2. Orders the applicant to pay the costs.

Mertens de Wilmars Pescatore O'Keeffe

Bosco Koopmans Due Bahlmann

Delivered in open court in Luxembourg on 15 March 1983.

P. Heim
Registrar

J. Mertens de Wilmars
President

OPINION OF MRS ADVOCATE GENERAL ROZÈS DELIVERED ON 18 JANUARY 1983 [1]

Mr President,
Members of the Court,

The Government of the Italian Republic has brought two actions for the partial annulment of two decisions of the Commission dated 16 November 1981 [2] concerning the clearance of accounts in respect of expenditure for 1974 and 1975 financed by the European Agricultural Guidance and Guarantee Fund (hereinafter referred to as "the Fund"), Guarantee Section.

I shall present my submissions in respect of both actions in a single opinion so as to avoid repetition, but in the interests of clarity I have chosen to present my arguments in relation to each product which has been the subject of litigation as regards expenditure, since the two cases relate in effect to intervention cereals, milk and milk products, wine and pigmeat.

I — Intervention cereals

By Decision 81/1043/EEC (Official Journal 1981, L 375, p. 25) the Commission refused to recognize as chargeable to the fund a sum of LIT 2 264 702 642 in respect of the sale of intervention cereals.

Regulation (EEC) No 2104/73 of the Council of 1 August 1973 (Official Journal 1973, L 214, p. 2) concerns the transfer to and sale by the Italian intervention agency of common wheat held by the German, French and Belgian intervention agencies. Pursuant to the regulation 200 000 tonnes of common wheat were put at the disposal of the Azienda di Stato per gli Interventi sul

1 — Translated from the French.
2 — Decisions 81/1043/EEC and 81/1044/EEC.

Mercato Agricolo (hereinafter referred to as "the Italian intervention agency"), to prevent speculation by hoarding at a time when a number of areas of Italy were experiencing considerable difficulty in procuring supplies. The sale price to be fixed by the Italian intervention agency must satisfy the combined requirements of Article 6 (4) of the aforementioned regulation and Article 3 (2) of Regulation (EEC) No 376/70 of the Commission of 27 February 1970 (Official Journal, English Special Edition 1970 (I), p. 126). Thus:

1. If the cereals are stored at a *marketing centre,* their price must be not less than the local market price and may not be lower than the intervention price valid at that centre plus 1.50 units of account per tonne; [1]

2. If the cereals are stored *elsewhere,* their selling price must be not less than the local market price or, failing this, the price on the nearest market, and it may not be lower than the price for that locality plus 1.50 units of account per tonne; [2]

3. If the sale relates to a delivery to a *place other than the place in which it is stored* the selling price must correspond to the local market price in the place where the produce is stored, plus the cost of transporting it to the place of delivery. [3]

In fact, in the course of the first half of 1974 the Italian intervention agency sold this common wheat on the Italian market at prices considerably lower than its price on the local markets.

Whilst the prices quoted by the Commission for Milan, for example, were on average LIT 9 500 per quintal, the prices applied by the intervention agency varied between LIT 8 000 and 8 200, that is to say, about 15% less.

The Italian authorities defended their practice of selling at lower prices with the following arguments.

1. Cereals coming from other Member States had characteristics which not only varied from one State to another but were also different from those of Italian cereals; accordingly, as provided in Regulation No 376/70, the prices should be adapted to the characteristics of the cereals being sold.

2. The prices charged on the Italian markets were only a guide, and varied from one place to another. The Italian authorities, for their part, based their figures on those produced by an organization specializing in market studies.

3. The market prices were artificially high owing to speculation in connection with the price freeze.

The Commission states that the shortage of wheat in Italy resulted in the purchase of French common wheat during the second half of 1973 and that therefore there was certainly at that time a reference price for cereals having the same characteristics as those which were transferred. It adds that common wheat of French origin is regularly quoted on the market in Milan and that about 39% of the cereals transferred and sold came from France. Furthermore, intervention cereals coming from Italy were sold during the same period (the first half of 1974) at prices more or less the same as, or even lower than, the prices of the cereals transferred.

1 — Article 3 (2) (a).
2 — Article 3 (2) (b).
3 — Article 6 (4) of Council Regulation No 2104/73.

The final purchases (in January, March and April 1975) were made at prices very close to the market prices communicated to the Commission. As with indigenous cereals, the cereals transferred were of the standard type on which the quotations sent by the Italian authorities to the Commission were based.

It would appear in fact that the unusually low price at which the transferred cereals were sold resulted from the price freeze introduced by Decreto Legge No 427 of 24 July 1973. The Italian Interdepartmental Committee for Economic Planning decided on 7 September 1973 to fix the selling price of common wheat at a variable amount between LIT 8 000 and LIT 8 200 per quintal, a figure which took into account in particular the price of bread and the economic situation in the different provinces. The Italian Government considers that by its sales policy the intervention agency helped to avoid serious disruption of the market and public unrest. In order to explain the speculative nature of the quotations for common wheat the Government refers in particular to the price freeze on pasta products; yet it appears that, at least in Italy, pasta can be made only from *durum* wheat.

Even if Italy's regulation of consumer prices for certain foodstuffs was in line with its social policy, however, such considerations lie outside the scope of the rules of Community law relating to the re-sale of intervention cereals.

In the Court's judgment of 22 January 1976 [1] it decided in an analogous case that:

"... the action of a Member State in purchasing durum wheat on the world market and subsequently reselling it on the Community market at a price lower than the target price is incompatible with the common organization of the market in cereals."

As the Italian Government has been unable to prove that the prices fixed for cereals sold by the Italian intervention agency corresponded to the market prices, the Commission was correct to rectify the "net losses" account by increasing the revenue arising from the sale of intervention cereals transferred from other Member States during the first half of 1974 in central and northern Italy.

II — Milk and milk products

The Commission has refused to be responsible for:

1. LIT 721 953 004 (accounting year 1974) and LIT 880 058 997 (accounting year 1975) in respect of aid granted for dried milk used in compound feedingstuffs for animals; and

2. LIT 1 143 616 575 (accounting year 1974) and LIT 3 727 568 990 (accounting year 1975) in respect of aid granted for private storage of Grana Padano and Parmigiano-Reggiano cheeses.

A — Processed skimmed milk

1. The system of aids is governed by two Council regulations and one Commission regulation.

Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organization of the market in milk and milk products (Official Journal, English

1 — *Carmine Antonio Russo* v *Azienda di Stato per gli Interventi sul Mercato Agricolo* [1976] ECR 45, para. 5 at p. 55.

Special Edition 1968 (I), p. 176) provides for the grant of aid for the use of skimmed-milk powder in compound feedingstuffs.

Regulation (EEC) No 986/68 of the Council of 15 July 1968 laying down general rules for granting aid for skimmed milk and skimmed-milk powder for use as feed (Official Journal, English Special Edition 1968 (I), p. 260) provides for the grant of aid for skimmed-milk powder and skimmed milk produced and processed in the dairy and used in the manufacture of compound feedingstuffs. It adds that the aid for a given quantity of skimmed milk used in the manufacture of compound feedingstuffs *is to be equal* to the aid which would be granted for the quantity of skimmed-milk powder which may be obtained from that quantity of skimmed milk. [1]

Finally, Article 1 of Regulation (EEC) No 990/72 of the Commission of 15 May 1972 on detailed rules for granting aid for skimmed milk processed into compound feedingstuffs and for skimmed-milk powder for use as feed (Official Journal, English Special Edition 1972 (II), p. 428) provides that:

"1. Aid shall be granted for *skimmed-milk* powder which has . . . been *used in* the manufacture of compound feedingstuffs under the conditions laid down in Article 4.

2. Aid may be granted for skimmed milk *used in the manufacture* of compound feedingstuffs meeting the definition in Article 4.

. . ."

The Italian intervention agency paid such aid, including in the quantity subsidized a loss amounting to 2% of the powder used in the compound feedingstuffs. That loss arose through handling in the course of production and is to be regarded as normal.

According to the Italian Government the word "used" in Article 2 (1) (d) of Regulation No 986/68 and Article 1 (2) of Regulation No 990/72 means that the aid may be granted for the milk taken up in the manufacture of the compound feedingstuffs. Thus aid may be received for the amount of powder lost for purely technical reasons in the course of processing — up to 2% — and which, in any case, has not been diverted from its proper use. In that connection it relies on national practice prior to the entry into effect of the Community rules; it also refers to a circular of the Italian intervention agency of 10 July 1974 (No 19) which states that "Community aid is paid only for powdered milk *actually used* in the manufacture of feed for animals."

In the opinion of the Italian Government the Community rules are intended to put powdered milk used in this manner in a competitive position and the attitude of the Commission compromises the efficacy of those rules; in fact it is the farmer, as the ultimate user, who will have to stand the cost of the loss arising during manufacture, for which no Community aid is provided.

In the alternative the Italian Government submits that the margin allowed by the Italian intervention agency was only about 1.5% during the years 1974 and 1975 and affected only 25% of the powdered milk manufactured in Italy.

The Commission contends that only the skimmed milk *actually converted* into compound feedingstuffs within the meaning of Article 4 of Regulation No 990/72 is eligible for Community aid; the excess, even if less than 2%, which

1 — Article 2 (d).

although intended for such production and "used" in the process of manufacture has "disappeared", cannot be considered to have been converted.

An analysis of the relevant provisions shows that the Italian Government's interpretation is not correct.

In fact, skimmed-milk powder *used* in the manufacture of compound feedingstuffs and eligible for aid may be *used* only as feed. [1] This was added "in order to make it easier for Member States to verify the intended use of the products." [2]

Likewise, Commission Regulation No 990/72 is intended to ensure that "the skimmed milk and skimmed-milk powder for which aid is granted are *in fact* used as feed" (third recital).

It requires the undertakings approved for the manufacture of compound feedingstuffs, if they wish to receive aid, to keep a monthly record which is to include, *inter alia*, particulars of "losses, samples, returns and exchanges of skimmed milk, skimmed-milk powder and compound feedingstuffs". [3]

The Commission rightly states that milk powder used in the manufacture of samples and in returns is not eligible for aid. The same must apply to "losses".

The Commission did not raise any objection to such a margin in the accounting years before 1974 since expenses of that nature had never been checked in respect of Italy, which is the only Member State to allow for such a margin.

In any case, the Italian authorities have not provided documents to show, precisely and in detail, the sums paid in respect of powder "lost" in the course of the manufacture of feed.

The accounts were cleared in accordance with the rules laid down in Regulation (EEC) No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy (Official Journal, English Special Edition 1970 (I), p. 218), and in 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 (Official Journal, English Special Edition Second Series III, p. 109).

Consequently the expenses incurred by the Italian intervention agency in 1974 and 1975 in respect of losses of skimmed-milk powder manufactured into compound feedingstuffs are not justified and the Italian Government's claims in that respect are unfounded.

B — Private storage of Grana Padano and Parmigiano-Reggiano cheeses

The relevant aid is provided for by Article 8 (3) of Regulation (EEC) No 804/68 of the Council of 27 June 1968.

Because of difficulties in concluding storage contracts in due and proper form in a short time, the Italian intervention agency treated a declaration by a State official that the product had gone into storage, signed by the warehouseman and stating the date on which the storage began, as amounting to a contract.

Such treatment explains the presence of a date several months after the entry into storage of the products on contracts for private storage of the cheeses in question and also the fact that sometimes the

1 — See Article 2 (5) of Regulation No 986/68 as amended by Regulation (EEC) No 1038/72 of the Council of 18 May 1972 (Official Journal, English Special Edition 1972 (II), p. 456).

2 — Last recital in the preamble to Regulation No 1038/72.

3 — Article 8 (3) of Regulation No 990/72.

contracts were signed only the day before the date on which the period of storage came to an end.

In the view of the Italian intervention agency a contract needed to be signed only to perfect the transaction and to put in order the relationship between the intervention agency and the warehouseman for accounting purposes. In view of the exchange of letters before and after the entry into storage of the product a contractual relationship should nevertheless be regarded as existing in accordance with the provisions of the Italian Civil Code. The rate for converting the aid into national currency was calculated in proportion to the representative rates applicable during the period of storage.

The Italian intervention agency always informed the Commission of the existence of such contracts by reporting the amounts going into and leaving storage on the basis of information contained in declarations made by provincial agricultural inspectors.

The intervention agency acted subsequently in accordance with the interpretation adopted by the Commission and it intended to convert the amount of aid into national currency on the basis of the rate applicable on the last day of storage.

In my view this difference of opinion must be settled by reference to the Court's judgment of 27 January 1981 in Case 1251/79 (*Italian Republic* v *Commission of the European Communities* [1981] ECR 205) concerning aid for the storage of table wine, which raised a very similar problem to the present one.

It is true that the rules of Community law do not lay down the form of the contract of storage.

Nevertheless, according to Article 11 of Regulation (EEC) No 971/68 of the Council of 15 July 1968 (Official Journal, English Special Edition 1968 (I), p. 251) laying down general rules for intervention on the market in Grana Padano and Parmigiano-Reggiano cheeses, the contracts must contain certain provisions regarding the period of storage and inspection measures.

Article 16 (c) of Regulation (EEC) No 1107/68 of the Commission of 27 July 1968 (Official Journal, English Special Edition 1968 (II), p. 382) on detailed rules of application for intervention on the market in Grana Padano and Parmigiano-Reggiano cheeses requires the storer to undertake not to alter the composition of the lot under contract during the period of the contract without the authorization of the intervention agency.

The storer will cease to qualify for the aid if the quantities of cheese specified in the contract are withdrawn from storage in whole or in part before the date of expiry of the contract. [1]

Thus all transactions involving private storage must, in order to qualify for the aid provided for in Article 10 (2) of Regulation No 971/68, be preceded by the drawing up of a written contract in due and proper form: signature of the general terms of the contract is an essential requirement.

Even the decision of the Italian intervention agency's governing board, [2] the body which is empowered by Italian legislation to conclude storage contracts, states in Article 2 that the contract between that agency and the storer is concluded "at the moment when the latter appends his signature to the instrument of acceptance whereby he agrees to comply with the conditions set out in the general terms". Article 5 states that the instrument must have an authenticated signature within five days; otherwise it will be void.

1 — Article 17 (2) of Regulation No 1107/68.

2 — Gazzetta Ufficiale [Official Gazette] of the Italian Republic No 225 of 2 October 1973.

III — Storage of wine

The contested decision refused to recognize as chargeable the sums of LIT 10 852 510 (for the year 1974) and LIT 3 610 555 765. The first sum concerned aid granted for long-term storage of table wine for the year 1971/72, [1] and the second concerned aid granted for short-term and long-term storage for the years 1973/74 and 1974/75 (1975 accounts). The decisions also refused to recognize as chargeable the sum of LIT 98 951 625 (1975 accounts) concerning aid granted for re-storage of table wine during the year 1974/75.

1. Regulation (EEC) No 816/70 of the Council of 28 April 1970 laying down additional provisions for the common organization of the market in wine (Official Journal, English Special Edition 1970 (I), p. 234) provides for the grant of aid for the private storage of wine, subject to the conclusion of storage contracts valid for either nine months [2] or three months. [3] Long-term contracts may be entered into only during the period from 1 December to 31 January of the same wine-growing year.

The Commission found, first, that the contracts for long-term storage for the years 1971/72, 1973/74 and 1974/75 had been concluded after the date laid down in the regulation and, secondly, that like the short-term contracts for the years 1973/74 and 1974/75, they had been concluded with retroactive effect, contrary to Article 8 (1) of Regulation (EEC) No 1437/70 of the Commission of 20 July 1970 on storage contracts for table wine (Official Journal, English Special Edition 1970 (II), p. 469). That article provides that a contract may not be concluded for a period beginning before the date of the conclusion of the contract.

In contrast to the years 1970/71 and 1971/72, it was no longer permissible at that time to conclude short-term contracts with such an effect.

Furthermore, a quantity of wine which was the subject of a contract or a request for a contract was sold during the period of storage, contrary to Article 10 (1) of Regulation No 1437/70 which provides that:

"During the period for which the contract is valid, the producer may not put up for sale, sell, or market in any other way, the wine which is the subject of the contract".

The anomalies were attributable to the fact that the quarterly payments provided for by Community law for long-term contracts were not made in Italy, and to the fact that the period of 30 days within which short-term payment and the final long-term payment were to be made was not adhered to; such payments were not made on average until two years after the due date.

The Italian Government argues that a distinction should be made between "formal execution" of a storage contract and its "conclusion", for which no form is laid down: conclusion in writing is merely a kind of crystallization of the contract in documentary form. It relies on Article 7 (2) of Regulation No 1437/70, according to which:

"The producer shall be under the obligation to allow the inspection referred to in paragraph (1) at any time during the period for which the contract is concluded".

That argument has already been rejected in the Court's judgment of 27 January

1 — 1974 accounts, cleared after the judgment of 27 January 1981 in Case 1251/79 *Italian Republic* v *Commission*, cited above.

2 — Article 5 (1), contracts for long-term storage.

3 — Article 5 (2) and (3), contracts for short-term storage.

1981 in Case 1251/79 *Italian Republic* v *Commission*, cited above, in which the Court dismissed an application by the Italian Government for a declaration that the refusal of the Commission to clear expenses submitted by the Italian intervention agency in respect of aid for private storage of table wine for the financial year 1973 was void.

The Court held that the contract did not become perfect until the preparation of the written instrument, after verification of all the relevant information by the intervention agency, [1] and I do not hesitate to accept that analysis.

2. It follows that the grant of aid for the re-storage of table wine is also dependent on the existence of a valid storage contract, that is to say, one drawn up at the time of the re-storage.

The same applies to aid payable under Regulation (EEC) No 1748/71 of the Commission of 9 August 1971, Regulation (EEC) No 1718/72 of the Commission of 8 August 1972 and Regulation (EEC) No 2083/74 of the Commission of 7 August 1974, which all require the existence of a contract which must, of course, be valid.

With regard to the long-term contracts in the year 1971/72 and the long-term and short-term contracts for the years 1973/74 and 1974/75 that requirement has not been fulfilled in Italy.

IV — Storage of dried pigmeat or dried and smoked pigmeat

The Commission has refused to recognize as chargeable a sum of LIT 78 596 145 concerning the grant of aid for the products mentioned above for the year 1975.

Article 7 of Regulation No 121/67/EEC of the Council of 13 June 1967 on the common organization of the market in pigmeat (Official Journal, English Special Edition 1967, p. 46) provides that aid may be granted for private storage. The detailed rules for granting such aid are laid down in Regulation (EEC) No 289/71 of the Commission of 10 February 1971 (Official Journal, English Special Edition 1971 (I), p. 60). [2]

The regulation provides that the aid may be granted only for products derived from animals recently slaughtered and stored

"in the form of dried and smoked hams the preparation of which requires a maturing period of at least five months before consumption . . .",

subject to the rule that

"storage shall commence on the first day of the sixth month following the commencement of drying or drying and smoking"

and that

"the quantity of the product must be shown in the contract both as a number of items and by weight. The weight of the finished product may not be less than 70 % of the weight of the fresh product as ascertained before drying or drying and smoking." [3]

The Italian intervention agency considered the "commencement of drying" to be the date of the certificate of weight given on the arrival at the drying establishment of the *first* consignment of the fresh product which is the subject of each storage contract and therefore considered the "commencement of the *period* of the storage" to be a date five months and one day after that initial date.

The Commission staff, however, considered that the minimum drying period must be observed for the *whole* quantity of meat under the contract, and

1 — Case 1251/79 *Italian Republic* v *Commission of the European Communities* cited above, paragraph 13 of the judgment.

2 — Article 2 (2) of Commission Regulation No 289/71, as amended by Regulation (EEC) No 2600/74 of the Commission of 11 October 1974 (Official Journal 1974, L 277, p. 34).

3 — Article 3 (4) of the same regulation, as amended by Article 2 of Regulation (EEC) No 2600/74.

not for *part* of that quantity alone. The storage period could not therefore begin to run until five months had elapsed since the date on which the *last* consignment was put into storage.

In support of its view the Italian Government refers to a working document of the Commission, although that is dated 1 April 1982, that is, after the material date. The document seems, however, to deal with the different problem of determining which rules are to apply in relation to time-limits, dates and periods.

The Commission produced a telex message of 14 October 1975 replying to a telex message sent by the Italian authorities on 26 September 1975, but it does not appear to be concerned with the requirements of maturing.

In any case the storage contract must indicate the quantity and weight of the consignments stored and must precede the actual putting into storage.

In fact, "the storage period ... begin[s] on the day on which storing is completed." [1]

It should not be forgotten that storage aid was intended to offset the costs arising from the withdrawal from the market of products which had already undergone maturing for the minimum prescribed. The Italian Government's view would lead to subsidies being paid for the withdrawal of the product from the market for the period during which it was maturing; in fact the costs arising from the withdrawal of the product during that period are offset by the increase in the value of the product resulting therefrom.

Article 2 (2) of Regulation No 289/71 does not therefore merely identify the products in storage, but lays down the condition for the commencement of the storage period.

Furthermore, the documents in the file do not show evidence of any formal approval by the Commission of the methods adopted by the Italian intervention agency.

In the Court's judgment of 27 January 1981 (cited above), the Court defined the circumstances in which the Commission is to recognize as chargeable to the Fund expenses incurred by virtue of a mistaken interpretation of Community law.

In the present case the implied consent alleged to have been given is insufficient to warrant the Fund's bearing the consequences of an improper practice.

Finally, the Italian Government considers that all the expenses rejected by the Commission were incurred in respect of transactions which did not compromise the objectives of the common agricultural policy even if the rules for granting Community assistance were misinterpreted.

In my opinion, however, Community financing given in pursuit of such objectives requires strict adherence to the rules.

Some say that the common agricultural policy already makes excessive demands on the European tax-payer. Unfortunately, major irregularities and frauds have occurred in various Member States which have had a detrimental effect on Community finance in certain sectors.

1 — Second paragraph of Article 3 of Regulation (EEC) No 1637/74 of the Commission of 27 June 1974 on special conditions for granting private storage aid for pigmeat (Official Journal 1974, L 173, p. 62).

The only guarantee against this lies in strict adherence to the Community rules.

Furthermore, the Court stated quite clearly in its judgment of 7 February 1979 in Case 11/76 *(Government of the Kingdom of the Netherlands* v *Commission of the European Communities* [1979] ECR 245) that:

"... the management of the Common Agricultural Policy in conditions of equality between traders in the Member States requires that the national authorities of a Member State should 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".

and added that:

"If such distortion of competition between Member States arises despite the means available to ensure the uniform application of Community law throughout the Community it cannot be financed by the EAGGF but must, in any event, be borne by the Member State concerned." [1]

I need only repeat the following dictum of the Court:

"As Community law now stands the procedure for the discharge of the accounts, on the other hand, serves to determine not only that the expenditure was actually and properly incurred but also that the financial burden of the common agricultural policy is correctly apportioned between the Member States and the Community and in this respect the Commission has no discretionary power to derogate from the rules regulating the allocation of expenses." [2]

In view of the above considerations my conclusions are:

1. That applications Nos 61 and 62/82 should be rejected; and

2. That the Italian Republic should be ordered to pay the costs.

1 — Paragraph 9 of the judgment, at p. 279.

2 — Judgment of 7 February 1979 in Joined Cases 15 and 16/76 *French Government* v *Commission of the European Communities* [1979] ECR 321, paragraph 28 of the judgment, at pp. 339 and 340.