of the common agricultural policy, it is the responsibility of the Member States, in accordance with national provisions laid down by law, regulation or administrative action, to take the measures necessary *inter alia* to satisfy themselves that the transactions financed by the Fund are actually carried out and are executed correctly, the Commission exercising only a supplementary function.

Under the system of supervision provided for by Article 9 of that regulation, if the taking and analysis of samples prove necessary, those operations must be carried out not by the Commission but by the Member States, either on their own initiative by virtue of the supervisory duties attributed to them by Article 8(1) or at the request of the Commission pursuant to the third subparagraph of Article 9(2).

By adopting Internal instructions 88/C 264/03, conferring on its officials the power to take samples independently of the Member States and laying down detailed rules to be followed by those officials, the Commission did not confine itself to making the provisions in force more explicit; although it had no power to do so, it purported to add to those provisions. Accordingly, the said instructions must be annulled.

REPORT FOR THE HEARING
in Case C-366/88 *

I — Facts and procedure

1. *Legislative background*

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) provides for a system of direct Community financing of refunds for exports to non-member countries and for intervention designed to regularize the agricultural markets through the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF). It is stated in the eighth recital in the preamble to that regulation that Community expenditure is to be subject to close supervision.

Pursuant to Article 9(1) of the regulation, Member States are to make available to the Commission all information required for the proper working of the Fund and to take all suitable measures to facilitate the supervision which the Commission may consider it necessary to undertake within the framework of the management of

* Language of the case: French.

Community financing, including inspections on the spot.

According to Article 9(2), officials appointed by the Commission to carry out inspections on the spot are to have access to the books and all other documents relating to expenditure financed by the Fund; they may in particular check:

(a) whether administrative practices are in accordance with the Community rules;

(b) whether the requisite supporting documents exist and tally with the transactions financed by the Fund;

(c) the conditions under which transactions financed by the fund are carried out and checked.

Before the inspection is carried out, the Commission gives due notice to the Member State concerned or to the Member State on whose territory it is to take place. Officials of the Member State concerned may take part in the inspection.

At the request of the Commission and with the agreement of the Member State, inspections or inquiries concerning the transactions referred to in the regulation are to be carried out by the competent authorities of the Member State. Officials of the Commission may also participate.

Under Article 9(3), the Council, acting by a qualified majority on a proposal from the Commission, is, as far as necessary, to lay down general rules for the application of Article 9.

An interdepartmental working party set up by the Commission on 7 January 1987 laid down internal instructions concerning certain administrative and technical procedures to be followed by officials given powers by the Commission concerning sampling and analysis of products for the purpose of the management and control of the EAGGF ('the Internal instructions'), of which the Commission informed the EAGGF Committee on 15 September 1988. They were published in the Official Journal of 11 October 1988 (C 264, p. 3).

The preamble to the Internal instructions refers to the abovementioned Regulation No 729/70, in particular Article 9 thereof. It explains that the taking and analysis of samples of products have become ever more frequently necessary for the purposes of EAGGF supervision and that, therefore, it is necessary to lay down certain administrative and technical procedures to be followed when checks are being carried out by Commission officials.

On 29 January 1988, the Commission submitted a proposal for a Council regulation (COM(87) 694 final) laying down general rules on controls in the wine sector (Official Journal 1988 C 24, p. 8). The proposal is based on Article 79(2) of Council Regulation (EEC) No 822/87 of 16 March 1987 on the common organization of the market in wine (Official Journal 1987 L 84, p. 1). Its purpose is to lay down rules designed to improve control procedures in the wine industry. It sets up a Community structure enabling specific officials of the Commission to intervene in that sector and lays down rules governing the cooperation of such officials with national supervisory authorities. Article 1(2) of the proposal provides that the regulation is not to affect the application in the Member States of rules relating to Community verification of expenditure. The proposal led to the

adoption of Council Regulation (EEC) No 2048/89 of 19 June 1989 laying down general rules on controls in the wine sector (Official Journal 1989 L 202, p. 32).

2. *Background to the dispute*

In April and July 1987, the Commission requested the French authorities, under Regulation No 729/70, to send to it samples of wine taken by French officials. The French authorities informed the Commission of the results of the analyses of the samples, without sending the samples themselves.

In response to that refusal, the Commission initiated the procedure provided for by Article 169 of the EEC Treaty against the French Republic. In the meantime, the French Republic has brought an action under Articles 173 and 174 of the Treaty for the annulment of the Internal instructions.

3. *Procedure*

The French Government's application was received at the Court Registry on 16 December 1988.

The written procedure followed the normal course.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

However, the Court asked the French Government to reply in writing to a question put to it and asked the Commission to produce a document.

II — Conclusions of the parties

The *French Government*, the applicant, claims that the Court should:

(i) annul the Internal instructions (document 88/C 264/03) concerning certain administrative and technical procedures to be followed by officials given powers by the Commission concerning sampling and analysis of products for the purposes of the management and control of the European Agricultural Guidance and Guarantee Fund;

(ii) order the defendant to pay the costs.

The *Commission*, the defendant, contends that the Court should:

(i) dismiss the application;

(ii) order the applicant to pay the costs.

III — Submissions and arguments of the parties

Admissibility

In its defence, the *Commission* raises an objection of inadmissibility. It considers that the Internal instructions are not a measure against which an action can be brought under Article 173 of the EEC Treaty.

It refers to previous decisions of the Court, in particular the judgment in Case 60/81 *IBM* v *Commission* [1981] ECR 2639. According to the Commission the Internal instructions are purely internal and do not have any legal or financial repercussions for economic agents or Member States. Under the Internal instructions, the expenditure incurred in taking samples is to be borne by the Commission, the quantities taken are limited to what is strictly necessary for the check and unused samples are returned to the owner.

Moreover, the Commission points out that, in Case 114/86 *United Kingdom* v *Commission* [1988] ECR 5289, the Court took the view that purely internal, preparatory instructions could not be the subject of an action under Article 173 of the EEC Treaty.

The *French Government* contests the objection of inadmissibility. It rejects the comparison of the Internal instructions at issue in this case with those referred to in Case 114/86, cited above. It is necessary, in its view, to refer to the nature of the measure concerned.

The French Government observes that, in this case, the Internal instructions add general implementing rules to those in Article 9 of Regulation No 729/70. According to the preamble to them, the Internal instructions constitute investigation procedures supplementing those already provided for in Article 9 of Regulation No 729/70; they thus impose fresh constraints on the administrations of the Member States and on the economic agents concerned. Thus, the Member States are obliged to give technical assistance for the taking of samples by Community officials. Moreover, the Internal instructions make it necessary to amend the French legislation on the granting of powers to officials of French administrative authorities and on the obligations of economic agents.

The substance

1. *The Commission's lack of powers*

The *French Government* maintains in the first place that, in adopting the Internal instructions, the Commission exceeded its powers under Regulation No 729/70 and Article 43 of the Treaty. The 'information' to be made available to the Commission by the Member States under Article 9(1) of Regulation No 729/70 does not include the taking and analysis of samples.

Moreover, Article 9(2) limits the scope of the checks to be carried out by the officials appointed by the Commission to documentary and book-keeping checks. The taking and analysis of samples, on the other hand, are physical operations not included within such checks. Accordingly, the purpose of the Internal instructions is to lay down new general rules; however, such rules should be laid down by a Council regulation, by virtue of Article 9(3) of Regulation No 729/70 or indeed Article 43 of the EEC Treaty.

The *Commission* rejects the restrictive interpretation of Article 9 of Regulation No 729/70 put forward by the French Government. The effect of such an interpretation would be to prevent the Commission from discovering cases of fraud. The very terms of Article 9, which are very broad, indicate that the officials appointed by the Commission are not required to confine their action to documentary and book-keeping checks. The inspections on the spot referred to in Article 9(2)(c) relate to the conditions under which the transactions financed by the EAGGF are carried out; they must therefore include the taking and analysis of samples. The Commission refers in that connection to the judgment in Case 214/86 *Hellenic Republic* v *Commission* [1989] ECR 367.

The Commission repeats its view that the internal instructions do not create any additional legal or financial responsibility for economic agents or the Member States by comparison with the existing provisions concerning EAGGF financing. Consequently, the Internal instructions cannot be classified as 'general rules for the application' of Article 9 of Regulation No 729/70, within the meaning of Article 9(3).

2. *Misuse of powers*

The *French Government* also claims that the Commission's action regarding the taking and analysis of samples represents a misuse of powers.

It refers to the proposal for a regulation on controls in the wine sector. During the negotiations on that proposal within the Council, difficulties arose concerning the very question of the powers concerning the taking of samples. In view of those difficulties, the Commission announced that the Internal instructions would be definitive and would be published in the Official Journal; it thus arrogated to itself a power which it did not have, by switching from difficult negotiations within the Council in the specific sector of wine products to a unilateral attribution of wide decision-making powers to Commission officials extending to all the sectors covered by a common organization of the markets.

The *Commission* draws attention to the differing intentions underlying the Internal instructions and the abovementioned proposal. The purpose of the proposal was to establish controls in a certain sector which went far beyond the financial aspect. On the other hand, whilst the Internal instructions extend to all agricultural products within a common market organization, they relate only to financial matters. The Commission also points out that the two measures have different legal bases. It refers to Article 1(2) of the proposal which (in its original version) provides that:

'This regulation shall not affect the application in the Member States of rules relating to:

...

...

Community verification of expenditure'.

The present version of that provision is to the effect that the regulation is not to affect Community verifications under Article 9 of Regulation No 729/70 (Article 1(2) of Regulation No 2048/89).

IV — Reply to the question put by the Court

The Court invited the French Government to explain in greater detail the legal or financial consequences for economic agents or the Member States which are additional to those deriving from Regulation (EEC) No 729/70. The French Government replied as follows.

In purely logical terms, the application of the instructions at issue should have no consequences at all since, being internal Commission measures, they should not be enforceable against the Member States or economic agents. However, the Internal instructions were published in the Official Journal and the manner in which they are formulated implies legal and financial consequences for the Member States and economic agents which did not previously apply, in so far as the instructions go further than mere interpretation and purport to introduce new rules of Community law. The Internal instructions constitute new practice regarding the controls to be carried out under Article 9 of Regulation No 729/70. The interpretation of that article previously adopted by the Member States and the Commission was limited to the carrying out of inspections on the spot, without any taking of samples.

Legal consequences

The Internal instructions thus require the Member States to introduce into national law an obligation whereby economic agents must agree to Community sampling carried out by Commission officials. Moreover, the Member State concerned must assist in the taking of such samples.

Economic agents have to agree to Community sampling. The Internal instructions may, furthermore, entail consequences for them concerning the secrecy of production processes. Commission officials are even empowered to request information from economic agents concerning production methods and ingredients (paragraph 8 of the Internal instructions).

Financial consequences

For the Member States, additional costs may result from the provision of assistance by national inspectors for the taking of samples by Commission officials. Court proceedings brought by economic agents concerning practices not conforming to national law concerning fraud prevention may also have financial consequences.

For economic agents, the third paragraph of point 2 of the Internal instructions may entail additional costs. It provides that 'the transport and handling of goods on the premises where samples are taken and unpacking and repacking operations shall be carried out under the responsibility of the

owner of the goods or his representative'. The French Government concludes from this that the costs of the handling of, and any damage to, the products inspected will be borne by the economic agents concerned. Moreover, the second paragraph of point 7 of the Internal instructions excludes any compensation for loss of all or part of the value of samples because of the analyses carried out.

P. J. G. Kapteyn
Judge-Rapporteur