as subsequently amended.