OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 1 October 1987 *

Mr President,
Members of the Court,

1. This action is for the annulment in part of Commission Decisions Nos 85/465/EEC and 85/466/EEC of 28 August 1985 on the clearance of accounts presented by the United Kingdom in respect of the European Agricultural Guidance and Guarantee Fund, Guarantee Section, for 1980 and 1981 (Official Journal L 267 of 9 October 1985, p. 49).

2. The United Kingdom asks the Court to declare those two decisions void insofar as they do not charge to the EAGGF sums totalling UKL 2 859 606.92 and UKL 2 276 421.59 respectively, relating to expenditure on consumer butter subsidy, the public storage of skimmed-milk powder, aid for skimmed-milk powder to be used for animal feed and to export refunds.

3. The Commission based its disallowance of that expenditure on Articles 2 and 3 of Regulation 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) according to which only expenditure on refunds on exports to non-member countries and on intervention intended to stabilize the markets respectively granted or undertaken 'in accordance with the Community rules within the framework of the common organization of agricultural markets' is chargeable to the EAGGF. The Commission claims that the sums in question correspond to increases in costs to the EAGGF which were strictly due to the unlawful practices of the British Milk Marketing Boards consisting in:

(a) the fixing of different prices for whole milk depending on the manner of marketing of the butter obtained from that milk and on the use of the skimmed milk remaining after the butter or cream had been made; and

(b) the fixing of different prices for whole milk depending on whether certain finished products obtained from that milk are sold within or outside the Community.

4. The United Kingdom advances a number of submissions and arguments which, according to the order in which they are set out in the application (see the clear summary on page 23), may be grouped into four points each of which constitutes an alternative to the previous point.

(1) The differential pricing practices of the Milk Marketing Boards were not contrary to Community law;

(2) The Commission has not satisfactorily established that a causal link exists between those practices and the disallowed expenditure;

(3) It has also failed to provide an accurate and convincing assessment of the expenditure in question;

* Translated from the French.

(4) It has failed to take into account savings on other expenditure and the fact that there was no overall increase in Community expenditure.

5. Finally, the United Kingdom makes two further submissions based on the breach of the principles of legitimate expectation and legal certainty (5) and on insufficient reasoning of the contested decisions (6).

1. The incompatibility of the Milk Marketing Boards' pricing practices with Community law

6. The Milk Marketing Boards' practices mentioned above in point (a) of paragraph 3 were the subject of the judgment of the Court of 2 December 1986 in Case 23/84 (*Commission* v *United Kingdom* [1986] ECR 3581), whilst those mentioned in point 3 (b) are the subject of Case 428/85 (judgment of 27 April 1988, not published), pending between the same parties.

7. In its judgment of 2 December 1986 the Court declared that:

'by authorizing the Milk Marketing Boards to operate

(1) a system of dual pricing for whole milk utilized for the manufacture of butter depending on whether it is to be sold as intervention or bulk butter or as packet butter on the retail market, and

(2) differential pricing for whole milk utilized for the manufacture of butter and cream depending on whether the skimmed milk obtained in such manufacture is used as animal feed or processed into skimmed-milk powder,

the United Kingdom has failed to fulfil its obligations under Article 10 of Council Regulation No 1422/78 of 20 June 1978 and Article 6 of Commission Regulation No 1565/79 of 25 July 1979.'

8. In my Opinion of 15 April 1986 in that case I expressed the view that the United Kingdom had also committed an infringement by applying different prices for whole milk used for the manufacture of butter and cream depending on whether the skimmed milk obtained in such manufacture was to be used to manufacture milk powder or caseins and caseinates. The Court considered that head of claim inadmissible and did not rule on the merits.

9. I maintain that submission for the purposes of the present case, especially since the Court's reasoning as regards the different price applied for whole milk where the skimmed milk is used as animal feed is wholly transposable to the case of caseins and caseinates (paragraph 57 of the judgment of 2 December 1986 in Case 23/84, cited above).

10. What is more, and above all, the price differentiation for whole milk depending on the use of the skimmed milk remaining after the manufacture of butter or cream is not a differentiation depending on the intended use of the milk, which is the only basis of differentiation allowed by Article 9 (1) (a) of Council Regulation No 1422/78, [1] but a differentiation depending on the use of a *product other than milk*, in this case *skimmed milk* (see paragraphs 30 to 32 of the judgment of 2 December 1986). That

1 — Council Regulation No 1422/78 of 20 June 1978 concerning the granting of certain special rights to milk producer organizations in the United Kingdom (Official Journal 1978, L 171 of 28 June 1978, p. 14).

differentiation therefore indisputably constitutes a breach of Community law.

11. The aforegoing observations also apply to the fixing of different prices for whole milk depending on the geographical destination of certain products obtained from that milk.

12. The differentiation of the price of whole milk depending on whether the butter or another product made from that milk is sold on the Community or world market no longer depends exclusively on the use made of the milk by the buyer but on the use which traders or exporters make of products obtained from the whole milk.

13. At the hearing on 9 July 1987 the Court was in fact told that the United Kingdom had finally come round to the view held by the Commission in Case 428/85 and that in future it would accept that such a milk price differentiation was contrary to Community law.

14. We may therefore consider it established that the practices on account of which the Commission refused to clear some of the accounts submitted by the United Kingdom for 1980 and 1981 did in fact constitute infringements of the Treaty.

2. The existence of a causal link between those infringements and the disallowed expenditure

15. The United Kingdom submits that it is for the Commission to prove that the contested practices had the direct and inevitable consequence of increasing Community expenditure and to justify the amounts disallowed. The applicant therefore considers that the burden of proof rests entirely on the Commission, which the Commission disputes.

16. In my view, the answer to that question may be found in the actual system of financing the common agricultural policy as established by Regulation No 729/70 of the Council, in particular as regards expenditure covered by the Guarantee Section of the EAGGF.

17. According to Article 4 (2) of that regulation, the Commission must make available to Member States the necessary credits for financing expenditure qualifying for finance under Articles 2 and 3 mentioned above. In accordance with Article 5 (2) (a) it does so by means of advances the details of which are regulated by Commission Regulation No 3184/83 of 31 October 1983 on the operation of the system of advances in respect of expenditure financed by the EAGGF Guarantee Section (Official Journal L 320 of 17 November 1983, p. 1).

18. It is therefore for the authorities and agencies designated by the Member States to pay that expenditure.

19. Pursuant to Article 5 (1) (b) of Regulation No 729/70 the Member States transmit at regular intervals to the Commission annual accounts and other reports and accounts relating to the payments thus made. Detailed rules on the presentation and submission of those documents are laid down in Regulation 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, Part III, p. 109). It is on the basis of that information that the Commission takes the decisions to clear accounts provided for in Article 5 (2) (b) of Regulation No 729/70.

20. Naturally, Member States may only make payments in respect of transactions which actually fulfil the conditions for financing by the EAGGF.

21. Article 8 (1) of Regulation No 729/70 requires the Member States to satisfy themselves that transactions to be financed by the EAGGF are actually carried out and executed correctly. As the Court has pointed out, in particular in its judgment of 21 September 1983 in Joined Cases 205 to 215/82 *(Deutsche Milchkontor GmbH and Others* v *Germany* [1983] ECR 2633), that article merely expressly confirms a duty already incumbent on Member States by virtue of the principle of cooperation laid down in Article 5 of the Treaty (paragraph 42) and which is to ensure that Community regulations, particularly those concerning the common agricultural policy, are implemented within their territory (paragraph 17).

22. Next, it is clear from Articles 2 and 3 of Regulation No 729/70 that only export refunds granted and intervention undertaken 'in accordance with the Community rules within the framework of the common organization of the agricultural markets' qualify for finance by the EAGGF. From this the Court has deduced, in particular in its judgment of 7 February 1979 in Case 11/76 *(Netherlands* v *Commission* [1979] ECR 245) that those provisions

'permit the Commission to charge to the EAGGF only sums paid in accordance with the *rules laid down in the various sectors* of agricultural production, while leaving the Member States to bear the burden of any other sum paid, and *in particular any amounts which the national authorities wrongly believed themselves authorized to pay in the context of the common organization of the markets*' (paragraph 8).

23. Moreover, the Court has repeatedly stated that: [2]

'the function of a Commission decision relating to the clearance of accounts in respect of expenditure financed by the EAGGF is to establish whether the expenditure was incurred by the national authorities in accordance with Community provisions'.

24. It is therefore for the Member States, which alone have all the information relating to the transactions carried out and the relevant payments, to show that expenditure has been duly and properly incurred. They are also obliged to keep the supporting documents relating to expenditure financed by the EAGGF at least until the Community authorities have finished their investigations (see the third recital of the preamble to and Article 4 (2) of Regulation No 1723/72).

25. This is what the Court clearly meant in its judgment of 12 July 1984 in Case 49/83 *(Luxembourg* v *Commission* [1984] ECR 2931) when it stated that, in order to obtain financing by the EAGGF for certain expenditure relating to private storage aid for table wine, the Member State in question had to demonstrate that the conditions for the granting of that aid had actually been fulfilled (see paragraphs 28, 29 and 30). Similarly, in its judgments of 27 February 1985 in Cases 55/83 and 56/83 *(Italy* v *Commission* [1985] ECR 683 and 703), it stated that only the expenditure which the national intervention agency could prove was properly incurred under the relevant provisions of Community law should be

2 — See for example its judgment of 7 February 1979 in Joined Cases 15 and 16/76 *France* v *Commission* [1979] ECR 321, paragraph 9 at p. 337, and its judgment of 14 January 1981 in Case 819/79 *Germany* v *Commission* [1981] ECR 21, paragraph 8 at p. 34.

charged to the EAGGF (see paragraphs 24 and 25).

26. If the Member State in question does not succeed in doing so, the only course open to the Commission is to refuse financing by the EAGGF of that expenditure. In its judgment of 7 February 1979 in Joined Cases 15 and 16/76 *(France* v *Commission* [1979] ECR 321) the Court expressly held that:

'As Community law now stands, the procedure for the discharge of the accounts . . . serves to determine not only . . . 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' (paragraph 28).

27. The United Kingdom argues, however, that the problem is different in cases in which, as in this case, the Commission's disallowance of expenditure is not based on the breach of the regulations directly governing the expenditure in question but on a failure to comply with more fundamental provisions of Community law. In such cases, which the United Kingdom describes as 'secondary' cases since the 'primary' conditions for financing by the EAGGF are met, it is for the Commission to prove that a causal link exists between the breach of the rules in question and the expenditure which it disallows.

28. My view, however, is that in the present case the question as to the person upon whom the burden of proof rests is really the wrong question.

29. The United Kingdom submitted its applications for the clearance of accounts relying quite obviously on its own argument to the effect that the differential prices applied were in conformity with the Community regulations concerning the Milk Marketing Boards and that the resultant expenditure was not open to challenge since it had been proved in other respects that it had been incurred and that the aid or refunds in question had been granted in compliance with the relevant provisions.

30. The Commission, on the other hand, by initiating two proceedings for breach of Community law and applying to the Court, took the initiative to obtain a declaration that the regulations on the Milk Marketing Boards had not in fact been complied with. The correctness of the Commission's view was confirmed by the Court as regards the fixing of different prices on the internal market and accepted by the United Kingdom as regards the fixing of different prices for exports to non-member countries.

31. The Commission has, moreover, tried to show with the help of statistics that the infringements in question caused distortions of competition and gave rise to economic consequences different from those which would have occurred if the infringements had not taken place and that they therefore also caused the EAGGF to incur costs different from those which it would normally have incurred. *The Commission has therefore actually assumed the burden of proof.* The question whether the evidence it has adduced is sufficiently convincing is a further question which will be for the Court to resolve, in particular in the light of the opposing arguments put forward by the United Kingdom.

32. Since the correctness of the basis of the Commission's reasoning, namely the unlawfulness of the pricing practices of the Milk Marketing Boards, may not now be disputed, only the United Kingdom's arguments by which it seeks to show that the infringements in question had no financial effects on the EAGGF or that such effects are different from those calculated by the Commission still qualify for consideration.

33. The problem is therefore to decide which of the two parties has provided the most convincing evidence in support of its case.

3. Evaluation of the disallowed expenditure

34. To calculate the expenditure which it refused to charge to the EAGGF, the Commission followed, for each of the various categories of measures, a line of reasoning in which it determinined in turn:

(1) the level at which the price of milk would have been fixed if there had been no price differentiation;

(2) the extent to which the milk user would have passed on the resultant increase or decrease in the price of milk to the various economic agents 'downstream' as far as the final consumer;

(3) the effects which that increase or decrease would have had on consumption, use, and the export of the processed products concerned, taking into account an assumed figure for price elasticity of demand;

(4) the amount of expenditure thus generated by virtue of the various intervention measures in question (aid for consumption butter, public storage costs for skimmed-milk powder, aid for skimmed-milk powder to be used for animal feed) and the export refunds.

35. In the United Kingdom's view, those are merely complex hypotheses amounting to 'historical speculation', none of which are sustainable, so that they cannot constitute a sufficient legal basis for the disallowance by the Commission. What must be made of that contention?

36. First of all, as I pointed out in my Opinion in Case 23/84, it is beyond question that an accurate estimation of what would have happened if another pricing system had been applied is necessarily impossible.

37. The parties themselves are agreed on this, but only where this seems to suit their interests. In their answers to the question put to them by the Court on the extent to which the statistics for the years 1984, 1985 and 1986, in which the price differentiation in question was discontinued, confirm or invalidate the Commission's assumptions, the parties are obliged to recognize that 'these indications cannot objectively be taken as a guide to the situation which would have been obtained if a single price system had been applied in 1980 and 1981' (Commission, page 3) or that 'it is unsafe to draw any firm conclusion about what might have happened . . . in 1980 and 1981 if the milk price in those years had been set at the . . . level' suggested by the Commission (United Kingdom, paragraph 3.2).

38. It must be observed, next, that, whilst the Commission attempts to present a reasoned economic argument which, though hypothetical, is coherent, the United Kingdom simply criticizes that argument and describes the Commission's assumptions as 'implausible, uncertain and improbable' without making any effort to show by means of alternative figures what, in its view, would have happened if the unlawful pricing practices had not existed. I, for my part, have reached the conclusion that the United Kingdom has not succeeded in demonstrating convincingly that the Commission, in its efforts to evaluate the probable financial consequences of the practices in question, applied unreasonable economic criteria or based its assessment on unrealistic assumptions.

39. On the other hand, it is not certain whether the Commission is right as regards all the assumptions and extrapolations which it makes. It seems, moreover, to be aware of this since it tells us itself that 'since the calculations are hypothetical ones, the assumptions that have been made may not be the only assumptions possible' (rejoinder, p. 2).

40. We are therefore faced with a situation which is virtually the same as that which arose in Case 16/76 *France* v *Commission* (which was joined with Case 15/76 and was the subject of a judgment delivered in both cases on 7 February 1979, [1979] ECR 321) in which the Court also found itself faced with the impossibility of establishing beyond doubt what would have happened if certain national measures had not been adopted. The contested measures consisted of national aid which the French Government had introduced in addition to Community aid for the distillation of wine. The French Government took the view that, as regards all the quantities of wine that had been distilled, only the proportion of the aid corresponding to the additional French aid should have been disallowed by the Commission whilst the proportion corresponding to the rates fixed by the Community rules should have been charged to the EAGGF.

41. In its judgment of 7 February 1979 the Court stated that:

'... it is impossible to ascertain to what extent the total effect of the combined national and Community measures is due to one or other component part.

It is, in particular, impossible to establish with certainty what quantities of wine would have been distilled in France if the national measure had not been adopted' (paragraphs 32 and 33).

The Court concluded from this that:

'In those circumstances the Commission had no choice but to refuse to charge to the EAGGF the expenditure incurred by the French authorities' (paragraph 35).

42. After initially describing that case as a 'secondary' case comparable to the present case (application, paragraphs 5.6 and 5.7), the United Kingdom argues in its reply (paragraphs 3.5 and 5.22) that, since there was 'an obvious link between the direct national aid paid by the French Republic and increased EAGGF expenditure, ... there was no need for the Commission

to undertake an assessment of the economic effects of the French Republic's infringement in order to see whether Community expenditure had been increased'.

43. In my view, that assertion calls at the very least for some qualification. There was indeed no doubt that the French aid had caused additional expenditure. However, that expenditure could not be precisely calculated or assessed approximately. It was precisely for that reason that the Court held that the Commission was entitled to refuse to charge to the EAGGF *all* the expenditure incurred, including the expenditure relating to the quantities of wine which would have been distilled if there had been no additional national aid and the volume of which could possibly have been determined by means of a hypothetical economic assessment.

44. It follows logically from that judgment that the Commission would have been entitled to refuse to accept the totality of the items of the EAGGF accounts affected by the application of different milk prices once it had established that the normal functioning of the financial mechanisms of the common organization of the markets in milk had been disturbed by the price differences. The Commission has not gone that far, however, but has carried out the complex economic assessments described in the Report for the Hearing, arriving at a disallowance figure of UKL 5 million instead of UKL 300 million (rejoinder, part I).

45. I should also point out that on other occasions the Court has accepted that certain payments could be disallowed generally, so to speak, simply on the basis of a finding that they were irregular.

46. The cases concerned were cases[3] in which the Court upheld the Commission's decision to refuse to disallow certain expenditure on the sole ground that evidential formalities had not been complied with and did not concern itself with the question whether in substance the failure to comply with the relevant provisions of Community law had actually led to substantively unjustified expenditure. The Court even expressly ruled out the possibility that later regularization of such evidential formalities[4] or the substitution of other proofs for those prescribed[5] may invalidate the Commission's refusal to charge the expenditure to the EAGGF. Consistently with that decision the Court also refused to attach any importance to the fact that a national supervision system, different from the system provided for by the Community legislation, might possibly have been more effective.[6]

47. In my view, the conclusion which emerges from those judgments does not seem to be invalidated by the judgments of 27 February 1985 in Cases 55/83 and 56/83 (*Italy* v *Commission* [1985] ECR 683 and 703) relied upon by the applicant.

48. Those cases concerned an Italian fiscal measure which the Commission considered to be contrary to the common organization

3 — See, for example, the judgments of 27 February 1985 in Case 55/83 and Case 56/83 *Italy* v *Commission* [1985] ECR 683 and 703, paragraph 21 at pp. 697 and 711. I also refer to the judgments of 15 March 1983 in Case 61/82 and Case 62/82 *Italy* v *Commission* [1983] ECR 655 and 687, in which the Court did not uphold the Italian Government's argument that 'in substance, regardless of any procedural omissions, the aid was paid for actual and genuine storage in respect of which all the required verifications had been carried out beforehand' ([1983] ECR at pp. 667 and 697).

4 — See the judgment of 7 February 1979 in Joined Cases 15 and 16/76 *France* v *Commission* [1979] ECR 321, paragraph 11.

5 — See the judgment of 7 February 1979 in Case 18/76 *Germany* v *Commission* [1979] ECR 343, paragraphs 20 and 22 at pp. 387 and 388.

6 — See the judgment of 14 January 1981 in Case 819/79 *Germany* v *Commission* [1981] ECR 21, paragraphs 10 and 35.

of the market in wine because it was capable of affecting price formation, of jeopardizing the equal treatment of economic operators and of altering the conditions of competition (paragraph 10).

49. The Court pointed out first of all that, owing to the fiscal powers retained by the Member States at that stage of development of Community law, only those national measures capable of interfering with the functioning of the machinery established by the common organizations of the market and in particular having an appreciable influence on price levels on the market constituted a breach of Community law (paragraphs 11 and 12).

50. However, precisely because neither the documents in the case nor the arguments presented before the Court showed that the Italian measure in question had affected the market price for wine-based alcohol and was capable of jeopardizing the aims and functioning of the common organization of the market in wine the Court finally annulled the Commission's decision refusing to charge to the EAGGF the expenditure incurred by the Italian intervention agency (paragraph 16).

51. In the present case, however, the practices of the Milk Marketing Boards both contravened Community law and disturbed the normal functioning of the common organization of the markets. On the basis of the case-law of the Court, the Commission could have disallowed all the expenditure on the relevant items. By endeavouring to evaluate as best as possible the expenditure resulting from the practices of the Milk Marketing Boards and only disallowing those amounts the Commission has, in my view, adopted a reasonable decision the annulment of which would not be justified.

4. The absence of any net overall increase in Community expenditure

52. According to the United Kingdom, the Commission has drawn from its hypothetical arguments only some of the conclusions which necessarily arise from it: whilst taking into account an increase in expenditure it omits to take into consideration the savings which would necessarily have been made if its own assumptions were correct.

53. In part III.4 of the Report for the Hearing some examples of the kind of savings to which the United Kingdom is referring are given and I must admit that I was quite impressed by the case of skimmed milk.

54. The Commission tells us that, if the United Kingdom had applied a lower price for skimmed milk intended for use as animal feed, the aid granted for that purpose would have been more effective and additional large quantities of skimmed milk would have been consumed by animals. Instead of that, the milk had to be processed into powder which would then be stored and attract other kinds of aid.

55. The United Kingdom argues in reply that if the animals had consumed more liquid skimmed milk, the additional amounts which would have had to have been allocated to animal-feed aid would have far exceeded the amounts disallowed by the Commission. The practices of the Milk Marketing Boards therefore allowed the EAGGF to make savings.

56. In all probability, that argument is correct: even so, is it necessary to draw the conclusion that the Commission was wrong to refuse to charge the amounts in question to the EAGGF? The answer to that question must be in the affirmative if the purpose of a refusal to clear accounts is solely to make the Member States bear *net increases in costs to the EAGGF* resulting from practices contrary to Community law.

57. On the other hand, the answer must be in the negative if the aim of disallowance is to *make the Member States bear the financial consequences of any irregular conduct.* In my view, there is a whole series of reasons which supports the latter view.

58. (a) The procedure for the clearance of EAGGF accounts relates to expenditure incurred by the Member States in administering the common agricultural policy. Only 'expenditure incurred by the national authorities in accordance with the Community rules' or 'sums paid in accordance with the rules laid down in the various sectors of agricultural production' (see the judgment in Case 11/76 *Netherlands* v *Commission* [1979] ECR 245, paragraph 22) may be financed by the EAGGF. By definition, no expenditure is incurred in the case of 'savings' and it cannot therefore be taken into account.

59. (b) 'Any amounts which the national authorities wrongly believe themselves authorized to pay in the context of the common organization of the markets' (Case 11/76) constitute unjustified and unforeseen expenditure. The 'savings' which they make in the same way constitute unjustified and unforeseen non-expenditure as well. It must be remembered that the operations which have thus not been carried out were established by the Community legislature and that the expenditure which must in principle arise from them is planned expenditure fulfilling aims of the common agricultural policy.

60. (c) In Case 45/82 *Netherlands* v *Commission*, the Netherlands Government sought the annulment of a decision to refuse clearance which was based on non-compliance with certain conditions of quality and composition upon which the grant of Community aid for the processing of skimmed-milk powder into animal feed depended. In its judgment of 15 March 1983 ([1983] ECR 631), the Court expressly rejected the argument of the Netherlands Government to the effect that, notwithstanding the fact that the animal feed lacked the required quality, the aim of the Community regulations had been attained because 'the purpose of those rules is not solely the marketing of a product and the relief of the market in milk but also the employment of the product for useful economic ends . . . ' (paragraph 17).

61. The Court did not therefore take account of the 'beneficial' effects of those operations for the EAGGF but solely of the fact that the expenditure corresponding to the aid in question was precisely 'programmed' with a quite specific object in mind which had not been respected.

62. Similarly, when confirming in its judgment of 7 February 1979 in Joined Cases 15 and 16/76 *(France* v *Commission* [1979] ECR 321) that the Commission was entitled to disallow all the expenditure incurred by the French authorities, the Court did not take account of the favourable effect which the excessive payments of distillation aid had on the wine market or of the resultant reduction in expenditure for the EAGGF in respect of private storage costs for wine (since if the

wine had not been distilled it would have been stored under private storage contracts) and export refunds which might have had to be paid (rejoinder, p. 4).

63. (d) Moreover, as the Court has repeatedly pointed out, the very objective of Regulation No 729/70 requires a strict interpretation of the conditions under which expenditure is to be borne by the EAGGF because

'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'.

64. The same principle which applies as regards a wide as opposed to a strict interpretation applies *a fortiori* to an incorrect application of Community law.

65. The Court went on to state 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'.[7]

7 — See the judgment of 7 February 1979 in Case 11/76 *Netherlands* v *Commission* and in Case 18/76 *Germany* v *Commission* [1979] ECR 245 and 343, paragraphs 9 and 8 respectively at pp. 279 and 384.

66. As Mr Advocate General Capotorti pointed out in his combined Opinion in Cases 11/76, 15 and 16/76 and 18/76, in such a situation

'it is not merely a question of insuring that the budget of the EAGGF does not bear expenditure greater than that which would probably have been incurred in the absence of the unilateral [national] measures; it is primarily a question of ensuring that the Community does not ratify a measure which is contrary to the balance of the system and the principles which govern the working of the common market' ([1979] ECR 319, at the end of part 19).

67. In the present case, the United Kingdom's failure to observe the relevant provisions of Council Regulation No 1422/78 and Commission Regulation No 1565/79 has in fact caused disturbances in the normal working of the common organization of the markets in milk and milk products.

68. Such disturbances are by their nature liable to have caused expenditure which would not have arisen, or at any rate not in the same way, if they had not occurred.

69. (e) Finally, it should also be noted that, according to Article 8 of Regulation No 729/70 on the financing of the common agricultural policy, sums lost as a result of irregularities or negligence attributable to administrative authorities or other bodies of the Member States are to be borne by the Member States if they cannot be recovered. The Council did not therefore provide that the amounts in question could be offset by the savings made by the EAGGF at the same time, for example storage costs saved upon the exportation of butter on which a refund has wrongly been granted.

70. To sum up, it may therefore be concluded that a Member State must not be able to escape the financial consequences of a breach of Community law on the ground that it is thus helping to reduce Community expenditure in other ways. If the EAGGF did not restrict itself to financing only expenditure incurred in accordance with Community law but also, to the extent to which it does not exceed the latter, expenditure arising from unilateral national action, the principle that Community law must be applied uniformly in all Member States and the very foundations of the common agricultural policy would be undermined.

5. The submission alleging breach of the principles of legitimate expectation and legal certainty

71. The United Kingdom further argues that by refusing to charge the expenditure in question to the EAGGF the Commission applied in 1985 to events which occurred in 1980 and 1981 new rules going far beyond those applied in the past and did so before giving notice of the new rules and in circumstances in which their introduction could not have been anticipated. Similarly, it claims that by Regulation No 1565/79 of 25 July 1979[8] the Commission gave authorization to the Milk Marketing Boards whilst being aware of the practice followed with regard to differential prices for milk and was slow to raise objections to that practice.

72. The second argument, which for reasons of logic I would like to examine first, was put forward in Case 23/84. In its judgment of 2 December 1986 the Court rejected it. It stated that 'from the beginning the Commission has expressed its doubts with regard to the conformity of Community law of a system of differential prices' (paragraph 16) and that, although the views expressed by the Commission's staff were sometimes ambiguous, 'the British authorities were not given any assurance which would have allowed them to consider that the authorization granted them by Regulation No 1422/78 had the wide scope now attributed to it by the United Kingdom' (paragraph 39).

73. It is established case-law that 'upon the occasion of the clearance of accounts presented by the Member States the Commission is not obliged to charge to the EAGGF expenditure incurred on the basis of an erroneous interpretation of Community law unless the error may be attributed to an institution of the Community'.[9]

74. As regards to the first argument, it must be observed that the United Kingdom must have been aware that only refunds granted or intervention undertaken in accordance with the Community rules under the common organization of the agricultural markets may be financed by the EAGGF.

75. Since the Commission had since 1979 made known to the United Kingdom its reservations about certain forms of price differentiation, that Member State could not have any legitimate expectation that the EAGGF would bear the expenditure arising from the practices in question.

8 — Commission Regulation (EEC) No 1565/79 of 25 July 1979 laying down rules for implementing Regulation (EEC) No 1422/78 concerning the granting of certain special rights to milk producer organizations in the United Kingdom (Official Journal L 188 of 26 July 1979, page 29).

9 — See the judgment of 25 November 1980 in Case 820/79 *Belgium* v *Commission* [1980] ECR 3537, paragraph 15, and the judgment of 27 January 1981 in Case 1251/79 *Italy* v *Commission* [1981] ECR 205, paragraph 17. The quotation is taken from paragraph 2 of the summary of those two judgments.

76. Moreover, the nature of the procedure for the clearance of EAGGF accounts is such that the Commission does not examine them until the expenditure set out therein has been incurred.

77. Finally, the fact that certain expenditure is not charged to the EAGGF does not in any way constitute a penal sanction but is merely the consequence prescribed by law for cases in which the expenditure was not incurred 'in accordance with the Community rules within the framework of the common organization of the agricultural markets'.

6. The reasoning of the contested decisions

78. The very fact that the United Kingdom has brought this action and above all the extent and detailed nature of the arguments which it has advanced against the contested decisions prove that it was quite aware of the reasoning on which they were based.

79. There does not therefore seem to me to be any necessity at all to depart in this case from the Court's case-law concerning the reasoning of decisions relating to the clearance of EAGGF accounts according to which such a decision 'does not require a detailed statement of reasons where the Government concerned was closely involved in the process by which the contested decision was made and was therefore aware of the reason for which the Commission considered that the disputed amount might not be charged to the EAGGF'. [10]

80. That was the case in this instance because a number of bilateral discussions took place between the United Kingdom and the Commission and there was a quite lengthy exchange of correspondence between them. This exchange of views even led the Commission to revise certain figures. The calculation methods used by the Commission are set out in great detail in a 'Summary report' and a 'Study paper' of which the United Kingdom was aware. In those circumstances, the two contested decisions must be considered to be sufficiently reasoned.

Conclusion

81. Having thus arrived at the conclusion that none of the submissions relied on by the United Kingdom is well founded, even though some doubt exists — and will always exist — about what precisely would have happened if the system of differential prices had not been applied as it was, I can only propose that the Court should dismiss the application and order the United Kingdom to pay the costs.

10 — See the judgment of 14 January 1981 in Case 819/79 *Germany* v *Commission* [1981] ECR 21, paragraphs 20 and 21 at p. 36, and the judgment of 27 January 1981 in Case 1251/79 *Italy* v *Commission* [1981] ECR 205, paragraphs 20 and 21 at pp. 221 and 222. The quotation is taken from paragraph (4) of the summary of the judgment in Case 819/79.