additional amount may be granted where there has been prior payment of aid of a lower amount.

In the absence of a contrary provision, the same rule applies to the cases not expressly referred to in these provisions in which a trader buys from the intervention agency in his own country skimmed-milk powder coming from intervention stocks held in another Member State, unless the nature of that situation is such as to give strong evidence that the situation existing at another time is to be taken into account for calculating the aid.

2. Financial compensation for the withdrawal from the market of fishery products cannot be charged to the EAGGF if the producers' organization has not been subject to the continuous supervision, by the Member State concerned, of its operations provided for under the Community rules on the recognition of such organizations.

REPORT FOR THE HEARING
delivered in Case 342/85 *

I — Facts and procedure

1. 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) provides for a system of direct Community financing of refunds for exports to non-member countries and interventions by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (hereinafter referred to as 'the EAGGF') aimed at stabilizing agricultural markets.

Under Article 4 of that regulation, the Commission is to make available to Member States the necessary credits so that the competent national authorities and bodies may, in accordance with Community rules and national legislation, pay the refunds and finance the interventions.

According to Article 5 (2) (b) of the same regulation, the Commission is to make up the accounts in respect of the expenditure carried out by the national authorities and bodies on the basis of annual accounts submitted by the Member States and accompanied by the documents required for their clearance.

According to Article 8 of 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, Volume III, European Agricultural Guidance and Guarantee Fund, p. 109), the decision to make up the accounts covers, *inter alia*, the determination of the amount of expenditure incurred in each Member State during the year in question, recognized as chargeable to the EAGGF, Guarantee Section.

2. In Decision 85/459 of 28 August 1985, notified to the Italian Republic by letter of 5 September 1985 and published in the Official Journal, L 267, p. 33, the

* Language of the Case: Italian.

Commission fixed, for the Italian Republic, the expenditure recognized as chargeable to the EAGGF, Guarantee Section, in respect of the 1980 financial year.

When it adopted that decision, the Commission considered that the inspections carried out showed that a part of the expenditure declared, amounting to LIT 35 988 034 293, did not satisfy the requirements of the applicable Community rules and therefore could not be financed, and that the Member State had been fully informed of that correction and had been able to give its views thereon.

It can be seen from the file that according to the Commission, the transactions which gave rise to that expenditure did not comply with the provisions governing the intervention measures at issue. The specific reasons why each of those transactions did not comply with the relevant rules were made clear to the Italian Republic during the bilateral consultations which preceded the decision clearing the accounts. They were summarized in the Summary Report for the financial years 1980 and 1981 (hereinafter referred to as 'the Summary Report'), transmitted to the Italian Republic and later considered by the EAGGF Committee in the context of the consultation provided for in Article 5 (2) of Regulation No 729/70.

3. This application is directed against the exclusion of the following items:

LIT 655 750 in respect of aid for skimmed-milk powder in intervention;

LIT 1 350 061 770 in respect of aid for the consumption of olive oil;

LIT 2 727 740 360 in respect of compensation for the withdrawal from the market of fishery products.

4. The application was lodged at the Court Registry on 15 November 1985.

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 called upon the Commission to reply to several questions concerning the calculation of the amount of the aid paid in respect of skimmed-milk powder in intervention stocks. The Commission replied in writing to those questions on 28 November 1986.

II — Conclusions of the parties

The applicant, the Italian Republic, claims that the Court should:

Declare void Commission Decision 85/459 of 28 August 1985 in so far as it refuses to recognize as chargeable to the EAGGF the sums of LIT 655 750 + 1 350 061 770 + 2 727 740 360 (a total of LIT 4 078 457 880) in the clearance of the accounts presented by the Italian Republic in respect of expenditure for 1980;

Or, for the reasons set out in the application, order that such lesser sums as the Court may stipulate should be recognized as chargeable to the EAGGF;

Order the defendant to pay the costs.

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

Declare the application inadmissible in regard to the submissions not supported by arguments of substance;

Dismiss the remainder of the application as being without foundation;

Order the Italian Republic to pay the costs.

III — Submissions and arguments of the parties

In regard to each of the three heads of claim, the Italian Government alleges that Article 8 of Regulation No 1723/72 has been infringed. Furthermore, it alleges that the Commission has exceeded its powers in regard to the part of the decision concerning aid for the consumption of olive oil and that it has both exceeded its powers and failed to provide an adequate statement of the reasons on which its decision is based in regard to the financial compensation for the withdrawal from the market of fishery products.

The Commission considers that those submissions, which are supported by no arguments, do not meet the requirements of Article 38 (1) of the Rules of Procedure and that they are therefore inadmissible.

A — *Aid for skimmed-milk powder in intervention*

1. *Legal framework*

Under Article 10 of Regulation No 804/68 of the Council of 27 June 1968 on the common organization of the market in milk and milk products (Official Journal, English Special Edition 1968 (I), p. 176) 'aid shall be granted for skimmed milk and skimmed-milk powder which are produced in the Community and are for use as feedingstuffs if these products reach certain standards'. The arrangements for the grant and payment of such aid are to be laid down by the Commission.

According to the Commission's defence and to the reply which it gave to the questions put by the Court concerning the calculation of the amount of the aid, the applicable Community provisions may be summarized as follows.

Where a trader buys skimmed-milk powder on the *open market of his own country*, Article 9 of Commission Regulation No 1725/79 of 26 July 1979 on the rules for granting aid to skimmed milk processed into compound feedingstuffs and skimmed-milk powder intended for feed for calves (Official Journal, L 199, p. 1) provides that 'the amount of aid shall be that applicable on the day on which the skimmed milk or skimmed-milk powder is denatured or on the day on which it is processed into compound feedingstuffs'. The aid is paid to the processor by the competent authorities in the Member State concerned.

If a trader buys on the *open market of a Member State other than the one in which his registered office is situated*, the amount of the aid is that applicable on the day of processing (under Article 9 of Regulation No 1725/79) or that provided for in Commission Regulation No 1624/76 of 2 July 1976 concerning special arrangements for the payment of aid for skimmed-milk powder denatured or processed into compound feedingstuffs in the territory of another Member State (Official Journal, L 180, p. 9). According to the Commission, the rules contained in the latter regulation are an exception. It explains that as a general rule, when aid is paid after incorporation or denaturing, it is paid by the Member State on whose territory the operation was carried out, in accordance with Regulation No 986/68 of the Council of 15 July 1968 laying down general rules for granting aid for skimmed milk and skimmed-milk powder for use as feed (Official Journal, English Special Edition

1968 (I), p. 260). However, Regulation No 1624/76 provides for a derogation from that rule by authorizing payment of the aid by the consignor Member State as follows:

(i) The aid is to be paid in advance to the exporter once proof has been furnished that the skimmed-milk powder has been subject to customs control or equivalent administrative control and that a security has been lodged (Article 2);

(ii) The amount of the aid is that applicable on the day the customs formalities for export are completed (Article 8 (1));

(iii) An additional amount may be paid to the processor of the products in question by the authorities of the Member State of destination if the aid, expressed in national currency, has been increased between the day determining the amount of the aid in the consignor Member State and the day of processing (Article 8 (2)).

According to the Commission, those rules were introduced in order to be applied in Italy, the only country structurally deficient in skimmed-milk powder at that time.

If a trader buys from an *intervention body*, the purchase is, in principle, governed by Commission Regulation No 2213/76 of 10 September 1976 on the sale of skimmed-milk powder from public storage (Official Journal, L 249, p. 6). Where a trader buys skimmed-milk powder in order to process it into feedingstuffs, the same aid is paid as in the case of a purchase on the open market (mentioned above).

However, where a trader buys from the *intervention agency in his own country* skimmed-milk powder from *intervention stocks in another Member State*, the purchase is governed, according to the Commission, by special rules. Such a possibility was provided for periodically in favour of Italy, having regard to the lack of stocks of skimmed-milk powder in that country. In Regulation No 1763/78 of 25 July 1978 on the transfer to the Italian intervention agency of skimmed-milk powder held by the intervention agencies of other Member States (Official Journal, L 204, p. 8), the Council decided to make available to the Italian intervention agency part of the stock held by the intervention agencies of the other Member States. That transfer took place in two lots, composed of 40 000 and 60 000 tonnes respectively. In Regulation No 516/80 of 29 February 1980 on the transfer of skimmed-milk powder to the Italian intervention agency (Official Journal, L 58, p. 51), the Commission laid down the detailed rules for the transfer of the second lot. Article 3a (3) of that regulation, as amended by Commission Regulation No 1146/80 of 7 May 1980 (Official Journal, L 117, p. 18), provides that the sales in question to be carried out by the Italian intervention agency are subject to the special condition that 'at the time of payment of the purchase price, that price shall be reduced by the amount of the aid referred to in Article 10 of Regulation (EEC) No 804/68'. The same condition was provided for in connection with earlier transfers in Commission Regulation No 2972/76 of 7 December 1976 laying down detailed rules for the application of Regulation (EEC) No 1861/76 on the transfer to the Italian intervention agency of skimmed-milk powder held by the intervention agencies of other Member States (Official Journal, L 339, p. 18).

2. *Facts and procedure preceding the adoption of the contested decision*

According to the Summary Report, EAGGF officials found that in Italy supplementary aid had been paid for skimmed-milk powder drawn from public stocks and sold under Regulation No 516/80 (as applicable after its amendment by Regulation No 1146/80). This additional aid matched the difference between the amount of the aid when the contract was concluded and that applicable on the day of processing.

The Italian Government justified this supplement by the argument that Article 5 of Regulation No 2972/76 and Article 3a of Regulation No 516/80 stipulate that the selling price as fixed by Article 2 (1) (a) of Regulation No 2213/76 must be reduced by the amount of aid provided for by Article 10 of Regulation No 804/68. According to the Italian Government, that aid is the amount granted under Regulation No 1725/79. It observes in particular that Articles 5 and 3a themselves refer to Regulation No 1725/79, Article 9 (1) of which stipulates that the amount to be paid is that in force on the day of processing. Consequently, in so far as at the time of sale only the rate valid at that time can be referred to, where the aid is increased before processing, the selling price must be reduced by an amount equivalent to the increase. The Italian Government refers in that regard to Article 8 (2) of Regulation No 1624/76, which also lays down such a procedure.

It can be seen from the Summary Report that the Commission disagrees with those arguments for the following reasons.

In the first place, Regulation No 1624/76, read together with Regulation No 1725/79, can be applied only to the direct processing of skimmed-milk powder bought on the open market of a Member State other than Italy and processed in Italy. In that case, the aid is paid on the basis of the rate applicable on the day when the customs formalities are completed and Italian traders purchase the merchandise by paying a net price, namely the market price minus the aid. The payment to the processor of the difference between the amount of the aid calculated on the day when the customs formalities are completed and the higher amount applicable on the day of processing is justified in order to put the Italian processor on an equal footing with processors in other Member States. Furthermore, in the context of Regulation No 1624/76, the amount of the aid may not exceed the maximum applicable during the processing period, which is restricted to six months, and the trader is responsible for the cost of transport from the Member State of production or processing. In regard to skimmed-milk powder purchased from an intervention agency under Regulation No 2213/76, no such compensatory requirement exists. No processing time-limit is fixed and traders may therefore choose the most convenient moment to process the product, that is to say when the aid is highest. In that case, the trader pays only the relatively low transport costs from intervention stocks.

Secondly, the purpose of the reference to Regulation No 1725/79 in Article 5 of Regulation No 2972/76 and Article 3a of Regulation No 516/80 is merely to define the conditions governing the grant of aid. It does not concern the method of calculating the selling price.

Finally, the Commission observes that under Article 1 (2) (b) of Regulation No 1725/79 'the skimmed milk and skimmed-milk powder . . . may qualify for aid only if . . . they have not qualified and are not likely to qualify for aid or a reduction in prices by virtue of other Community provisions'. In the present case, the skimmed-milk powder enjoyed a price reduction on withdrawal from public stocks.

For those reasons, the Commission considers that the EAGGF cannot finance the supplementary aid granted by the Italian intervention agency which amounted to LIT 655 750 for 1980.

3. *Submissions and arguments of the parties*

The applicant, the Italian Government, claims first that the Commission's argument is contrary to the terms of the Community provisions concerned. Regulation No 516/80 provides that the purchase price of skimmed-milk powder is to be 'reduced by the amount of the aid referred to in Article 10 of Regulation No 804/68'. However, the latter provision states neither the amount of the aid nor the arrangements and conditions to which the grant thereof is subject. The reference to that article consequently includes all provisions implementing it and in particular, those of Regulation No 1725/79, Article 9 of which provides that the amount of the aid is to be that applicable on the day of denaturing or processing. Consequently, if the amount of the aid applicable on the day of processing is higher than that obtained at the time that the purchase price was paid, the intervention agency is obliged to pay the difference. Moreover, the Italian Government contests the relevance of the fact that that obligation is not expressly provided for in Regulation No 516/80, whereas Article 8 of Regulation No 1624/76 contains an express provision on that subject. In the latter regulation, an express provision was necessary solely to indicate that the difference in question must be paid by an intervention agency (that of the importing Member State) other than the intervention agency (that of the exporting Member State) which paid the initial aid applicable on the day of customs clearance.

The Commission replies that the legal consequences of an act are governed, according to the principle *tempus regit actum*, by the provisions in force at the time at which the act takes place. In this case, the act giving rise to the debt was the purchase. In the absence of an express derogation, the aid to be granted is consequently that applicable on the day of purchase. The Commission explains that the arrangements for the grant and payment of the aid, which were laid down in Regulation No 804/68, differ according to the way in which the purchase was carried out: purchase on the open market, purchase on the open market with denaturing or processing on the territory of another Member State or purchase from intervention agencies. A

reference to Article 10 of Regulation No 804/68 cannot therefore embrace all the rules adopted for its implementation.

The Italian Government contends secondly that the failure to grant the difference in question gives rise to an unjustified difference in treatment to the detriment of traders who bought skimmed-milk powder from the Italian intervention agency under Regulation No 516/80. Traders who bought skimmed-milk powder in other Member States, on the open market or from intervention agencies, received the larger amount in aid applicable on the day of processing.

The Commission rejects the allegation that purchasers of skimmed-milk powder from the Italian intervention agency suffered a financial disadvantage compared to purchasers in the other Member States, whether they purchased on the open market or from intervention agencies. The two methods of purchasing are distinct and traders are free to avail themselves of either option, each option having its advantages and disadvantages.

B — *The aid for the consumption of olive oil*

1. *Legal framework*

According to the first paragraph of Article 8 of Council Regulation No 3089/78 of 19 December 1978 laying down general rules in respect of aid for the consumption of olive oil (Official Journal, L 369, p. 12), aid for the consumption of olive oil is to be paid when the supervisory body designated by the Member State in which packaging takes place has checked that the conditions for granting the aid have been satisfied. The second paragraph of the said article provides that 'the aid may, however, be advanced as soon as the aid application is submitted, provided that sufficient security has been provided'. According to Article 7 of the same regulation, the Member States are to institute a system of supervision to ensure that the product for which aid has been applied qualifies for such aid.

In Regulation No 557/79 of 23 March 1979 (Official Journal, L 73, p. 13), the Commission laid down detailed rules for the application of the system of consumption aid for olive oil. Article 10 (4) of that regulation provides that 'the Member States shall pay the aid within 150 days of the submission of the aid application'. The same condition was laid down in Article 9 (3) of Commission Regulation No 3172/80 of 5 December 1980 laying down implementing rules in respect of the system of consumption aid for olive oil (Official Journal, L 331, p. 27), which replaced Regulation No 557/79 with effect from 9 December 1980.

According to Regulation No 283/72 of the Council of 7 February 1972 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organization of an information system in this field (Official Journal, English Special Edition 1972 (I), p. 90), the Member States are to communicate to the Commission during the month following the end of each quarter, *inter alia*, 'a list of irregularities which have been the subject of the primary administrative or judicial findings of fact' (Article 3).

2. *Facts and procedure preceding the adoption of the contested decision*

According to the Summary Report, checks carried out in Italy by the EAGGF showed that the inspections provided for by Community rules had not taken place within the time-limits specified, and in some cases

there had been no checks at all. Those delays and the failure to carry out checks meant that in a large number of cases the advances paid on the aid under Article 8 of Regulation No 3089/78 had not been regularized within the period of 150 days specified by Article 10 of Regulation No 557/79 (and by Article 9 of Regulation No 3172/80). Since the period of validity of securities provided in respect of those advances under Article 8 of Regulation No 3089/78 was as a rule 10 months, many of the aid files not checked within this time-limit were no longer covered by securities. The EAGGF considered that such advances, not regularized when the period of validity of the security ends, do not comply with Community rules and, consequently, are not eligible for financing by the EAGGF.

According to the Summary Report, the checks carried out by the EAGGF also revealed that administrative and judicial proceedings have been started against a number of traders following irregularities found during on-the-spot inspections. The aid amounts involved are LIT 1 350 061 770 for 1980. In that regard, the Italian authorities pointed out that, in certain cases, the irregularities came to light after the national checks made for the purpose of confirming entitlement to the aid. In those cases, the Italian intervention agency claimed repayment from the traders of the aid incorrectly paid. Nevertheless, the administrative or criminal proceedings have not yet been concluded and, for that reason, the quantities in respect of which aid has been incorrectly paid have not yet been fixed.

The EAGGF observed, on the one hand, that those irregularities have never been com,1municated to the Commission under the terms of Regulation No 283/72 and, on the other hand, that the guarantees given had already expired before the national checks. Even if the irregularity had been discovered during the national checks, the recovery by means of the guarantee of the amount of aid advanced would no longer have been possible.

As a result of those findings, the Commission excluded a total sum of LIT 2 196 972 206 from the amount chargeable to the EAGGF for 1980.

3. *Submissions and arguments of the parties*

The Italian Government explains first that its action deals solely with the refusal to charge to the EAGGF an amount of LIT 1 350 061 770 concerning aid paid to undertakings against which criminal or administrative proceedings in respect of irregularities have been brought at national level, which refusal the Commission justifies, on the one hand, on the ground that the cases of irregularity were never communicated to the Commission under Regulation No 283/72 of the Council and, on the other hand, that the securities lodged for the advance payment of the aid had ceased to be valid before the national authorities carried out their checks.

The Italian Government claims principally that the refusal to charge the said sum to the EAGGF in its entirety must be regarded as unlawful. Although it is true that the failure to inform the Commission of the

initiation of criminal or administrative proceedings constitutes an infringement of Community rules, no Community provision attaches to such an infringement any consequences in regard to the charging of expenditure to the EAGGF. The fact that the securities lodged for the advance payment of the aid had already ceased to be valid is also not of such a nature as to entail automatically a refusal to accept it. The Italian Government points out in that regard that in many cases, the checks carried out produced a positive result and the irregularities appeared at a later date. In those cases, the Italian intervention agency had no further opportunity to avail itself of the guarantee. Moreover, the refusal to accept the expenditure is not justified while the criminal or administrative proceedings are still pending. Until those proceedings have been terminated, it is not possible to establish whether or not there have been irregularities and in many cases, the aid was excluded in its entirety although the alleged irregularity concerned only a part thereof.

The Commission observes first that it considers that EAGGF financing may be granted exceptionally if subsequent checks confirm the regularity of the transaction. Ultimately, the only cases which will be excluded are those in which no checks were carried out. The Commission points out in that regard that Article 8 of Council Regulation No 3089/78 provides for advance payment of the aid, before a check is carried out to verify the existence of the conditions giving a right thereto, as long as sufficient security has been provided. Commission Regulation No 557/79 provides that the aid is to be paid within 150 days of the submission of the application. Under those circumstances, the verification of the existence of the conditions giving a right to the aid and, in the case of advance payment, the release of the security, must also be carried out within the same period of 150 days. However, in many cases the Italian agencies carried out the checks and closed the file after the expiry of that period. The Commission considers that the refusal to charge the amounts in question to the EAGGF is therefore justified. Furthermore, it points out that the first paragraph of Article 8 (2) of Regulation No 729/70 of the Council provides that 'in the absence of total recovery, the financial consequences of irregularities or negligence shall be borne by the Community, with the exception of the consequences of irregularities or negligence attributable to administrative authorities or other bodies of the Member States'. In this case, the Italian administration is clearly liable since it did not carry out the necessary checks before the period of validity of the securities expired. Finally, the Commission observes that the result of the criminal or administrative proceedings currently pending is irrelevant in regard to the financing of expenditure by the EAGGF.

The Italian Government claims, in the alternative, that the refusal to charge the contested aid to the EAGGF should have been limited to an amount of LIT 597 889 016. That reduction of the amount initially advanced, namely LIT 1 350 061 770, was set out in a table dated 28 May 1985 (Annex 8 to the application) in accordance with criteria approved by the Commission and the latter became aware of it at one of the last meetings before it adopted its decision.

The Commission observes that it accepted the figures provided by the Italian authorities in a letter of 28 November 1984 (Annex 2 to the defence). The table dated

28 May 1985 proved to be unusable because it merely contained a list of the pending criminal and administrative proceedings.

C — *Financial compensation for the withdrawal from the market of fishery products*

1. *Legal framework*

Article 4 of Council Regulation No 105/76 of 19 January 1976 on the recognition of producers' organizations in the fishing industry (Official Journal, L 20, p. 39) provides, *inter alia*, that recognition of a producers' organization in that industry is to be withdrawn if the conditions for such recognition are no longer fulfilled or if recognition is based on false information. If the organization obtained or benefited from recognition by fraudulent means recognition is to be withdrawn retroactively.

In Regulation No 2062/80 of 31 July 1980, the Commission laid down the conditions and procedure for granting or withdrawing recognition of producers' organizations and associations thereof in the fishing industry (Official Journal, L 200, p. 82). Article 5 of that regulation sets out, *inter alia*, the common rules on production and marketing which must be laid down by the producers' organizations. Under Article 8 of the same regulation, 'the Member States shall exercise continuous supervision of the operation of recognized producers' organizations and associations, with particular regard to the application of Article 4 of Regulation (EEC) No 105/76 and of Article 5 of this regulation'.

2. *Facts and procedure preceding the adoption of the contested decision*

It can be seen from the file that at the beginning of 1984, the leaders of a producers' organization in the fishing industry, Domar of Porto Garibaldi, together with the members of the local control committee responsible for checking that products had actually been withdrawn from the market, were charged with fraud on the ground that they had together unlawfully obtained or attempted to obtain the Community aid available for the withdrawal from the market of fishery products during the period from 1978 to 1982.

When it was informed of those facts, the Commission refused to charge to the EAGGF the total expenditure declared by Domar, amounting for 1980 to LIT 2 727 740 360, and stated that, given the complete absence of any valid check on the operations of that organization, that expenditure could not be financed by the EAGGF.

3. *Submissions and arguments of the parties*

The Italian Government observes first that criminal proceedings are currently pending and that the accused contest the facts and have pleaded not guilty. Consequently, it is not yet possible to establish whether aid was improperly obtained and if so, in what amount. In any event, it is not certain that the supervising bodies were in any way responsible. The Italian Government claims principally that the contested expenditure should have been charged to the EAGGF even if the amounts had been improperly obtained (subject to repayment to the EAGGF of sums recovered in the future)

inasmuch as no irregularities or negligence have been shown to exist on the part of the Italian administration or Italian agencies. The Italian administration is not liable for the wrongful conduct of the persons appointed to carry out the checks.

The Commission replies that the Member States have a specific obligation to check the declarations made by producers' organizations (it refers in particular to Article 8 (2) of Regulation No 729/70 and Article 8 of Regulation No 2062/80). If the supervising bodies do not check fraud but take part in them themselves, the resulting losses should be borne by the Member State concerned.

The Italian Government claims, in the alternative, that the Commission should have accepted the amounts in question conditionally until the definitive outcome of the pending criminal proceedings was known.

The Commission considers that it is not required to await the outcome of those proceedings. It observes in particular that it is improbable that the outcome of criminal proceedings would be decisive in regard to financing by the EAGGF. Furthermore, even if the offences were not proved, it is improbable that Domar has in fact fulfilled all its obligations as a producers' association.

T. Koopmans
Judge-Rapporteur