and supervising food-aid operations decided on by the Commission, can be held liable to the undertaking to which it has, by contract, delegated the actual implementation of the operations for any damage suffered by the latter in the course of carrying out that food-aid operation, even though the financial burden of the food-aid operation must ultimately be borne by the Community.

In Case 109/83

REFERENCE to the Court under Article 177 of the EEC Treaty by the First Civil Division of the Tribunale di Milano (District Court, Milan) for a preliminary ruling in the action pending before that court between

EURICO SRL,

plaintiff,

and

COMMISSION OF THE EUROPEAN COMMUNITIES,

defendant,

on the interpretation of the Community provisions regarding food aid, for the purpose of defining the relationship between the Community, the national intervention agencies and traders when an operation forming part of the Community food-aid programme is carried out,

THE COURT (Fifth Chamber)

composed of: O. Due, President of Chamber, C. Kakouris, U. Everling, Y. Galmot and R. Joliet, Judges,

Advocate General: C. O. Lenz
Registrar: H. A. Rühl, Principal Administrator

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

1. Facts

On 25 March 1976 the Council of the European Communities declared that it proposed, by way of Community action, to grant 3 750 tonnes of rice to the Republic of Niger under its 1975/76 food-aid programme.

By Decision 76/648/EEC of 10 September 1976 (Official Journal 1976, L 259, p. 22) addressed to the Italian Republic, the Commission decided in accordance with Article 1 of Council Regulation (EEC) No 696/76 of 25 March 1976 that the Ente Nazionale Risi [hereinafter referred to as "the ENR"], the Italian intervention agency responsible in particular for carrying out and supervising operations relating to food aid, would conclude a private contract for the purchase on the Community market of 3 750 tonnes of rice; the contract was to be for the purchase and supply of products delivered to a specified destination.

Eurico, Società a Responsabilità Limitata [hereinafter referred to as "Eurico"] was chosen by the ENR as the other contracting party.

The contract was performed but the quality of the product supplied was criticized by the authorities in the country of destination.

The ENR initially suspended payment of the invoice issued to it by Eurico and then made only a payment on account of LIT 1 500 000 000; the total amount of the invoice was LIT 1 770 000 000.

2. The proceedings before the Italian courts

(a) On 23 December 1977, Eurico summoned the ENR to appear before the Tribunale di Milano, seeking an order that that agency should pay it the sum of LIT 270 000 000 plus compensation for monetary depreciation and interest.

By judgment of 19 June 1980 the Tribunale di Milano dismissed the plaintiff's claim on the ground that the ENR was not a proper defendant since it had acted as representative of the Commission and that that legal relationship was apparent in particular from the fact that the Commission had been involved in the performance of the contract at every stage by giving instructions and orders to the ENR to adopt or refrain from adopting certain measures.

The court then excluded the ENR from the proceedings, considering that the action by Eurico "should have been brought directly against the Commission of the EEC".

Eurico appealed against that judgment to the Corte d'Appello [Court of Appeal], Milan, but in the meantime summoned the Commission to appear before the Tribunale di Milano.

(b) The proceedings instituted by Eurico against the Commission before the Tribunale di Milano

By a summons served on 1 November 1981, Eurico brought an action against the Commission before the Tribunale di Milano for an order that it should pay the plaintiff the sum of LIT 283 000 000 plus interest and a sum in respect of monetary depreciation.

In those proceedings the Commission immediately objected that the case could not be proceeded with since it was not a proper defendant and it contended that the view expressed by the Tribunale di Milano in its aforementioned judgment of 19 June 1980 was unacceptable. It also contested the substance of the claim.

For its part, Eurico maintained that the ENR had acted as an agent representing the Commission and that the negotiations undertaken by that intervention agency were attributable directly to the Commission.

The Tribunale di Milano considered that it had jurisdiction by virtue of the first paragraph of Article 215 of the EEC Treaty in conjunction with Article 183 thereof, taking the view on the one hand that the contractual liability of the Community was involved in this case and, on the other, that the contract in question had, by virtue of Article 4 of the Italian Code of Civil Procedure, been concluded in Italy.

The court considered, however, that it should establish whether or not, upon concluding the contract for the purchase of rice intended for the Republic of the Niger, the ENR acted as a duly authorized agent of the Commission, and expressed doubts as to the answer to that question.

3. The question submitted for a preliminary ruling

The Tribunale di Milano did not adopt the wording suggested by the Commission for the reference for a preliminary ruling, which was as follows:

Must the Community rules regarding food aid be interpreted as meaning that in the event of a dispute with the successful tenderer only the Member States and the agencies designated by them are proper defendants in proceedings instituted before the national courts to the exclusion of the Commission or any other Community institution?

Instead, by order of 24 March 1983 which was received at the Court Registry on 14 June 1983, the First Civil Division of the Tribunale di Milano asked the Court to reply to the following question:

"Was the Ente Nazionale Risi, the Italian intervention agency, expressly or by implication vested with specific authority to act in the name of the EEC ['mandato con rappresentanza'] for the purpose of concluding the private contract for the purchase of 3 750 metric tonnes of husked long-grain rice intended for the Republic of Niger by virtue of the Commission decision of 10 December 1976 (Official Journal of the European Communities of 23. 9. 1976) and the legislative measures referred to therein?"

Pursuant to Article 20 of the Statute of the Court of Justice of the European Communities, written observations were submitted by Eurico, represented by Giordano Rao Torres, and by the Commission of the European Communities, represented by its Legal Adviser, Gianluigi Campogrande, acting as Agent, assisted by Giovanni Maria Ubertazzi and Fausto Capelli, of the

Milan Bar, with an address for service in Luxembourg at the office of Oreste Montalto, a member of the Legal Department of the Commission, Jean Monnet Building, Kirchberg.

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 decided to invite the Commission to reply to the following questions before the oral procedure:

(a) The legal basis of the food-aid policy

1. The Commission is invited to produce a complete list of the regulations on the food-aid policy adopted since the conclusion of the Wheat Agreement and the 1981 Food-Aid Convention.

2. Does the Commission consider that at the present time the food-aid policy:

   Merely constitutes a facet of the common agricultural policy;

   Is more closely associated with the common commercial policy; or

   Represents a new common policy closely linked with the Community policy of cooperation with developing countries?

3. Would the answer to the previous question have been different under the law as in force on 10 September 1976, the date of the decision giving rise to the main proceedings? If so, give details of the changes which have occurred.

(b) Details of the management of the food-aid policy

4. *As regards aid with respect to cereals,* in the event of urgent need or non-availability on the Community market, how were those products obtained at the time of the material events?

   Did the Commission enter into a contract directly for that purpose and, if so, did the contract contain a clause attributing jurisdiction?

   Did the Commission approach the national intervention agencies?

   Did the Commission have recourse in general or occasionally to agents acting on its behalf?

   If so, the Commission is invited to produce a number of relevant decisions in that connection.

5. If the management of the food-aid policy differs according to the products concerned (cereals, milk products, sugar, vegetable oils and other products), what is the basis of and justification for such differentiation?

(c) The detailed rules for concluding and performing the contract the subject of the main proceedings

6. The Commission is invited to produce all the correspondence and telex messages sent by it to the Italian Republic or to the Ente Nazionale Risi at every stage of the contract-conclusion, performance and payment.

7. Does the Commission agree with the description of the facts contained in the letter dated 12 May 1977 from the ENR to Eurico? (Annex 101 to Eurico's observations).

8. The Commission is invited to give details of how financing was arranged for the operation and to indicate in particular, in so far as Community credits were used for that operation, whether the payee was the Italian Republic or the Ente Nazionale Risi.

The Court also invited the Government of the Italian Republic to produce the Italian legislation governing the ENR and Eurico was invited to produce the contract for the supply of rice concluded between it and the ENR, following Commission Decision 76/748 of 10 September 1976.

II — The Community regulations regarding food aid, as described by the Commission

The dispute to be dealt with by the court making the reference relates to the performance of a contract concluded within the framework of the Community food-aid programme.

The legal basis of that programme is, first, Regulation No 2681/74 of the Council of 21 October 1974 on Community financing of expenditure incurred in respect of the supply of agricultural products as food aid (Official Journal 1974, L 288, p. 1) and, secondly, Regulation No 2750/75 of the Council of 20 October 1975 fixing criteria for the mobilization of cereals intended as food aid (Official Journal 1975, L 281, p. 89).

Article 3 of Regulation No 2681/74 lays down in the first place the rules and conditions regarding the payments made by the Member States through the bodies designated by them for the carrying out of Community operations for the supply of agricultural products as food aid; in the second place it lays down the procedures to be followed by the Commission in granting the appropriate advances to the Member States in order to cover their expenses in that connection and in auditing the accounts for those operations in compliance with the provisions of Regulation No 729/70 on the financing of the common agricultural policy.

Commission Regulation No 249/77 of 2 February 1977 (Official Journal 1977, L 34, p. 21) laid down detailed rules for the application of that regulation.

The second recital in the preamble to Regulation No 2750/75 states that "disturbance of the market in cereals caused by withdrawals of cereals intended as food aid should be avoided";

Article 3 indicates the priorities to be observed by the intervention agencies in purchasing cereals intended for food aid.

Article 4 provides that the buying-in of cereals for the purpose of food aid is to be carried out by the intervention agencies by inviting tenders.

However, Article 1 of Council Regulation No 696/76 of 25 March 1976 (Official Journal 1976, L 83, p. 8) derogates from that provision by providing that it is possible in exceptional

cases to resort to a procedure other than a tendering procedure for the supply and delivery of products as food aid.

The Commission decision of 10 September 1976 relating to the urgent supply of husked long-grain rice as food aid to the Republic of Niger authorized recourse to that derogation.

Finally, Article 7 (4) of the regulation provides that "As soon as the principle of an emergency Community action has been adopted, the Commission shall decide which Member State or States shall be responsible for carrying out the action, fix the date thereof, determine the place where the products must be made available within the Community or within the recipient country, as appropriate, and finally determine any other elements necessary for carrying out this action".

Thus, Article 6 of the aforementioned Commission Decision of 10 December 1976 states that "This Decision is addressed to the Italian Republic" and Articles 1 to 5 thereof lay down the specific rules for that Community aid action to be carried into effect.

III — Written observations submitted to the Court

A — Observations of the plaintiff company in the main proceedings

1. It claims in the first place that it is clear that the Commission granted authority to the ENR to act as agent.

(a) The existence of an authority to act as agent appears clearly from the document submitted on 21 February 1978 by the ENR during the first action brought against it by Eurico before the Tribunale di Milano.

In that document, the ENR stated in particular that it was not in fact the other party to the contract with Eurico but merely the agent of the Commission, having confined itself to implementing scrupulously the instructions and decisions of the Commission, including those of a financial nature, since it is the Commission which makes the necessary means of payment available to it.

For that reason the ENR submitted that the action against it was brought against the wrong party and that the applicant ought to proceed against the Commission.

(b) The existence of such an authority to act as agent is apparent from the very wording of the Commission Decision of 10 September 1976.

(c) It is also confirmed by the Commission's conduct during the performance of the contract.

The plaintiff company in the main proceedings maintains that the Commission intended to be directly answerable for the effects of the contract, by denying the Italian intervention agency any scope for initiative and any responsibility:

By intervening directly by means of peremptory instructions, with respect both to the Niger authorities and to Eurico;

By sending its own supervisers to the place where the rice was unloaded in Niger, the intervention agency not being involved at all;

By deciding to suspend all payments to Eurico, despite several requests to the contrary by the ENR;

By subsequently authorizing a payment on account of the agreed price to Eurico;

By finally prohibiting the ENR, without further justification, from paying the balance due on the contract;

By rejecting the request submitted for that purpose by Eurico, and at the same time stating that the Commission would inform the ENR of what action might be taken regarding that request.

The plaintiff company in the main proceedings therefore infers that the Commission interfered unrestrictedly at every stage of the contract and thus intended to be directly responsible for all the effects of the contract entered into on its behalf by the ENR.

Thus, according to Eurico, since it was apparent that the ENR was a necessary opposing party, at least if its position as intermediary between the Commission and Eurico was taken into account, the Court making the reference wrongly believed that it could make the outcome of the dispute conditional upon the answer given to the question submitted for a preliminary ruling.

In fact, the reply given to that question is irrelevant to the main proceedings and the question thus submitted falls outside the jurisdiction of the Court since it presupposes that facts which, in the opinion of Eurico, it is for the Italian trial court to examine, have been established and considered.

(d) That analysis is confirmed by Commission Decision 76/748/EEC of 10 September 1976.

According to Eurico, the Tribunale di Milano rightly stated that Community food-aid action represents the performance of obligations which attach solely to the European Economic Community and that cooperation on the part of national intervention agencies is directly for the benefit of the EEC.

In fact there are no Community rules preventing the Commission from being represented by the intervention agency designated by it for the conclusion of particular contracts or, in any event, from granting direct authority to act as agent.

Moreover, as far as food aid is concerned, at least in the area of urgent Community action, no exclusive powers are reserved to the Member States.

Since Article 215 of the Treaty allows the Commission to accept contractual liability on the basis of the law applicable to the contract in question, there is no reason to deny that the Commission is a proper defendant in the proceedings brought by Eurico since it intended to confer direct authority upon the ENR to conclude the contract in question and it also decided to treat itself as the proper party to supervise the performance of the contract.

Finally, as regards the fact that Article 6 of the aforementioned Commission decision states that it is addressed to the Italian Republic, Eurico considers that provision to be necessary not for conferring upon others any standing under the contract concluded with third parties but merely to state by means of what machinery the price was to be paid.

In fact, on the basis of Regulations Nos 2681/74 and 249/77 cited above, the

sole object of Article 6 of the decision of 10 September 1976 was to make the Italian Republic responsible for actually financing the purchasing operation, whilst the Commission assumed direct and full responsibility for organization and supervision.

2. In the second place, the plaintiff company is of the opinion that there is no doubt that the Italian legal provisions on agency and representation are applicable.

(a) It considers that the decisions of the Court cited by the Commission, and in particular the judgment of 10 June 1982 (Case 217/81 *Interagra SA* v *Commission* [1982] ECR 2233) is not significant, because the Court was not dealing with a question relating to a contract entered into by an agent of the Commission, either with or without the authority to act in the name of its principal.

Moreover, by contrast with the other judgments cited by the Commission, the point of law raised in the present case concerns the effects of a contract decided upon by the Commission in an area falling within its powers and not within the powers reserved to the national bodies.

Fot those reasons, Eurico considers that the Court has not yet delivered a judgment of the point of law raised in the present proceedings.

(b) Eurico considers that it is clear that the principles of Italian law apply in this case and therefore that it is immaterial whether or not the ENR, upon entering into the contract, was empowered to represent the Commission.

It is clear that the Commission took direct responsibility for overseeing the performance of the contract entered into by its agent and considered itself empowered to take any action to ensure fulfilment of the obligations towards each other entered into by the intervention agency and Eurico.

Thus, even if it were admitted that the ENR was merely empowered to act as an agent, but not to act in the Commission's name, the Italian legal concept of ratification, by virtue of which conduct on the part of the Commission proving that it accepted the effects of contracts concluded on its behalf by the ENR would be decisive, must apply in any event.

For all those reasons, Eurico proposes that the question submitted by the national court should be answered as follows:

"Preliminarily:

1. The Court is unable to give any ruling on the question referred to it by the Tribunale di Milano because the answer would involve a finding and an assessment of fact which is the responsibility of the Italian trial court.

In reply to the question:

2. In any case, the decision of the Commission of the European Economic Community of 17 September 1976 involved the effective grant of authority to the Ente Nazionale Risi to act as agent of the European Economic Community for the purpose of concluding the contract for the purchase by private contract of 3 750 tonnes of husked long-grain intended for the Republic of the Niger.

In the alternative:

3. In this case, for the purpose of deciding who is a proper defendant and as to the resultant contractual liability, it is immaterial whether the authority conferred upon the Ente Nazionale Risi by the Commission of the EEC was an authority to act as representative of the Commission of the EEC."

B — The observations of the Commission

By way of preliminary, the Commission states on the one hand that it would have been preferable if the national court had submitted the question seeking a preliminary ruling from the Court in the terms which it had suggested and, on the other, that it is probably the exceptional nature of the food-aid action in question, based on an emergency procedure and thereby formally mentioning the Italian intervention agency, which explains the erroneous view of the court making the reference that there is a genuine agency contract between the Commission and the ENR.

In the Commission's opinion, consideration of the fundamental principles of the Community rules on agriculture (1) and a study of the attribution of liability under the Community rules on agriculture (2) lead, in the present case, to the adoption of a solution consonant with the principle of Community law whereby proceedings to establish liability may be brought before the Italian courts only against the Italian State and against its intervention agency, the ENR, acting on its behalf (3).

1. The fundamental principles of the Community rules on agriculture

The Community rules on agriculture are based on two fundamental principles: the creation of a single market within the Community area for the sectors covered by a common organization of the market and the attribution of exclusive legislative power to the Community institutions to govern the functioning of the market organizations.

Those exclusive legislative powers exclude any competing powers vested in the Member States and in fact it is provided in Article 43 (3) of the Treaty that the European market organization replaces the national market organization.

The decisions of the Court have confirmed the exclusive nature of those legislative powers (judgment of 18. 6. 1970 in Case 74/69 *Krohn* [1970] ECR 451: judgment of 18. 2. 1970 in Case 40/69 *Bollmann* [1970] ECR 69; judgment of 30. 1. 1974 in Case 159/73 *Hannoversche Zucker AG* [1974] ECR 121). However, it stated that the Member States retain powers to implement Community rules through their administrations and, in particular, their intervention agencies for the various agricultural sectors.

As a result of this attribution of powers, there is a corresponding attribution of liability as between the institutions and the Member States.

2. The attribution of liability under Community law

(a) The liability of the European Community

Liability may be incurred in connection with the exercise of the legislative function within the limits laid down in the judgment of 25 May 1978 in *HNL* v

Council and Commission (Joined Cases 83 and 94/76, 4, 15 and 40/77 [1978] ECR 1209). In the case of implementing measures, the liability of the Community may be incurred only in the rare cases where Community provisions attribute specific powers to the institutions, and the principle remains that the Community cannot incur liability at the stage of implementation of Community rules by the Member States.

(b) The liability of the Member States (and of their intervention agencies)

Since the Member States are empowered to implement Community rules on agriculture within their territory, liability arising from any consequences of the implementation of those Community rules by the intervention agencies attaches to the Member States since they appoint the intervention agencies and lay down the detailed provisions in accordance with which the agencies are to apply Community rules on agriculture.

That liability on the part of the Member States has moreover been recognized by the Court (judgment of 22. 1. 1976 in Case 60/75 *Russo* v *AIMA* [1976] ECR 45; judgment of 13. 2. 1979 in Case 101/78 *Granaria* [1979] ECR 623). The Commission considers that the solution adopted regarding extra-contractual liability must, *a fortiori*, be adopted in the case of contractual relations.

(c) The liability of the Italian State and of the ENR in this case

The Commission considers that there is a contractual relationship between Eurico and the Italian State (through the ENR) and that it is the latter's liability which is necessarily incurred following an infringement of the Community or national rules applicable in this case.

In its opinion, it is clear from an analysis of the general theory of agency, of Community law and of Italian law that when the Tribunale di Milano concluded in its judgment of 19 June 1980 that the ENR acted as an agent for the Commission it reached a wholly erroneous conclusion.

* The general theory of the agency contract

According to the Commission, an agency contract is, essentially, a form of cooperation between two parties governed by private law, the principal and the agent, based on a consensus. The agent takes the place of the principal in order to undertake action and operations which the latter can or could undertake himself.

The agency contract has also become established in the area of public law where a public authority entrusts to another the task of taking measures producing legal effects and undertaking operations which fall within the former's powers.

One of the characteristic features of the agency contract therefore lies in the fact that the principal is always empowered to take the measures whose execution he entrusts to the agent.

That is not the case in this instance since the Commission does not possess the powers which the ENR exercised in implementation of Decision 76/748 cited above, regard being had to the powers conferred upon it by the Italian Republic.

Furthermore, in both private and public law, the agency contract implies a direct relationship between the principal and the agent, with a view to achieving

a certain kind of cooperation. In this case, such a relationship between the Commission and the ENR is wholly absent.

That lack of a direct relationship is confirmed by an examination of Community law and of Italian law.

* Community law

The Commission points out that Article 6 of Decision 76/748 provides expressly that it is addressed to the Italian Republic. That fact is particularly significant because, by its nature, a decision could be addressed not only to the Member States but also to any other person or entity, even one governed by private law.

Thus, the Commission could have used the instrument of a decision in order to address the ENR directly rather than the Italian State. Instead of doing so, it imposed an obligation only on Italy and in those circumstances such a decision creates no direct relationship between the Commission and the intervention agency.

According to the Commission, even though Decision 76/784 indicates that the obligations are incumbent upon the ENR, that is only for technical reasons.

The absence of a direct relationship and, *a fortiori*, of a relationship of principal and agent is also clearly to be inferred from the fact that the Commission is unable to compel the ENR directly to observe the relevant provisions.

The Court so held in its judgment of 27 March 1980 (Case 133/79 *Sucrimex SA* ECR 1299) and in its judgment of 10 June 1982 (Case 217/81 *Interagra*, cited above).

* Italian law

The Commission points out in the first place that by virtue of the legislation conferring upon the ENR the capacity of intervention agency (Ministerial Order of 22. 10. 1964 and Ministerial Order of 27. 10. 1967), the ENR has the task of acting as an intervention agency on behalf, in the interests and under the control of the State for the purpose of fulfilling the obligations laid down in Regulation No 359/67 of the Council of 25 July 1967. In those circumstances, the ENR can discharge no duties other than those of agent of the Italian Ministry of Agriculture and cannot act as agent of the Commission. The Commission cannot have the role of principal since it is not itself in a position to discharge, on Italian territory, the functions discharged by the ENR as appointee of the Italian Government.

In the second place, it is pointed out that the Commission cannot be regarded as the ENR's principal because under Italian law the principal is empowered to give the agent precise instructions which the latter must follow scrupulously (last paragraph of Article 1711 of the Civil Code).

That is not the case in this instance.

In the third place, and contrary to Article 1723 of the Italian Civil Code, by virtue of which the principal may, as a general rule, revoke the authority granted to the agent, no such revocation is possible in this case since the Commission would not have been able to revoke the instructions given by the Italian State to the ENR.

In the fourth place, contrary to the provisions of Article 1726 of the Italian Civil Code, whereby an agent may repudiate the agency contract, repudiation of that kind would be meaningless in this case: a notice of repudiation sent by the ENR to the Commission would

be ineffective since the ENR has obligations only towards the Italian Republic.

In the fifth place, whilst Article 1719 of the Italian Civil Code makes it incumbent upon the principal to provide the agent with the necessary means for carrying out his task, the Commission, by virtue of Article 3 (2) of Regulation No 2681/74 cited above, grants the credits necessary for financing the food aid direct to the Member States concerned, and those Member States must provide for the needs of their intervention agencies in accordance with the national provisions.

From all the foregoing, the Commission infers that the relationship existing between it and the ENR is not classifiable as one of agency but falls within the sphere of the allocation of responsibilities as between the Community institutions and the Member States.

In the same way, the regulations on the common organization of the markets not only lay down rules creating rights and obligations for the Member States and their nationals but also contain provisions regarding organization and provisions defining the powers of the bodies in question.

3. Resolution of the present case in accordance with the principles of Community law

(a) The incurring of liability by the State under national law

The Commission is of the opinion that in the present case proceedings under Italian law to establish liability may be brought before the Italian courts only against the Italian State and against its intervention agency acting on its behalf.

If any doubts were to arise as to the interpretation of the applicable Community provisions they could be interpreted by the Court in response to a reference for a preliminary ruling under Article 177 of the Treaty.

It is for the national court to determine any liability in legal proceedings between on the one hand persons governed by private law (Eurico) and, on the other, the Member States and their internal agencies (the Italian Republic and the ENR) acting pursuant to an explicit delegation of powers.

This view is indirectly confirmed in the decisions of the Court and in particular the judgments of 4 April 1974 *(Belgian State and Grand Duchy of Luxembourg* v *Mertens and Others,* Joined Cases 178, 179 and 180/73 [1974] ECR 383), 13 June 1972 (Joined Cases 9 and 11/72 *Grands Moulins* v *Commission* [1972] ECR 391), 5 May 1977 (Case 110/76 *Pretore di Cento* v *A person or persons unknown* [1977] ECR 851) and 27 March 1980 (Case 133/79 *Sucrimex* v *Commission,* cited above).

By analogy with those various cases which the Court has considered, the Commission takes the view that in this case the only person who is a proper defendant is the ENR in its capacity of intervention agency designated by the Italian State.

(b) Relations between the Member State (ENR) and the European Community (Commission)

The Commission points out that even if the liability of a Member State is established before its own courts, the Member State does not necessarily have to bear the consequences thereof.

A Member State may in fact plead that it has no liability towards the Community

when the Community accounts are cleared, that is to say at the time of the annual audit of the balance of accounts between the Member States and the Community, in the context of the obligations incumbent upon the Member States under Community agricultural law.

That is the system provided for in Community law for settling, at the pre-contentious stage, any differences of opinion between the Member States and the Community.

In the absence of agreement, recourse may be had to proceedings before the Court of Justice to determine who is to bear the consequences of the incorrect application of Community agricultural law.

By virtue of numerous decisions of the Court and in particular the judgment of 14 January 1981 (Case 819/79 *Federal Republic of Germany* v *Commission* [1981] ECR 21), expenses incurred by Member States in connection with management of the agricultural markets pursuant to the Community provisions cannot be charged to the Community (in that case the European Agricultural Guidance and Guarantee Fund) unless the management operations have been carried out in accordance with the Community provisions applicable to them.

In conclusion, the Commission considers that the proceedings commenced by Eurico indicate confusion between powers relating to the implementation of a food-aid operation and jurisdiction in legal proceedings. In fact, the Tribunale di Milano has before it a problem concerned with the financial liability of the Community which in reality falls within the exclusive jurisdiction of the Court of Justice, once the specific procedure prescribed for that purpose is completed, that is to say the clearance of accounts between the Community and the Member State concerned.

For all those reasons, the Commission proposes that the Court should state in reply to the court making the reference that there is no relationship of principal and agent between the Commission and the Ente Nazionale Risi.

IV — Replies to the questions put by the Court

(1) The Commission gave the following answers to the various questions put to it by the Court.

(a) The legal basis of the food-aid policy

1. The Commission produced a list, broken down according to product, of the 1537 regulations on the food-aid policy adopted since 1971.

2. The present basis of the food-aid policy

The Commission considers that it is apparent from the very terms of Council Regulation No 3331/82 of 3 December 1982 (Official Journal 1982, L 352, p. 1) that the food-aid policy cannot today be regarded as a branch of the common agricultural policy.

Similarly, in the Commission's view, it is also quite clear that the food-aid policy cannot be regarded as being associated with the common commercial policy; the only connection between those two Community policies lies in the fact that the Community's accession to the 1980 Food-Aid Convention was decided upon by the Council pursuant to Article 113 of the EEC Treaty.

According to the Commission, it is quite clear from the foregoing that the food-aid policy now represents a new common policy closely linked with the

Community policy of cooperation with developing countries.

3. However, the Commission makes clear that the situation was very different when the decision giving rise to the present proceedings was adopted (10 September 1976).

Thus, in the 1970's, the link between Community food-aid policy and the common agricultural policy was much closer than it is today. This is apparent not only from the practice ordinarily followed by the Community but also from the very legal basis of the measures governing food aid. At that date, in fact, the most frequent and best structured food aid (relating in particular to cereals and milk products) was governed by the basic regulations concerning the common organization of the agricultural markets, whilst action relating to other products fell within the management committee procedure provided for in the various basic regulations. The Commission points out that whilst Article 113 of the Treaty was the sole basis adopted for the Community's accession to the 1971 Food-Aid Convention, the reason is that at that time it was erroneously considered that the legal basis of the external aspects of the common agricultural policy should be Article 113 rather than Article 43 of the Treaty.

(b) Details of the management of the food-aid policy

4. In reply to the question on the detailed provisions for mobilization of cereals for the purposes of food aid at the time of the material events, in the event of urgent need or non-availability on the Community market, the Commission stated that it did not have recourse to the world market until 1978 to find the necessary cereals for food-aid action.

The products were mobilized on the internal market, in accordance with the Commission regulations or decisions adopted in accordance with the management committee procedure for cereals and, in the case of decisions, were sent to the Member State which was to proceed with mobilization. In cases of urgent need, the supplier had to be chosen not by a tendering procedure but by the private contract procedure.

The Commission has thus never entered into a purchase contract directly and has never used agents acting on its behalf.

On the contrary, it has systematically observed the principle of the "separation of duties" whereby the political decision is the responsibility of the Community and management is the exclusive responsibility of the Member States acting through intervention agencies.

That legal interpretation, by virtue of which the only parties having dealings with traders and, in particular, with successful tenderers are the Member States and, on their behalf, the intervention agencies, necessarily follows from the regulations adopted by the Council and, particularly at the time of the material events, Regulations Nos 2052/69 of 17 October 1969 (Journal Officiel L 263, p. 3), 1703/72 of 3 August 1972 (Journal Officiel L 180, p. 1), 2681/74 of 21 October 1974 (Official Journal L 288, p. 1), on Community financing of expenditure incurred in respect of the supply of agricultural products as food aid.

The reason for such a legal interpretdation lies in the close correlation existing between the operations and expenditure of the European Agricultural Guidance and Guarantee Fund, Guarantee Section, and those in respect of food aid, for which it is unthinkable to establish a system of direct management by the Community, whose action would systematically interfere with the operations and accounting of the agricultural intervention agencies.

5. In reply to the question whether or not the management of the food-aid policy differs according to the products concerned, the Commission stated that the same indirect management system, that is to say one using the Member States as intermediary, has been adopted systematically from the very outset for aid in respect of milk products for which the legal justification is to be found in the basic regulations in that sector (Regulation No 1347/75 of the Council of 26. 5. 1975 (Official Journal L 138, p. 1) and Regulation No 1541/75 of the Council of 16. 6. 1975 (Official Journal L 157, p. 4)).

On the other hand, in the case of food-aid action involving the mobilization of other products, which occurs much less frequently in the Community, the basic Council regulations and the Commission implementing regulations went into less detail, but in broad outline observed the principle that management was entrusted to the Member States and the intervention agencies. It was only with regard to sugar that the Commission considered itself authorized to act directly when purchases had to be made on the world market because the Member States, and the intervention agencies acting on their behalf, were not in a position, from a technical point of view, to manage the aid.

(c) The detailed rules for concluding and performing the contract the subject of the main proceedings

6. The Commission produced all the documents requested of it.

7. The Commission agrees with the statement of facts contained in the letter of 12 May 1977 from the ENR to Eurico, as regards the part concerning the correspondence between the ENR and the Commission.

8. In reply to the question regarding the arrangements for financing of the operation, the Commission stated as follows:

The arrangement for financing the food-aid operation involved in the main proceedings were those provided for by the rules which were in force at the time of the material events and remain in force, subject to certain amendments of detail. In parallel with the requirements of the system established for the expenses of the EAGGF, Guarantee Section, the Italian Republic forwarded to the Commission before the 20th of each month a request for an advance to cover the financial needs of the departments and agencies authorized to pay for the operations. The Commission paid the monthly advances to the Italian Republic.

The Italian Republic then notified the Commission of the expenses incurred so that they could be the subject of an expenditure commitment and could be allocated to the appropriate budget headings, and it entered those expenses in the annual accounts intended for clearance by the Commission.

In accordance with the rules in force, the recipient of the Community funds could only be the Italian Republic, and the Commission complied with those rules.

(2) The Government of the Italian Republic and Eurico produced the documents requested by the Court.

V — Oral procedure

At the sitting on 15 May 1984, oral argument was presented by Eurico Srl, represented by G. Rao Torres, Avvocato, and by the Commission of the European Communities, represented by G. L. Campogrande and F. Capelli, acting as Agent.

Eurico submitted a number of ducuments at the hearing among which were three telex messages sent by the ENR to the Commission of the European Communities and submissions made to the Corte d'Appello [Court of Appeal], Milan on 5 May 1984 in relation to the appeal brought by Eurico against the judgment of the Tribunale di Milano of 19 June 1980.

The Commission, for its part, emphasized that the facts of the case were governed, in particular with regard to the criteria for mobilization, by Regulations Nos 2750/75 and 696/76 of the Council and, with regard to financing, by Regulation No 1732/72, which was replaced in February 1977 by Commission Regulation No 249/77 which consequently applied to the operations regarding financing at issue in the present case, which took place after February 1977.

An examination of all of those regulations confirmed that they established a framework and rules for the management of the food-aid policy which were absolutely identical to those laid down for intervention in the agricultural markets. It was the Member States, and for that reason, the intervention agencies, which had the power to act and to undertake obligations towards traders.

For that reason, to accept that there was a direct contractual relationship between Eurico and the Commission would constitute a distortion of that institutional and financial structure.

The Advocate General delivered his opinion at the sitting on 4 July 1984.

Decision

1 By order of 24 March 1983, which was received at the Court on 14 June 1983, the Tribunale di Milano [District Court, Milan] referred a question to the Court of Justice under Article 177 of the EEC Treaty for a preliminary ruling on the interpretation of the provisions of Community law regarding the Community's food-aid policy.

2 That question was raised in proceedings before the Tribunale di Milano, initially between Eurico srl and the Ente Nazionale Risi and later between Eurico srl and the Commission of the European Communities, in which the plaintiff company sought payment of the amount outstanding on a public contract which it had concluded with the Ente Nazionale Risi.

3 By Decision 76/748 of 10 September 1976 (Official Journal 1976, L 259, p. 22), addressed to the Italian Republic, the Commission decided that the Ente Nazionale Risi, an Italian intervention agency with particular responsibility for carrying out and supervising operations relating to food-aid [hereinafter referred to as "the ENR"], was to conclude a private contract for the purchase on the Community market of 3 750 tonnes of rice and for the supply of the product to the Republic of the Niger.

4 Eurico was chosen by the ENR as the other contracting party and performed that contract, but the quality of the product supplied was criticized by the authorities in the country of destination. For that reason, the ENR, in compliance with telex messages received from the Commission and after initially suspending payment of the invoice issued to it by Eurico, made only a payment on account of LIT 1 500 000 000, although the total amount of the invoice was LIT 1 770 000 000. The main proceedings relate to the recovery by Eurico of the outstanding amount of LIT 270 million.

5 For that purpose, in December 1977, Eurico sued the ENR before the Tribunale di Milano which, by judgment of 19 June 1980, dismissed the plaintiff's claim on the ground that the ENR was not a proper defendant since it had acted as a duly authorized representative of the Commission and that the action should have been brought directly against the Commission of the European Communities.

6 Eurico therefore brought an action against the Commission before the same court for an order that it should pay the sum of LIT 283 million together with interest and a sum in respect of monetary depreciation. The Commission raised the preliminary objection that it was not a proper defendant and it contended that both the argument accepted by the Tribunale in its first judgment, referred to above, and the application itself, were without foundation.

7 The Tribunale di Milano considered that it had jurisdiction by virtue of the first paragraph of Article 215 of the EEC Treaty in conjunction with Article 183 thereof and that it was entitled to establish whether or not the ENR had acted as a duly authorized agent of the Commission in connection with the food-aid operation at issue. In the national court's view, "the Commission and, therefore, pursuant to Article 211 of the Treaty, the European

Economic Community, are bound to fulfil their contractual obligations in the capacity of party to the contract only if that question is answered in the affirmative". In order to resolve its doubts as to the reply to be given to that question, it stayed the proceedings and submitted the following question to the Court of Justice for a preliminary ruling:

"Was the Ente Nazionale Risi, the Italian intervention agency, vested with specific authority to act in the name of the EEC ["mandato con rappresentanza"] for the purpose of concluding the private contract for the purchase of 3 750 metric tons of husked long-grain rice intended for the Republic of the Niger by virtue of the Commission Decision of 10 December 1976 (Official Journal, L 259 of 23. 9. 1976, p. 22) and the legislative measures referred to therein expressly or by implication?"

8 It is apparent from the facts of the case as they have just been set out and from the grounds of the order for reference that the question submitted by the national court seeks, in reality, to establish whether it is to the Commission or to the national intervention agency that any liability would attach, under the Community provisions regarding food aid which were in force at the date of the Commission Decision of 10 September 1976, *vis-à-vis* an undertaking which the national intervention agency had chosen as the other party to a contract and had instructed to carry out a food-aid operation decided on by the Commission.

The jurisdiction of the Court to rule on the question

9 According to the plaintiff in the main proceedings, a question of the kind submitted for a preliminary ruling in this case cannot fall within the jurisdiction of the Court of Justice since in order to reply to that question it would have to decide whether the ENR was to be regarded as the Commission's agent under the terms of the Italian Civil Code and would have to appraise facts which fell for consideration solely by the Italian court dealing with the substance of the case.

10 It is apparent from an examination of the actual purpose, as stated above, of the question referred to the Court for a preliminary ruling, that, contrary to the contention of the plaintiff in the main proceedings, that question is not of such a nature as to lead the Court of Justice to appraise the nature of the legal relationship between the ENR and the Commission under the terms of

the Italian Civil Code, nor is it of such a nature as to entail an appraisal of facts which fall for consideration by the Italian court alone. Since food aid constitutes intervention by the Community, only an analysis of Community law is relevant to the reply to such a question.

The reply to be given to the question

11 The plaintiff company in the main proceedings considers that by concluding a contract such as the one at issue, the Ente Nazionale Risi acted, in the capacity of an authorized agent, on behalf of the Commission. In support of that view it relies upon the following arguments:

As a matter of law, the existence of that agency relationship can be deduced, on the one hand, from the terms of the Commission Decision of 10 September 1976, Article 1 of which imposes an obligation directly upon the ENR and, on the other hand, from an examination of the Community rules, from which it is apparent that Community food-aid operations constitute the performance of obligations which are entirely the responsibility of the European Economic Community and that the action of the national intervention agencies in such food-aid operations is taken directly on behalf of the EEC. For that reason, the principles concerning the division of powers and responsibilities as between the Communities and the Member States or their intervention agencies, developed in the context of the implementation of the common agricultural policy, cannot be transposed to the field of food aid.

As regards the facts, the existence of the agency relationship is confirmed by the Commission's behaviour during the performance of the contract, since it involved itself totally at every stage of the contract and thus intended to take direct responsibility for all the effects of the contract concluded on its behalf by the ENR.

12 It is true that food aid constitutes a Community action, financed out of Community funds and that, from that point of view, the intervention of the Member States and their agencies in the implementation of a food-aid operation contributes to the achievement of Community objectives. That very general statement is, however, insufficient to provide a useful answer to the

question raised. The way in which the relevant Community legislation provides for the organization and financing of food-aid must also be examined so as to determine the role and the powers of the national intervention agencies in that regard.

13 It should be noted in the first place, as the Commission emphasizes, that when the events which gave rise to the main proceedings took place, the rules governing the granting of food-aid were closely modelled on those governing the common agricultural policy.

14 As regards the general framework in which food-aid operations are carried out, the conditions under which obligations arising under agreements relating to food-aid are to be carried out and the conditions for determination of the criteria for the mobilization of goods intended for food-aid are laid down in Article 28 of Regulation No 2727/75 of the Council of 29 October 1975 on the common organization of the market in cereals (Official Journal 1975, L 281, p. 1) and Article 25 of Council Regulation No 1418/76 of 21 June 1976 on the common organization of the market in rice (Official Journal 1976, L 166, p. 1).

15 With regard, more particularly, to the way in which food-aid operations involving cereals are carried out, Regulation No 2750/75 of the Council of 29 October 1975 fixing criteria for the mobilization of cereals intended as food aid (Official Journal 1975, L 281, p. 89) establishes a close link between the common agricultural policy and food aid, in particular, by entrusting the task of mobilizing the products intended to be used as food aid to the intervention agencies set up within the framework of the common agricultural policy and by laying down the principle that the management of cereal contracts and withdrawals of cereals intended to be used as food aid should be coordinated.

16 It is essential to emphasize, in the second place, as the Commission has also pointed out, that when the events which gave rise to the main proceedings took place, the provisions in force regarding the financing of the food-aid policy, and in particular, Regulation No 2681/74 of the Council of 21 October 1974 on Community financing of expenditure incurred in respect of the supply of agricultural products as food aid (Official Journal L 288,

p. 1), provided for machinery and a system of management which were practically identical to those established for intervention in the agricultural markets.

17 It is apparent from the analysis of the Community provisions that the rules in force when the events which gave rise to the main proceedings took place divided powers relating to food aid as betwwn the Community and the Member States in a manner identical to that laid down for the implementation of the common agricultural policy.

18 With regard to the common agricultural policy, the Court has already had occasion to rule on the scope of the relevant provisions concerning the powers of the Member States and their intervention agencies, as well as their non-contractual liability towards third parties. According to well-established case-law (judgment of 22. 1. 1976 in Case 60/75, *Carmine Russo* v *AIMA,* [1976] ECR 45; judgment of 13. 2. 1979 in Case 101/78, *Granaria BV* v *Hoofdproduktschap voor Akkerbouwprodukten,* [1979] ECR 623; judgment of 10. 6. 1982 in Case 217/81, *Compagnie Interagra SA* v *Commission* [1982] ECR 2233), the question of compensation by a national agency for damage caused to private individuals by the agencies and servants of Member States, either by reason of an infringement of Community law or by an act or omission contrary to national law, in the application of Community law, is entirely a matter for the Member State or for the agency acting on its behalf and must be determined by the national courts in accordance with the national law of the Member State concerned, without prejudice to the possibility of those courts submitting questions to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty.

19 The same principles must be applied to contractual liability where the national intervention agencies conclude contracts for the purpose of giving effect to Community law regarding food aid. Consequently, according to the provisions in force during the period to which the main proceedings relate, only the intervention agency of the Member State concerned, to which implementation of the Commission's decision was entrusted, can incur liability towards private traders with whom it has concluded contracts, even though the financial burden of the food-aid operation must ultimately be borne by the Community.

20 In that context, the fact that the Commission intervened in a very active way during the performance of the contract at issue is without significance as regards the divisions of powers and liability as beween the Community and the Italian intervention agency. Even if it is accepted that the letters and telex messages sent to the Italian Republic or to its intervention agency by the Commission went beyond the powers of supervision granted to the Commission by Article 4 of the aforementioned Regulation No 2681/74 of the Council, and however ambiguously they may have been drafted, they did not bind the national authorities and had no legal effect other than to express the opinion of the Commission. As the Court has held on several occasions (judgment of 27. 3. 1980 in Case 133/79, *Sucrimex* v *Commission*, [1980] ECR 1299; judgment of 10. 6. 1983 in Case 217/81, *Interagra* v *Commission*, cited above), the expression of those opinions forms part of the internal cooperation between the Commission and the national bodies responsible for applying Community rules in that field and that cooperation cannot make the Community liable to individuals.

21 Moreover, it should be noted that the Commission decision of 10 September 1976 was in fact addressed to the Italian Republic, as required by the provisions referred to above relating to the implementation of food aid. Although the Italian intervention agency was designated by name therein, that fact is accounted for by technical requirements relating in particular to the urgency with which the food-aid operation had to be carried out in that case and likewise cannot in any way affect the division of powers and liability as between the Community and the national intervention agency.

22 The reply to the question submitted by the national court must therefore be that the effect of the provisions of Community law regarding food aid in force at the time of the Commission Decision of 10 September 1976 is that only the national intervention agency of the Member State concerned, which was responsible for carrying out and supervising food-aid operations decided on by the Commission, can be held liable to the undertaking to which it has, by contract, delegated the actual implementation of the operations for any damage suffered by the latter in the course of carrying out that food-aid operation.

Costs

23 As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision as to costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber)

in answer to the question referred to it by the Tribunale di Milano by order of 24 March 1983, hereby rules:

The effect of the provision of Community law regarding food aid in force at the time of the Commission Decision of 10 September 1976 is that only the national intervention agency of the Member State concerned, which was responsible for carrying out and supervising food-aid operations decided on by the Commission, can be held liable to the undertaking to which it has, by contract, delegated the actual implementation of the operations for any damage suffered by the latter in the course of carrying out that food-aid operation

Due Kakouris

Everling Galmot Joliet

Delivered in open court in Luxembourg on 18 October 1984.

For the Registrar

D. Louterman

Administrator

O. Due

President of the Fifth Chamber