OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 16 DECEMBER 1980 [1]

Mr President,
Members of the Court,

The third case arising from the clearance of the accounts presented by the Member States in respect of expenditure financed by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund in the 1973 financial year concerns the accounts presented by the Italian Republic in respect of aid for the private storage of wine.

The authorities responsible for paying the aid in Italy declared expenditure amounting to LIT 4 094 831 305 in respect of this item (6910) for the 1973 financial year; the Commission, however, only recognized an amount of LIT 3 401 690 025. The balance (LIT 603 141 280) results from a correction made by the Commission, mentioned on page 52 (Chapter 69: Wine) of the Draft Summary Report of 20 February 1979 on the conclusions from the preliminary work for the clearance of the EAGGF, Guarantee Section, accounts for the year 1973. The reasons for that correction are set out in detail in paragraph 2.3.7.1 of the draft report. That report was laid before the Fund Committee, which the Commission consulted before adopting its decision.

The Italian Republic seeks a declaration that Commission Decision 79/898/EEC of 12 October 1979, notified to it on 18 October 1979, is void, in so far as it excludes the sum of LIT 604 863 175 in respect of the payment of aid under long-term storage contracts for the year 1971/72. That sum represents the aforementioned LIT 603 141 280 plus a sum of LIT 1 721 895, which was recorded as received in 1974.

I — In view of the foregoing summary, the submission based on the absence of a sufficient statement of reasons, which the applicant pleaded in the written procedure but did not pursue in the oral procedure, cannot succeed. The Italian Republic was informed in full detail not only of the amount of the deduction made by the Commission, but also of the reasons therefor; in its letter of 7 July 1979 and at the meeting of the Fund Committee on 11 July 1979 it was able to give its views on the matter in detail. Therefore, for reasons which correspond to the arguments advanced by Mr Advocate General Capotorti in his opinion in Case 819/79 *Federal Republic of Germany* v *Commission*, the first submission is, in my view, unfounded.

II — Secondly, the applicant claims that the Commission misinterpreted the "Community legal provisions concerning the common organization of agricultural markets" and the purpose thereof. At the root of the dispute is a conflict of opinion between the Commission and the Azienda di Stato per gli Interventi nel Mercato Agricolo (hereinafter called "AIMA"), which in Italy is responsible for paying the aid financed by the Fund's

1 — Translated from the German.

Guarantee Section, on the question when, pursuant to the Community legal provisions applicable for the 1971/72 wine-growing year, long-term storage contracts for wine had to be concluded and which acts constituted "conclusion" of such contracts.

1. Let me first set out the relevant provisions of Community law.

Under the second subparagraph of Article 5 (5) of Regulation (EEC) No 816/70 of the Council of 28 April 1970 laying down additional provisions for the common organization of the market in wine (Official Journal, English Special Edition 1970 (I), p. 234) aid for *long-term* storage contracts may be granted only under the conditions laid down by Article 5 (1) of that regulation, which, as amended by Article 1 of Regulation (EEC) No 2722/71 of the Council of 20 December 1971 (Official Journal, English Special Edition 1971 (III), p. 1004) provides as follows:

"(1) Private storage aid shall be granted in respect of specified table wines when the forward estimates for a wine-growing year show that the quantity of table wine available at the beginning of the wine-growing year exceeds total forseeable requirements for that year by more than four months' consumption."

This application is concerned solely with *long-term contracts* valid for a minimum of nine months. Initially such contracts could be entered into only during the period form 1 December to 31 January of the same wine-growing year (second subparagraph of Article 5 (5) of Regulation No 816/70). Since, however, the date for the submission of the forward estimate was put back to 10 December by Article 1 of Regulation (EEC) No 2504/71 of the Council of 22 November 1971 amending Regulation No 24 and Regulation No 816/70 on the common organization of the market in wine (Official Journal, Special Edition 1971 (III), p. 962), Article 2 of that regulation substituted for the period referred to above *the period from 16 December to 15 February.*

16 December is the date before which, under Article 3 (1) of Regulation No 816/70, the Council must fix a threshold price activating the intervention system (the activating price); the need for strict observance of the time-limit of 15 February is shown in particular by the fact that the conclusion of long-term contracts may be prohibited even before 15 February "if justified by the development of the market situation and in particular by the rate of conclusions of storage contracts" (letter (a) of the second subparagraph of Article 5 (6) of Regulation No 816/70, as amended by Regulation No 2504/71 of the Council).

Irrespective of whether the contracts were short-term or long-term, it was originally provided by Article 8 (1) of Regulation (EEC) No 1437/70 of the Commission of 20 July 1970 on storage contracts for table wine (Official Journal, English Special Edition 1970 (II), p. 469) that a contract could not be concluded for a period beginning before the date of the conclusion of the contract, and hence that in general the period during which the wine was considered to be stored could not *begin* before the date of the conclusion of the relevant contract. The amount of the aid is in any case fixed per day and per hectolitre; the relevant period for the calculation of the aid is computed from the date of the commencement of storage under the contract to the date when the wine is removed from storage.

However, that principle is no longer of unqualified application. By Article 1 of Regulation (EEC) No 436/71 of the Commission of 26 February 1971 amending Regulation No 1437/70 on storage contracts for table wine (Official Journal, English Special Edition 1971 (I), p. 101) and by Article 1 of Regulation (EEC) No 617/71 of the Commission of 24 March 1971 (Official Journal, English Special Edition 1971 (I), p. 165), the rule laid down by Article 8 of Regulation No 1437/70 of the Commission was amended with the effect that, for the 1970/71 wine-growing year and from 15 January 1971, the period of validity of a contract was to begin on the day on which the written application was received by the competent authority. However, in the case of a contract application made before 15 January 1971, in respect of which no contract was concluded by that date, the period of validity of the contract was to begin on 15 January 1971.

By Regulation No 2837/71 of 27 December 1971 granting aid for the private long-term storage of certain table wines, the Commission provided that in the wine-growing year 1971/72 long-term storage contracts valid for nine months were to be concluded for table wines of types R I, R II and A I and for table wines standing in close economic relationship to those types of table wine. After the period during which long-term contracts must be concluded had been put back by Regulation No 2504/71 of the Council of 22 November 1971 to the period between 16 December and 15 February, the Commission took the view that producers could not properly assess the economic advisability of concluding short-term or long-term storage contracts for that wine-growing year. Therefore, by Article 3 of Regulation No 2837/71 it permitted, by way of exception, long-term storage contracts to be entered into (during the period from 16 December 1971 to 15 February 1972) for table wines of types R I, R II and A I and for table wines standing in close economic relationship to those types, where they were the subject of a short-term storage contract concluded in the period from 15 November to 30 December 1971. Before the adoption of that regulation, the chairman of the Management Committee, which was consulted on 22 December 1971, expressly emphasized that that measure was not to be regarded as a precedent.

The first subparagraph of Article 8 (1) of Regulation No 1437/70 provides:

"A contract may not be concluded for a period beginning before the date of the conclusion of the contract."

The second subparagraph of Article 8 (1) of that regulation (inserted by Regulation No 617/71) was amended by Commission Regulation (EEC) No 176/72 of 26 January 1972 supplementing Regulation (EEC) No 1437/70 on storage contracts for table wine (Official Journal, English Special Edition 1965-1972, p. 44) and reads as follows:

"Notwithstanding the previous subparagraph, the period of validity of a storage contract for which written application is received by the competent agency between 1 December 1971 and 31 August 1972 shall commence on the day on which the application is received.

However, the period of validity of storage contracts for which written application is received by the competent agency after 29 December 1971 shall commence not more than 30 days before the date of the conclusion of the contract."

2. AIMA granted aid under approximately 100 long-term storage contracts on the basis of the provisions cited above

and had claimed reimbursement of that expenditure.

All of those contracts were concluded after 15 February 1972 (according to the list submitted by the Italian Government one of them is even dated 7 August 1973). About 30 contracts cover a period commencing on or before 15 February 1972. Approximately 60 contracts cover a period commencing after that date.

AIMA had at first assumed that the period of storage began to run only when the written contract was executed and not when agreement was reached by the contracting parties. Subsequently, however, the Italian authorities reached the view that, as a result of Commission Regulation No 176/72, storage aid could also be paid under contracts which were not formally concluded until after 15 February 1972, where the application was received no later than that date, because the period of storage commenced on the day on which the application was submitted or, in any event, on the day on which it was received.

(a) In this regard it must first be observed that the purpose of Article 1 of Regulation No 176/72 was, as is clear from the wording chosen for the special provision inserted into Article 8 (1) of Regulation No 1437/70, to lay down a derogation from the basic provision governing the *commencement of the period of validity* of storage contracts contained in the first subparagraph of Article 8 (1), but not to alter the period in which such contracts had to be concluded. Indeed, the Commission could not validly have made such an alteration, because the period from 16 December to 15 February, within which long-term storage contracts had to be concluded, was laid down by Article 5 (5) of Regulation No 816/70 of the *Council*, as amended by Article 2 of Regulation No 2504/71 of the *Council*. The Commission could not by its regulation in any way amend those measures adopted by the Council; nor did it intend to.

(b) In my view, the requirement that the period to be considered when paying the aid must in principle not begin before the conclusion of the contracts is a reasonable one. A producer may certainly be considered for the grant of the aid from the date on which he submits his application; but that application cannot be regarded as accepted on the date of its receipt, still less on the date on which it is submitted. The requirement for the actual payment of the aid that the contract must have been formally concluded certainly does not constitute excessive formalism. Neither the Community rules nor the general implementing decisions of AIMA warrant the view canvassed by the applicant.

A distinction is made by the Community rules in Article 8 (1) of Regulation No 1437/70, as amended by Article 1 of Regulation No 176/72, between the drafting of the written application, its receipt by the competent agency, its acceptance by that agency and (in Article 15 (1)(b)) the contract's taking effect.

There are in fact no standard forms for the contract; however, Article 9 (1) of Regulation No 1437/70 provides that it is to be drawn up in at least two copies, of which one copy is for the producer and the other is to be kept by the intervention agency. In addition, Article 9 (2) lists the minimum information required in order to enable the wine to be identified.

It follows from the foregoing that the contract application imposes obligations on one party only, namely AIMA, whereas the storage contract contains reciprocal obligations: the payment of the aid (Article 9 (2) (b)) is the counterpart (Article 13) of certain obligations incumbent upon the producer, in particular those listed in Article 9 (2) (c).

The producer may conclude a contract only for wine of which he is still the owner when the contract is concluded (Article 2 (2) of Regulation No 1437/70). The contract must be concluded for a quantity of 100 hectolitres or more (the first subparagraph of Article 3 (2)). Both in the case of long-term and short-term contracts the producer undertakes not to put for sale, sell or draw off into containers of less than 50 litres capacity the wine which is the subject of the contract during the period for which the contract is valid (Article 10). The aid is only granted for wine which is stored throughout the agreed period. The application for aid is not of itself sufficient for the wine to be regarded as actually stored. Normally the contract begins and terminates only on the dates on which the agreed conditions are fulfilled.

AIMA, and through it the Fund, can protect their interests and assume their obligations towards the Community and towards the wine-producers and storers only if, before assuming those obligations by contract, they have been able to inspect *inter alia* the quantity and the quality of the wine to be stored and its place of storage.

Since it is difficult to make sure that the wine which is the subject of the contract had not already been sold before the contract was signed (without its having left the producer's stores), it must at least be possible to establish that the quantity of wine remaining in the producer's stores does not alter throughout the period of storage. But how is that to be established if the physical existence of the quantity stored was not ensured at the time when the contract was drawn up? Before the conclusion of the contract the producer is free to dispose of his wine and to draw it off into other containers; in this regard declarations of intent are not sufficient. The Commission contends (and it is not disputed by the Italian Government) that producers have sold their wine in the period between the submission of the application and the conclusion of the contract.

Finally it must be possible to establish that the wine in question fulfils the conditions for storage aid. The identification of the wine is necessary in order that the intervention agency may keep itself informed of any change in the wine which is stored and, for example, satisfy itself that the wine is not being prepared for marketing during the period of validity of the contract.

The Court has held that an inspection by the intervention agencies (in the present case AIMA and the provincial agricultural inspectorates) is necessary in order to determine "having regard to the specific conditions of the wine-growing zones in question, to what extent a multiplication of the places of storage would be likely to jeopardize the effectiveness of the check or to increase its costs out of proportion to the objective sought and thus justify a refusal to conclude a storage contract" (judgment of 28 June 1979 in Joined Cases 233 to 235/78, *Lentes* v *Federal Republic of Germany* [1979] ECR 2305, at p. 2314).

The formal conclusion of the contract is therefore the necessary proof of the actual performance of the checks which establish that the wine is eligible for the aid; it is only upon conclusion of the contract that the respective rights and duties of the producer and the intervention agency crystallize. The storage contract must therefore be formally concluded within the period laid down by the second subparagraph of Article 5 (5) of Regulation No 816/70 of the Council, as amended by Article 2 of Regulation No 2504/71 of the Council, in order for the storage to qualify for aid.

III — Finally the Italian Government alleges a breach of the principle of the protection of legitimate expectation.

I have already explained that long-term contracts may under no circumstances, by analogy with Regulation No 176/72 of the Commission and contrary to the clear wording of Regulation No 816/70 of the Council, be regarded as concluded before 15 February on the ground that the application had already been submitted before that date.

Even though Regulation No 176/72 permitted more extensive derogations than had been provided for in respect of the wine-growing year 1970/71 (by Regulations Nos 436/71 and 617/71), that did not justify the Italian authorities in concluding that they could henceforth take into consideration contracts which were not in fact concluded until after 15 February.

Even assuming that at the meeting of the Fund Committee on 22 December 1971 the Italian delegation asked whether (as, in its opinion, was the case in the previous wine-growing year, a view which I, however, having regard to the wording of Regulation No 436/71, consider to be unfounded) the date on which the contracts took effect might generally be that of the application and not that on which the contract was concluded, it was nevertheless clear from Regulation No 176/72, which was the outcome of that meeting, that that question was, in any event as regards *long-term contracts* and subject to the limited exception laid down in that regulation, answered in the negative.

The onus was on the Italian authorities to eliminate the difficulties which had led to that exception being granted to them. On numerous occasions the Community authorities have complained to the Italian authorities about delays in paying out these Community aids; but those delays cannot be remedied by making the payment even before the conditions prescribed in the Community rules for the payment of the aid have been fulfilled. In any event, the Community cannot be held responsible for the Italian authorities' incorrect interpretation of the Community rules which they were called upon to implement.

IV — In conclusion, I propose that the Court should dismiss the application and order the Italian Republic to pay the costs.