OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 7 July 1989 *

Mr President,
Members of the Court,

A — Introduction

1. The joined cases on which I am here giving my Opinion relate to disputes arising out of the clearance of accounts concerning the European Agricultural Guidance and Guarantee Fund, Guarantee Section (EAGGF), in respect of the 1983, 1984 and 1985 financial years. The Italian Republic contests the decisions of the Commission relating to the clearance of accounts for the years in question.

2. By its application in Case 258/87, the applicant seeks a declaration that the Commission's decision of 19 June 1987 on the clearance of the accounts presented by the Italian Republic in respect of the European Agricultural Guidance and Guarantee Fund, Guarantee Section, expenditure for 1983 is void. [1] By its applications in Cases 337 and 338/87 it seeks a declaration that the Commission's decisions of 18 August 1987 on the clearance of accounts for 1984 and 1985 are void in part. [2]

3. These applications are directed against the refusal to allow to be charged to the EAGGF expenditure relating to sales of skimmed-milk powder in public storage, the conversion of oranges and lemons and special carry-over premiums in the fisheries sector. More precisely, the following items are involved:

(a) sales of skimmed-milk powder in public storage:

(i) in Case 258/87: LIT 6 905 742 049 and LIT 1 350 568 120 for 1983,

(ii) in Case 337/87: LIT 1139 642 880 and LIT 1 720 264 000 for 1984,

(iii) in Case 338/87: LIT 2 024 919 600 and LIT 6 305 824 900 for 1985;

(b) the conversion rate for the conversion of oranges and lemons:

(i) in Case 258/87: LIT 2 824 069 for 1983,

(ii) in Case 337/87: LIT 5 515 101 163 and LIT 1 080 936 168 for 1984,

(iii) in Case 338/87: LIT 567 423 720 and LIT 34 814 210 for 1985;

* Original language: German.
1 — OJ 1983, L 195, p. 40.
2 — OJ 1987, L 262, pp. 23 and 35.

(c) special carry-over premium in the fisheries sector:

(i) in Case 258/87: LIT 101 983 620 for 1983,

(ii) in Case 337/87: LIT 155 417 885 for 1984,

(iii) in Case 338/87: LIT 196 711 020 for the 1985 financial year.

4. The applicant bases its submissions on a misuse of powers and a failure to supply a statement of reasons and on an infringement of Articles 1, 3 and 5 of Council Regulation No 729/70 of 21 April 1970,[3] and Article 8 of Commission Regulation No 1723/72 of 26 July 1972.[4]

5. The applicant claims that the Court should declare void the Commission's decisions on the clearance of accounts in respect of 1983, 1984 and 1985 to the extent to which the amounts in question were disallowed.

6. More specifically, the applicant claims that the Court should:

in Case 258/87:

(i) declare void Commission Decision No 87/368 of 19 June 1987, in so far as it disallows from EAGGF financing the amounts of LIT 6 905 742 049, LIT 1 350 568 120, LIT 2 824 069 and LIT 101 983 620 (that is in total LIT 8 361 117 858) in the clearance of the accounts presented by the Italian Republic for expenditure incurred in 1983 or, on the basis of grounds set out, such lesser sums as may be held to be correct;

(ii) order the defendant to pay the costs;

in Case 337/87:

(i) declare void Commission Decision 87/468 of 18 August 1987, in so far as it disallows from EAGGF financing the amounts of LIT 1 139 642 880, LIT 1 720 264 000, LIT 5 515 101 163, LIT 1 080 936 168 and LIT 155 417 885 (that is in total LIT 9 611 362 096) in the clearance of accounts presented by the Italian Republic for expenditure in 1984 or, on the basis of the grounds set out, such lesser sums as may be held to be correct;

(ii) order the defendant to pay the costs;

in Case 338/87:

(i) declare void Commission Decision No 87/469 of 18 August 1987 in so far as it disallows from EAGGF financing the amounts of LIT 2 024 919 600, LIT 6 305 824 900, LIT 567 423 720, LIT 34 814 210 and LIT 196 711 020 (that is in total LIT 9 129 693 450) in the clearance of accounts presented by the Italian Republic for expenditure in 1985 or, on the basis of the grounds set out, such lesser sums as may be held to be correct;

3 — OJ, English Special Edition 1970, p. 218.

4 — JO 1972, L 186, p. 1

(ii) order the defendant to pay the costs.

7. The defendant contends in all three cases that the Court should:

(i) dismiss the applications as unfounded;

(ii) order the applicant to pay the costs.

8. As far as the facts and arguments of the parties are concerned, reference is made to the Report for the Hearing. I will mention the facts only to the extent necessary for the reasoning in support of my proposal for a decision.

B — Analysis

I — *The sales of skimmed-milk powder held in public storage*

(a) *Marking of the sacks*

9. Only in respect of 1983 is there disagreement on the reimbursement of expenditure relating to sales of skimmed-milk powder in public storage on account of the marking of sacks under Article 15 of Commission Regulation No 368/77 of 23 February 1977,[5] and Article 7 of Commission Regulation No 443/77 of 2 March 1977.[6] Those articles provide: 'the skimmed-milk powder shall be delivered by the intervention agency in sacks marked with one or more of the following indications in letters not less than 1 cm high: "to be denatured (Regulation (EEC) No 368/77)", ... "to be denatured (Regulation (EEC) No 443/77", ...'.

10. The defendant disallowed the amount of LIT 6 905 742 049 on the ground that there had not been proper compliance with the obligations arising from Article 15 of Regulation No 368/77 and Article 7 of Regulation No 443/77. The defendant states that the suspicion that the marking had not been carried out arose first of all from the fact that no request for the costs relating to marking to be taken into account had been made. The investigations which were carried out as a result confirmed this suspicion. During a mission in May 1986, the Italian authorities explained that the marking had not been carried out because it had already been effected by the German authorities. Where the skimmed-milk powder originated in German intervention agencies, the sacks bore, in accordance with Article 2(2) of Regulation No 2254/82,[7] the words 'latte scremato in polvere ad uso zootecnico in Italia'.

11. By a telex message dated 17 June 1986,[8] the defendant requested the applicant to provide information on the problem of marking during a bipartite meeting fixed for 26 June 1986. The telex message was not formally transmitted but is said to have been handed personally to an official of the Italian Ministry of Agriculture. The applicant observes that that

5 — Commission Regulation No 368/77 of 23 February 1977 on the sale by tender of skimmed-milk powder for use in feed for pigs and poultry (OJ 1977, L 52, p. 19).

6 — Commission Regulation No 443/77 of 2 March 1977 on the sale at a fixed price of skimmed-milk powder for use in feed for pigs and poultry and amending Regulations (EEC) Nos 1687/76 and 368/77 (OJ 1977, L 58, p. 16).

7 — Commission Regulation No 2254/82 of 13 August 1982 laying down detailed rules for the transfer to the Italian intervention agency of skimmed-milk powder held by the intervention agencies of other Member States (OJ 1982, L 240, p. 9).

8 — Annex 1 to the defence.

telex message was only a draft.[9] It adds that, in the event that it was transmitted, the view should be taken that that transmission could in any event only have taken place after 23 June 1986, since the telex message of 23 June 1986 (No 260224/3-G4),[10] containing the items on the agenda of the bipartite meeting to be held on 26 June 1986, still stated expressly that a separate telex message would follow as regards the labelling of skimmed-milk powder in public storage.

12. On 17 June 1986, the defendant adopted, in pursuance of Article 1(3) of Regulation No 1723/72[11] as amended by Regulation No 422/86,[12] a decision addressed to the Member States fixing at 15 July 1986 the expiry of the period of time for the transmission of additional information needed for the clearance of accounts for 1983. That decision was notified to the Member States on the following day.

13. On 26 June 1986,[13] immediately after the bipartite meeting, additional detailed and itemized information was requested as regards the expenditure to be reimbursed under Regulations Nos 368/77 and 443/77. In that letter there was no mention of the problem of the marking of sacks.

14. In the telex message of 8 July 1986 (No 280005/3-G4),[14] summarizing the results of the bipartite negotiations of 26 June 1986, it was stated, as regards the marking of sacks of powdered milk, that the written reply which had been promised was still awaited.

15. In the summary report of 15 August 1986 on the results and checks in respect of the clearance of accounts for 1983,[15] it is stated[16] that the sacks of skimmed-milk powder leaving the intervention agency were not marked. After providing detailed explanations on the problems relating to supervision of the denaturing and analyses, the report mentions, at point (c),[17] the marking requirement and states the relevant legal basis. In conclusion it states that the expenses relating to denatured skimmed-milk powder which has been subject to permanent supervision without analyses and to skimmed-milk powder, whether denatured or not, incorporated in animal feedingstuffs elsewhere than at the place of storage may not be reimbursed.[18] Since the information enabling exact figures to be given of the amounts disallowed had not yet been communicated, the amounts declared pursuant to Regulations Nos 368/77 and 443/77 were not covered by the clearance of accounts, so as not to delay clearance as a whole. In the amendment to the summary report of 15 October 1986,[19] the amounts declared under Regulations Nos 368/77 and 443/77 were still provisionally left out of account.

16. In another telex message of 17 October 1986,[20] the defendant requested precisely specified information in order to apply Regulations Nos 368/77 and 443/77.

9 — Annex 16 to the reply.

10 — Annex 15 to the reply.

11 — Commission Regulation No 1723/72 of 26 July 1972 on making up accounts for the European Agricultural Guidance and Guarantee Fund, Guarantee Section (OJ 1972, L 186, p. 1).

12 — Commission Regulation No. 422/86 of 25 February 1986 amending Regulation (EEC) No 1723/72 on making up accounts for the European Agricultural Guidance and Guarantee Fund, Guarantee Section (OJ 1986, L 48, p 31).

13 — Annex 17 to the reply.

14 — Annex 18 to the reply.

15 — Annex 3 to the application.

16 — See p. 67 of the summary report

17 — See p 68 of the summary report

18 — See (d) at p 69

19 — Annex 4 to the application

20 — Annex 6 to the application

However, the problem of the marking of the sacks was no longer mentioned at all. In reply to that telex message, the applicant drafted a memorandum [21] dated 27 October 1986 giving the information requested and stating furthermore that the prescribed marking had been carried out whenever the product physically left the place of storage.

17. On the basis of information supplied in the mean time, the defendant again amended the summary report on 12 November 1986. [22] In that document it decided to disallow the amounts declared of LIT 6 905 742 049 on account of the absence of marking and LIT 1 350 568 120 on account of the failure to carry out analyses. Those figures formed the basis for the decision which was taken on 19 June 1987 against which the application is directed.

18. The applicant considers that the expiry on 15 July 1986 of the period prescribed for the provision of additional information as regards the clearance of accounts for 1983 cannot be applied to the questions concerning the marking of sacks. It is of the opinion that the deadline was tacitly annulled, which it maintains is clear from the telex message of 8 July 1986 and the summary report of 15 August 1986 as well as the document amending it dated 15 October 1986.

19. The defendant replies that the period of time expiring on 15 July 1986 is a prescription period. It adds that precise details were given of the additional information necessary to calculate the amounts which could be reimbursed and that the substantive decision was adopted as soon as the summary report was established on 15 August 1986. In its view, what remained was merely to determine what quantities of skimmed-milk powder had been denatured at the place of storage and what quantities denatured elsewhere.

20. The answer to the question whether the expenses were properly disallowed, on account of the absence of marking, from the amounts to be reimbursed, depends on whether a period of time expiring on 15 July 1986 was validly fixed, whether that period is a prescription period and, if so, whether that period was extended, either expressly or by implication.

21. First of all, it is necessary to start from the fact that, in accordance with Article 1(2) of Regulation No 1723/72, the documents needed for the annual clearance of accounts must reach the Commission by not later than 31 March in the year following that during which the expenditure in question was paid. In respect of the 1983 financial year, the requisite documents ought therefore to have been communicated to the Commission by 31 March 1984.

22. The negotiations which ensue with regard to each clearance of accounts traditionally give rise to a lively exchange of information and opinions between the Member State and the Commission. In the past, these negotiations were sometimes carried on over a period of several years. In view of the need to arrive at a definitive conclusion, without however arbitrarily excluding certain items, Regulation No 422/86 added to Article 1 of Regulation No 1723/72 the following paragraph 3:

'Additional information may be forwarded to the Commission up to a deadline to be fixed by the Commission, taking into account in particular the amount of work

21 — Annex 7 to the application.

22 — Annex 5 to the application.

necessary to supply the information concerned. In the case of failure to submit the aforementioned information within the period fixed, the Commission shall take its decision on the basis of those elements of information in its possession at the deadline, except in cases where the late submission of information is justified by exceptional circumstances.'

23. On this legal basis which was adopted in February 1986, the defendant, on 17 June 1986, adopted the decision whereby additional information regarding the clearance of accounts for 1983 was to be transmitted not later than 15 July 1986.[23] The applicant in its arguments does not, moreover, contest that a period of time was validly prescribed. According to the applicant it was agreed, during the negotiations relating to a deadline, that the expiry of the period could not predate the completion of the usual negotiations. However, although the period of time was fixed on 17 June 1986, the negotiations were arranged for 26 June 1986 and did indeed take place on that date. The period expired only three weeks later, that is on 15 July 1986. The manner in which the period of time was fixed cannot therefore be open to criticism.

24. As regards the marking of sacks, the choice of date was also not unreasonable. More than three years after the end of the financial year to which the clearance of accounts related, the applicant knew, at the latest by the time of the mission in May 1986, that there was uncertainty as to the actual extent of the markings which had been carried out.

25. In the telex message of 17 June 1986, the applicant was expressly requested to provide explanations on this point. Even if the applicant's argument to the effect that only a draft telex message was sent in the first place is correct, it must have been aware at the latest when the definitive version of the telex message was transmitted immediately before the meeting on 26 June 1986 that, in the absence of other information or evidence, this item would be disallowed from financing. It is to be assumed that this subject was at least touched upon during the bipartite meeting on 26 June 1986. That is clear from the telex message of 8 July 1986, which is cited by the applicant itself, in which it was requested by the defendant to put into writing the explanations which it had promised. The telex message of 8 July 1986 cannot moreover be interpreted as meaning that the defendant wished indefinitely to pursue negotiations on this problem. The telex message refers, on the one hand, to subjects touched upon during the bipartite meeting. On the other hand, it contains a reminder regarding the information promised and may, to this extent, also be regarded as a formal notice prior to the expiry of the deadline on 15 July 1986.

26. It is not contested that no explanations were provided prior to 15 July 1986. The item relating to the marking of sacks could therefore only form the subject of the continuing negotiations if the defendant continued, either expressly or by implication, to deal with them.

27. There is no evidence from any of the documents produced before the Court which are dated after 15 July 1986 that the defendant wished to continue to negotiate on the marking of the sacks. No different conclusion may be drawn from the summary report of 15 August 1986 or from the amendments made to it. It must first be recalled that the report of 15 August 1986 was drawn up one month after the expiry of the period and that the most it might therefore have done was to reopen the period of time which had expired.

23 — Decision C(86) 1067 final, Annex 2 to the defence on p. 37

28. Any such reopening must, however, be clearly and unequivocally deduced from the document. However, that is not the case. With regard to the problems arising in the context of Regulations Nos 368/77 and 443/77, there is first of all the finding that the sacks were not marked when they left the intervention agency.[24] At point (c), the requirement to mark the sacks imposed by those regulations is mentioned. At point (d), the document finally states that only the calculation of items excluded from financing is not possible. Since the information relating thereto had not yet been supplied, the items conferring entitlement to reimbursement under Regulations Nos 368/77 and 443/77 were postponed, so as not to delay the clearance of accounts as a whole.

29. But it is clear from the overall context that the documents were only incomplete as regards the items 'permanent supervision without analyses' and 'skimmed-milk powder to be denatured or incorporated' elsewhere than in the premises of the intervention agency. Even for those items, the substantive decision with regard to the items to be excluded from reimbursement had already been taken. The only matter still outstanding was the additional information necessary for actually calculating the amounts to be reimbursed.

30. The amendment of the summary report of 15 October 1986 cannot lead to any other view of the matter. As regards the item 'marking of sacks', there was no alteration.

31. By the defendant's telex message of 17 October 1986, the applicant was once again requested formally in great detail to provide the information which was still needed in order to calculate the amounts. In reply to that telex message, the applicant expressed an opinion on the item relating to the marking of sacks for the first time after 15 July 1986 and without having been questioned on this point. For the rest, it supplied the information which was still missing.

32. On the basis of the documentation which had been completed in the mean time, the defendant calculated the amounts eligible for reimbursement and, in the second amendment to the summary report of 12 November 1986, disallowed the disputed item on account of the fact that there had been a failure to mark the sacks.

33. Since there had been no extension of the deadline of 15 July 1986, either expressly or by implication, the expenditure relating to denatured skimmed-milk powder was correctly disallowed from the reimbursement on account of the fact that the sacks had not been marked.

(b) *Failure to carry out analyses of the denatured skimmed-milk powder*

34. The problem of the denatured skimmed-milk powder arises in the context of the clearance of accounts for 1983, 1984 and 1985.

35. The applicant first claims that the chemical analysis of the denatured product, which is intended to determine whether the additional substances have been uniformly distributed, is not mandatory. In its view, no such obligation is laid down in Article 16(2) of Regulation No 368/77. It adds that paragraph 3(D) of Annex 1 to that regulation makes no provision for such an analysis to be carried out in every case.

24 — See p. 67.

36. The defendant objects that it is clear from the wording of paragraph 3(D) of the Annex to Regulation No 368/77 that an analysis must be carried out. In its view, the analysis forms part of the supervision prescribed in Article 16 of the regulation. It adds that, if that was not the case, the mandatory nature of the provisions of the annex would be meaningless.

37. Secondly, the applicant claims that the analyses in question were carried out, at the request of the firm Zoovit, by the laboratory Itrapac SpA, Crotone, with a view to the labelling of the product. The laboratory confirmed that the processing procedure adopted enabled optimal distribution results to be obtained. It is however clear beyond all possibility of mistake from the document produced in evidence by the applicant[25] that the relevant analyses intended to verify the uniform distribution of the added substances had not been requested and that, consequently, they were not carried out.

38. The sole matter of decisive importance is therefore the reply to be given to the question of law whether the analyses intended to verify the distribution results are mandatory.

39. The legal basis for supervision in the context of which the analyses in question must be placed results from the combined provisions of Article 16 and Article 6, together with the Annex to Regulation No 368/77, and finally Article 8 of Regulation No 443/77 which merely refers to the substantive provisions of Article 16(1) and (2) of Regulation No 368/77.

25 — Annex 12 to the application

40. Article 16 of Regulation No 368/77 is as follows:

'1. Denaturing or direct incorporation of the skimmed-milk powder in accordance with the first and second indents of Article 6(1) shall take place within four months . . .

2. The competent authority of the Member State concerned shall be responsible for checking that denaturing or direct incorporation has been properly carried out. To this end it shall both verify accounts and provide for on-the-spot supervision. In the case of direct incorporation, this may be done by making frequent unannounced visits of inspection.

. . .

In the case of denaturing by direct incorporation in accordance with the second indent of Article 6(1), the costs of the supervision of this operation shall be borne by the undertaking concerned. These costs shall be fixed at a flat rate of two units of account per tonne of skimmed-milk powder and, in the case of permanent on-the-spot supervision, shall not be less than 30 units of account per day of supervision.

. . .'

Article 6, to which reference is made in Article 16, provides in this connection:

'1. A tenderer may not take part in the invitation to tender unless he gives a written undertaking:

(i) to denature the skimmed-milk powder, or have it denatured, in accordance with one of the formulas set out in Section 1 of the annex and with the prescriptions set out in Section 3 thereof, at a denaturing centre approved in accordance with Article 7;

or

(ii) to denature the skimmed-milk powder by incorporating it directly in a feedingstuff under the conditions laid down in Article 8 and in accordance with Sections 2 and 3 of the said annex.

...'

Paragraph 3 of the annex is entitled:

'General prescriptions concerning denaturing and incorporation.'

Subparagraph D thereof states:

'The products to be added to skimmed-milk powder, as given in the formulas in Section 1, must be distributed in a uniform manner so that in two individual samples of 50 g, drawn at random from a 25 kg package, there is contained — by chemical determination — the same results as above within tolerable error limits set by the method of analysis used.

The provisions adopted pursuant to Council Directive 70/373/EEC of 20 July 1970 on the introduction of Community methods of sampling and analysis for the official control of feedingstuffs, shall apply for purposes of control of denaturing.'

41. Article 16 of Regulation No 368/77 provides no clarification as to the criteria which must be checked during supervision. The only certainty is that accounts must be verified and there must be on-the-spot supervision. The subject and the extent of supervision are to be derived from the combined provisions of Article 6 of, and the Annex to Regulation No 368/77.

42. The question therefore arises as to whether a legal obligation as regards the nature and the extent of the supervision may be derived from the annex itself. The whole economy of the annex points to the contrary. The annex sets out on a case-by-case basis, the formulas in accordance with which denaturing may be conducted [26] or lays down the proportions of the different substances to be directly incorporated. [27] Finally, paragraph 3 of the annex lays down a series of quality requirements which the denatured skimmed-milk powder must satisfy. The differences result from the denaturing formula chosen.

43. If supervision is carried out the product must naturally be in conformity with the provisions of the annex. Those are the limits to the mandatory nature of the annex as contended for by the defendant. The scope and intensity of supervision cannot however be deduced from the annex.

26 — Paragraph 1 of the annex.
27 — Paragraph 2 of the annex.

44. That is likewise true of paragraph 3(D) of the annex. That provision must be understood as a quality requirement in the sense that, where samples are analysed, the uniform distribution of substances added must satisfy the criteria laid down in that provision. The expression 'samples' by itself shows that in no event is an analysis involved which is required to be carried out on a regular basis. But it is not even possible to infer from this provision a legal obligation generally to carry out precisely these analyses.

45. One might at most have inferred a legal obligation of that nature from the second sentence, since reference is made therein to Council Directive 70/373/EEC of 20 July 1970. A reading of the directive referred to shows however that it is likewise only an instrument for introducing uniform methods of supervision and analysis and that it merely provides a legal basis enabling the supervision which is prescribed in other Community instruments to be carried out in accordance with a uniform method to be introduced by the Member States. [28]

46. The applicable instruments of Community law provide no clarification as to the scope and frequency of the analyses required. On account of their lack of specificity, they are not capable of establishing a legal obligation. The disallowance of the expenditure for supervision on account of the absence of analyses under paragraph 3(D) of the annex was therefore unlawful. The application must be granted on this point.

28 — See Articles 1 and 2 of Council Directive 70/373/EEC of 20 July 1970 on the introduction of Community methods of sampling and analysis for the official control of feeding stuffs (OJ, English Special Edition 1970 (II), p 535)

II — *The conversion rate for the processing of oranges and lemons*

47. The dispute concerning the application of different conversion rates by the parties stems from the fact that the defendant, for the purpose of determining at what time a new conversion rate becomes applicable to financial compensation for the processing of fresh oranges and lemons, had regard to the marketing years for those fruits, whereas the applicant considered that there was no link between the regime governing industrial processing and that governing the fresh products. For the Italian authorities the date of the entry into force of new conversion rates is thus the date laid down by the provisions governing those products for which there is no marketing year.

48. The application in Case 258/87 contests the disallowance of a sum amounting to LIT 2 824 069 in the clearance of accounts for 1983. This represents a reduction of the amount declared for reimbursement in respect of compensation relating to the processing of oranges during the 1981 to 1982 marketing year. The difference between the amount declared and the amount allowed stems from the application of different conversion rates. At the time of the establishment of the accounts for the marketing year 1981/82, the applicant took as its basis a conversion rate of ECU 1 = LIT 1 258. For its part, the defendant applied the rate of ECU 1 = LIT 1 227.

49. As regards the 1982/83 marketing year, the parties are in agreement that the conversion rate of ECU 1 = LIT 1 289 should apply. The establishment of the accounts in respect of the compensation for

the processing of oranges during the 1982/83 marketing year is therefore not part of the dispute.

50. The applications in Cases 337 and 338/87 are directed against the decisions of the Commission, inasmuch as they disallowed for reimbursement compensation relating to the processing of oranges amounting to LIT 5 515 101 163 for 1984 and LIT 567 423 720 for 1985. Also disallowed was compensation relating to the processing of lemons amounting to LIT 1 080 936 168 for 1984 and LIT 34 814 210 for 1985. The difference is due to the fact that the applicant worked on the basis of a conversion rate of ECU 1 = LIT 1 432 whereas the defendant based itself, as regards the 1983/84 marketing year, on a conversion rate of ECU 1 = LIT 1 341. It was only as from the beginning of the 1984/85 marketing year that the defendant applied the conversion rate of ECU 1 = LIT 1 432.

51. The applicant bases its claims in Case 258/87 on an alleged infringement of the following provisions: Article 7(a) of Regulation No 208/70,[29] added by Regulation No 2972/75,[30] Annex VII to Regulation No 878/77[31] as amended by Regulation No 3398/81,[32] Articles 1, 3 and 5 of Regulation No 729/70 and Article 8 of Regulation No 1723/72. In Cases 337 and 338/87, it also claims that Annex VII to Regulation No 878/77 as amended respectively by Regulation No 1223/83[33] and Regulation No 855/84[34] has been infringed.

52. All the applications are essentially based on the fact that the applicable conversion rate must be the rate which was in force on the date on which the transaction was carried out, in other words the date on which entitlement was conferred. For the processing of oranges and for the processing of lemons the events conferring entitlement were fixed by those regulations at different dates.

53. The defendant does not dispute the relevance of the event conferring entitlement. However, it proceeds on the basis that there is a marketing year applicable, both to oranges and to lemons, which is the reason for which the date of entry into force of a newly fixed conversion rate is different from the date of entry into force of the amending regulation relating thereto.

54. The applicant counters this line of argument by submitting that the processing of oranges and lemons does not constitute the marketing of agricultural products, namely oranges and lemons, which is governed by the common organization of the markets in the fruit and vegetable sector,[35] but industrial processing which is governed by other rules. In support of its argument it points out that the basic regulations governing the processing of

29 — Commission Regulation No 208/70 of 4 February 1970 (OJ, English Special Edition 1970 (I), p. 74).

30 — Commission Regulation No 2972/75 of 12 November 1975 (OJ 1975, L 295, p. 16).

31 — Council Regulation No 878/77 of 6 April 1977 (OJ 1977, L 106, p. 27).

32 — Council Regulation No 3398/81 of 27 November 1981 (OJ 1981, L 344, p. 1).

33 — Council Regulation No 1223/83 of 20 May 1983 (OJ 1983, L 132, p. 33).

34 — Council Regulation No 855/84 of 31 March 1984 (OJ 1984, L 90, p. 1).

35 — Council Regulation No 1035/72 of 18 May 1972 (OJ, English Special Edition 1972 (II), p. 437).

oranges[36] and lemons[37] make direct reference to Article 43 of the EEC Treaty.

55. In order to decide this question, it is first of all necessary to determine whether for oranges and lemons intended for processing there is in existence a marketing year within the meaning of the common organization of the markets in the fruit and vegetables sector. Annex II to Regulation No 1035/72 sets out the varieties of fruit and vegetables which are subject to a price and intervention regime. Oranges and lemons are included in that list. It follows that fresh oranges and lemons, in addition to being subject to the common organization of the markets in the fruit and vegetables sector, are governed by specific intervention measures.

56. In Regulation No 1343/73,[38] which is based on Regulation No 1035/72 and lays down basic prices and purchase prices in the fruit and vegetable sector for the 1973/74 marketing year the marketing year for oranges is established as the period from October to June of the following year and the marketing year for lemons as the period from July to May of the following year.

57. Apart from the general system of price intervention, a scheme was introduced for both oranges and lemons which was intended to encourage the processing of those agricultural products: the structure of the special measures to encourage processing for certain varieties of orange within the meaning of Regulation No 2601/69 and that of the special measures to encourage the marketing of products processed from lemons within the meaning of Regulation No 1035/77 are comparable. Before the beginning of each marketing year a minimum price is fixed which processors must pay to producers. The mere fact that the minimum price must be fixed at the beginning of the marketing year itself shows that the marketing year is also decisive as regards fruits intended for processing.

58. Moreover, the provisions relating to the fixing of the relevant minimum price also demonstrate the substantive link existing with the price and intervention regimes under the common organization of the markets in the sector of fruits and vegetables. The basic prices and purchase prices fixed in pursuance of those provisions form the basis for fixing minimum purchase prices. That is clear, as regards the processing of oranges, from Article 2 of Regulation No 2601/69 and from the recitals to subsequent regulations fixing minimum purchase prices.[39] As regards the processing of lemons, recourse to the purchase price and the basic price for fixing the minimum price is based on Article 1 of Regulation No 1035/77.

59. A formal argument in favour of a link between the common organization of the markets in the fruit and vegetables sector and measures intended to encourage processing may be derived from Article 3 of Regulation No 1035/77, which is the basic regulation for the processing of lemons and refers, as regards the adoption of detailed rules of application, to Article 33 of Regulation No 1035/72 establishing a common

36 — Council Regulation No 2601/69 of 18 December 1969 (OJ, English Special Edition 1969 (II), p. 586)

37 — Council Regulation No 1035/77 of 13 May 1977 (OJ 1977, L 125, p. 3).

38 — Council Regulation No 1343/73 of 15 May 1973 (OJ 1973, L 141, p. 1)

39 — See Commission Regulation No 1733/81 of 29 June 1981 (OJ 1981, L 172, p. 36) in respect of the 1981/82 marketing year, and Commission Regulation No 2507/83 of 3 September 1983 (OJ 1983, L 248, p. 12), in respect of the 1983/84 marketing year.

organization of the markets in the fruit and vegetables sector.

60. In addition to this formal link and the substantive link between the common organization of the markets for fruit and vegetables and the systems intended to encourage the processing of oranges and lemons, the fact that the provisions adopted in the context of aid for processing frequently have recourse to a marketing year shows that a marketing year also applies to fruit intended for processing. Such recourse may for example by found in Article 2(2) and Article 3(1) of Regulation No 2601/69, Article 3(2) of Regulation No 208/70, in Regulations Nos 1733/81 and 2507/83, in Article 1(2) of Regulation No 1035/77, in Article 1 of Regulation No 1045/77,[40] etc.

61. Finally, the fact that the marketing year applies also in the case of oranges intended for processing is made clear by Regulation No 1154/78,[41] which was expressly intended to amend Regulations Nos 2601/69 and 1035/72. That regulation amending the common organization of the markets in the sector of fruit and vegetables and the basic regulation on the processing of oranges establishes anew the marketing year for certain varieties of fruit and vegetables. Thus it is that under Article 1 of Regulation No 1154/78 a marketing year from 1 October to 15 July applies to oranges and one running from 1 June to 31 May to lemons. The parallelism between the systems of aid for the processing of oranges and for the processing of lemons is, moreover, apparent from the subsequent Regulation No 1562/85[42] laying down detailed rules for the application both of Regulation No 2601/69, the basic regulation for the processing of oranges, and Regulation No 1035/77, the basic regulation on the processing of lemons.

62. Aid for processing oranges and lemons is intended to support the marketing of those fruits. By reason of their purpose those measures in the last resort inure to the benefit of producers of fresh fruit. The financial support afforded to processing undertakings is merely a link in the chain intended to encourage the sale of fresh fruit. Financial support in the context of the manufacture of processed products is consequently intended only to be indirect.

63. It is therefore necessary to proceed on the principle that a marketing year also exists for oranges and lemons intended for processing. That is decisive as regards the validity of a given conversion rate. A separate question is the reference date for the application of the conversion rate in question. Article 6 of Regulation No 1134/68[43] on the conversion rates applicable in the context of the common agricultural policy, contains the following basic rule:

'For the purposes of this regulation, the time when a transaction is carried out shall be considered as being the date on which occurs the event, as defined by Community

40 — Commission Regulation No 1045/77 of 18 May 1977 (OJ 1977, L 125, p. 23).

41 — Council Regulation No 1154/78 of 30 May 1978 (OJ 1978, L 144, p. 5).

42 — Commission Regulation No 1562/85 of 7 June 1985 (OJ 1985, L 152, p. 5).

43 — Regulation (EEC) No 1134/68 of the Council of 30 July 1968 laying down rules for the implementation of Regulation (EEC) No 653/68 on conditions for alterations to the value of the unit of account used for the common agricultural policy (OJ, English Special Edition 1968 (II), p. 396).

rules . . . in which the amount involved in the transaction becomes due and payable.'

64. The event conferring entitlement to financial compensation for the processing of oranges is constituted by the fact of processing, as is indicated in the recitals to Regulation No 2972/75. Since it is, however, difficult to establish the precise date of processing for a given batch and since it was necessary to ensure the uniform application of the rules on financial compensation, it is appropriate to apply a uniform conversion rate. For this purpose a given date is fictitiously deemed to be the date of processing. Accordingly, in the case of the processing of oranges, the event conferring entitlement to financial compensation is deemed to have occurred on 1 May in each year. [44]

65. In the case of the processing of lemons a different treatment is applied according to the processing period. The event giving entitlement to financial compensation is deemed to have occurred on 30 November for the period from 1 June to 30 November and on 31 May for the period from 1 November to 31 May. In cases of additional financial compensation, the reference date is fixed at 31 May for the whole year. [45]

66. Regulation No 208/70 laying down detailed rules for the application of measures to encourage the processing of oranges and Regulation No 1045/77 laying down detailed rules for the application of measures intended to encourage the marketing of products processed from lemons were superseded by Regulation No 1562/85 laying down detailed rules of application for the sectors covered by the two regulations. The new regulation also altered the dates on which the event conferring entitlement is fictitiously deemed to occur. That amendment was made on the basis of the following considerations: '. . . In view of the link between financial compensation and the minimum price to be paid to growers, the conversion rate applied to that price should be the same as that applied to the financial compensation'. [46] In accordance with Article 11 of Regulation No 1562/85, the event creating entitlement to financial compensation is deemed to occur:

'(a) in the case of oranges: on 1 October of the marketing year in which the fruit is sent for processing;

(b) in the case of lemons:

(i) on either 1 June and 1 December of the marketing year . . . ,

(ii) on 1 December of the marketing year where the fruit is eligible for supplementary financial compensation'.

67. In order to calculate the actual amounts to be reimbursed it is necessary to go by the dates of the notional event creating entitlement and the conversion rate then applicable. The conversion rates for specific periods are to be determined in accordance

44 — See Article 7 bis of Regulation No 208/70 added by Regulation No 2972/75.

45 — See Article 9 in conjunction with Article 1 of Regulation No 1045/77

46 — See the sixth recital in the preamble to Regulation No 1562/85

with Regulation No 878/77 and its amending regulations,[47] and by reference to Regulation No 1223/83, repealing Regulation No 878/77 and to Regulation No 855/84, amending Regulation No 1223/83.

68. As regards the periods on which the Court is called upon to give a decision, the following situation emerges. Since 6 April 1981, the date on which Regulation No 850/81 entered into force, the rate applicable according to Annex VII thereto is ECU 1 = LIT 1 227. This rate was still applicable on 1 May 1982 so that the accounts for the marketing year 1981/82 in respect of oranges should be drawn up on the basis of that rate. The rate was amended by Annex VII to Regulation No 3398/81. Under that provision the applicable rate was ECU 1 = LIT 1 258. That rate was however to be applicable, in accordance with the fifth indent of paragraph 1 of Annex VII, as from the beginning of the 1982/83 marketing year for oranges, which alone are relevant in this connection. Prior to 1 October 1982, the beginning of the marketing year, the regulation was subject to a further amendment. Regulation No 1051/82 determined that, as from the beginning of the 1982/83 marketing year, the applicable rate was to be ECU 1 = LIT 1 289.[48] Regulations Nos 1207/83 and 1668/82 maintained that rate. The next amendment occurred only on 23 May 1983, so that on the reference date of 1 May 1983 the rate of ECU 1 = LIT 1 289 continued to be applicable.

69. Regulation No 1223/83 of 20 May 1983, which entered into force on 23 May 1983, introduced the rate of ECU 1 = LIT 1 341. This rate was applicable until the beginning of the 1984/85 marketing year, that is to say until 1 October 1984. On 1 May 1984, therefore, the applicable rate was ECU 1 = LIT 1 341. The amendment on 1 October 1984 in respect of oranges was brought about by Regulation No 855/84 and brought the rate to ECU 1 = LIT 1 432. This rate was still applicable on 1 May 1985.

70. In pursuance of those same principles, the following rates are applicable to the processing of lemons: the conversion rate of ECU 1 = LIT 1 289 came into force on 1 June 1982, the date of the beginning of the marketing year, and was therefore still valid on 30 November 1982.[49] The change of the conversion rate to ECU 1 = LIT 1 341 was adopted on 23 May 1983 in pursuance of Regulation No 1223/83 and was therefore in force on 31 May in respect of the period from 1 November 1982 to 31 May 1983. That conversion rate was still in force on 30 November 1983 and on 31 May 1984. It was only as from the beginning of the 1984/85 marketing year, that is 1 June 1984, that the rate of exchange of ECU 1 = LIT 1 432 was introduced by Regulation No 855/84. On 30 November 1984 and on 31 May 1985, therefore, the applicable rate was ECU 1 = LIT 1 432.

71. Regulation No 1562/85 altered, as has already been mentioned, the dates on which the event conferring entitlement to financial compensation is deemed to have occurred. On the entry into force of that regulation, namely on 12 June 1985,[50] dates at the beginning of the processing period

47 — See Council Regulation No 850/81 of 1 April 1981 (OJ 1981, L 90, p. 1), Regulation No 3398/81 (OJ 1981, L 344, p. 1), Council Regulation No 1051/82 of 4 May 1982 (OJ 1982, L 123, p. 1), Council Regulation No 1207/82 of 18 May 1982 (OJ 1982, L 140, p. 51) and Council Regulation No 1668/82 of 28 June 1982 (OJ 1982, L 184, p. 19).

48 — See the 10th indent of paragraph 1 of Annex VII to Regulation No 1051/82.

49 — See Regulations Nos 3398/81, 1051/82, 1207/82 and 1668/82.

50 — See Article 22 of Regulation No 1562/85.

henceforth constitute the reference dates — 1 October for oranges and, as the case may be, 1 June or 1 December for lemons. It is true that, in accordance with Article 21 of Regulation No 1562/85, Regulations Nos 208/70 and 1045/77 were repealed. However, they remained applicable to products processed before the date of entry into force of the regulation. Consequently, in respect of the marketing years from 1 October 1984 to 15 July 1985 for oranges and from 1 June 1984 to 31 May 1985 for lemons, 1 and 31 May 1985 continued to be the reference dates for oranges and lemons respectively.

72. The defendant therefore applied the correct conversion rates. Consequently, the application should be dismissed on this point.

III — *The special carry-over premium in the fisheries sector*

73. The last point which remains to be discussed relates to the refusal to finance the special carry-over premiums for sardines and anchovies, which were granted to the processing industry.

74. To increase competition in the sector of sardines and anchovies in the Community, the defendant adopted a system of premiums which was intended to inure ultimately to the benefit of producers in the Community. The structure of the aid is such that, in the first place, producers' organizations may directly acquire a right to special carry-over premiums. Secondly, a sufficiently remunerative minimum price is to be guaranteed to producers' organizations by means of the accrual to the processing industries of the right to a premium if they contractually undertake to pay a minimum price. [51]

75. In the clearance of accounts for 1983, 1984 and 1985, the defendant disallowed special carry-over premiums granted to the processing industry in so far as the sardines and anchovies came from the producers' organization Domar.

76. Irregularities had come to light in the producers' organization Domar which gave rise to criminal proceedings at national level. On account of the offences established, the special carry-over premiums granted to the producers' organization Domar in respect of the 1980 financial year were properly excluded from financing. The Court confirmed that this measure was justified in the judgments which it gave in Cases 342 and 343/85. [52] The decisions of the Court are, *inter alia*, based on the finding that the supervision prescribed was not properly carried out.

77. The applicant considers that the irregularities on the part of the producers' organization should not have any effect on the grant of special carry-over premiums to the processing industry. In its view, both the requirement to pay a minimum price and the actual processing of the quantities declared are matters which can be verified and were properly carried out. The defendant replies that the conduct of the

51 — See Council Regulation No 2204/82 of 28 July 1982 (OJ 1982, L 235, p. 7), and Commission Regulation No 3138/82 of 19 November 1982 (OJ 1982, L 235, p. 9)

52 — Judgments of 25 November 1987 in Case 342/85 *Italy* v *Commission* [1987] ECR 4677 and of 25 November 1987 in Case 343/85 *Italy* v *Commission* [1987] ECR 4711

processing undertakings is not decisive in itself; the Member State must also accept responsibility for the necessary supervision and compliance by the producers' organizations with Community requirements.

78. In order to decide the question whether, as a matter of law, the special carry-over premiums granted to the processing industry must be reimbursed where those undertakings conduct themselves in a regular manner or whether the business attitude adopted by producers' organizations must also have an impact on that decision, it should first of all be stated that in this case it is a question of deciding whether the processing undertakings were or were not able to claim special carry-over premiums. The reply to that question is to be derived from the legal relationship between the Member State and the processing undertakings.

79. The reply to the question whether a Member State may claim reimbursement by the Community of a premium paid to a processing undertaking depends on the relationship between the Member State and the Community. Considerations relating to the object and purpose of the system of premiums may therefore also have an impact on that decision.

80. Furthermore, the Member State is in a different legal position as regards the Community than as regards the processing undertakings. Article 8 of Regulation No 2204/82 refers in the first place to the relationship between the Member State and processing undertakings. On the other hand, Article 4 of the regulation lays down obligations the fulfilment of which must be guaranteed as regards the Community by the Member State. The Member State's supervisory duties and possibilities of intervention justify imposing on it, *vis-à-vis* the Community, a more extensive responsibility than that of verifying whether a special carry-over premium has or has not been correctly granted.

As is already apparent from a reading of the recitals in the preamble to Regulation No 2204/82, the special carry-over premiums for anchovies and sardines are in the last analysis to inure to the benefit of producers. Thus Article 2 of the regulation states: 'The special carry-over premium shall be granted only in respect of sardines and anchovies which . . . have been caught by a member of a producers' organization'. It is the Member State which is responsible for ensuring observance of the Community requirements. That is why in the recitals it is stated that: '. . . the special carry-over premium cannot be paid until the Member States have established that all the relevant conditions have been fulfilled'.

81. Moreover, Article 4(1) of Regulation No 2204/82 requires Member States to introduce a system of supervision. If they do not comply with that obligation they cannot ask the Community to reimburse their expenditure. Their liability is in the nature of a surety obligation since it is only when all Community requirements have been fulfilled that aid may be reimbursed by the European Agricultural Guidance and Guarantee Fund, Guarantee Section.

82. That comprehensive responsibility of the Member State, which remains at the same time free to choose the means which it uses to ensure observance of Community requirements, justifies, in cases of manifest irregularities giving rise to criminal proceedings on the part of a producers' organization, disallowing reimbursement of the premiums allegedly based on deliveries

made by that organization. Even if non-compliance with its obligations cannot be alleged against the processing undertaking it is nevertheless the case that the Member State has not complied with the supervisory obligations falling within its sphere of responsibility. Consequently, the application cannot succeed in so far as it seeks the annulment of the defendant's decision in relation to the special carry-over premiums excluded from reimbursement.

83. This conclusion cannot be countered by arguing that the defendant reimbursed expenditure to another Member State which acquired the products from the same producers' organization. That Member State cannot be accused of having failed to fulfil its supervisory obligations towards a producers' organization which is not situated on its territory.

Costs

84. In accordance with Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. In accordance with the first subparagraph of Article 69(3), the Court may order the parties to bear their own costs in whole or in part where each party succeeds on some and fails on other heads.

C — Conclusion

85. I propose that the Court should only grant the application to the extent that it is directed against the disallowance of expenditure relating to the denaturing of skimmed-milk powder on account of the absence of analyses. My proposal for the Court's decision is as follows:

'(1) Commission Decisions 87/368 of 19 June 1987, 87/468 of 18 August 1987 and 87/469 of 18 August 1987 on the clearance of the accounts presented by the Italian Republic in respect of the European Agricultural Guidance and Guarantee Fund, Guarantee Section, expenditure for 1983, 1984 and 1985 are declared void in so far as they disallowed from EAGGF financing the amounts of:

(i) LIT 1 350 568 120 for the 1983 financial year,

(ii) LIT 1 720 264 000 for the 1984 financial year, and

(iii) LIT 6 305 824 900 for the 1985 financial year.

(2) For the rest, the application is dismissed.

(3) The parties shall bear their own costs.'