OPINION OF ADVOCATE GENERAL LÉGER

delivered on 29 February 1996 *

1. Pursuant to Article 173 of the EC Treaty, the Italian Republic is seeking the annulment of Commission Decision 94/281/EC of 29 April 1994 on the clearance of accounts of Italy for certain expenditure financed by the European Agricultural Guidance and Guarantee Fund (EAGGF), Guarantee Section, for the financial year 1991, [1] in so far as it excludes the sum of LIT 18 934 858 259 from financing by the Community.

2. Before I go on to explain the reasons for that exclusion and analyse the grounds cited by the Italian Republic in support of its application, it seems to me essential to describe the relevant legislation and the facts underlying the dispute.

The relevant Community legislation

3. On 5 March 1991, the Council adopted Regulation (EEC) No 598/91 on urgent action for the supply of agricultural products intended for the people of the Soviet Union. [2]

4. That regulation is based on Articles 43 and 235 of the EEC Treaty. The first recital of the regulation provides that: '... the Community has agricultural products in storage as a result of intervention measures and, in view of the situation on the market, priority should be given to supplying these products; ... regularization of the agricultural markets may also be achieved by supplying such products in processed form'; the second recital states: '... the action proposed is essentially humanitarian in its aim and should therefore be based also upon Article 235 of the Treaty'.

5. The purpose of the regulation is stated in Article 1. The Community had decided to take urgent action to supply the Soviet Union with agricultural products and set expenditure on that action at ECU (budget) 250 million.

* Original language: French.

1 — OJ 1994 L 120, p. 59.

2 — OJ 1991 L 67, p. 19.

6. Article 2 sets out the principles governing implementation of the relevant measures.

7. Article 2(1) thus provides that 'the Community shall transfer agricultural products available as a result of intervention free of charge to the Soviet Union'.

8. Article 2(2) adds that 'supply costs shall be met by the Community and suppliers shall be chosen by tendering procedure. Transport costs shall be borne by the Community unless the recipient country itself takes the products over in the Community. These costs may include processing of products mobilized as provided for in paragraph 1'.

9. Article 4 of the regulation further provides that: 'The Commission shall be responsible for verifying on the spot the delivery operations and the application of the criteria adopted when the aid is distributed to the people'.

10. Finally, Article 5 makes the Commission responsible for implementing the measures.

11. In accordance with the procedure laid down in Article 5(2), the Commission adopted, on 11 June 1991, Regulation (EEC) No 1582/91 laying down certain detailed rules for the application of Council Regulation (EEC) No 598/91. [3]

12. Article 1 of Regulation No 1582/91 provides for a tendering procedure for the delivery of canned intervention beef.

13. According to Article 2 of the regulation, the delivery is to comprise, first, the processing and packaging of the beef; secondly, the possible storage at the manufacturer's expense until the taking over of the canned beef by the organization designated by the Commission for the transport of the food aid to its final destination (hereafter the 'transporter') and, finally, actual delivery of the canned beef to the transporter.

14. Articles 3 and 4 determine the tendering procedure.

3 — OJ 1991 L 147, p. 20.

15. Article 3(2) provides that tenderers are to submit their tender in writing to the national intervention agencies.

16. Article 4(1) provides that the intervention agencies are to forward to the Commission the tenders submitted.

17. Article 4(2) provides that, on the basis of the tenders received, the Commission is to decide either to fix a maximum amount of costs or to make no award. Where a maximum amount of costs is fixed, tenders not exceeding this amount are to be accepted.

18. Article 4(3) provides that within three working days following the day on which the Member States are notified of the Commission's decision, the intervention agency concerned is to inform all tenderers of that decision. Where a tender is accepted, the contract is to be deemed to have been concluded on the date of notification by the intervention agency to the successful tenderer.

19. Article 6(3) requires the successful tenderer to lodge a security with the intervention agency, in accordance with Commission Regulation (EEC) No 2220/85 of 22 July 1985 laying down common detailed rules for the application of the system of securities for agricultural products. [4]

20. According to Article 8, the successful tenderer is to ensure that the canned meat produced is placed and kept in store in easily identifiable lots.

21. Article 9 stipulates that intervention agencies are to be responsible for the supervision of all movements and operations related to the beef concerned until the canned beef is taken over by the transporter. According to that provision, that supervision must include permanent physical control to verify that all the meat taken over is used for the manufacture of canned beef in accordance with the specifications laid down in Annex I to Regulation No 1582/91 and, when actual delivery takes place, physical control to verify that the canned beef produced and stored fully corresponds with the canned beef to be delivered. In respect of each delivery contract a report is to be made *stating the findings of the supervision*. Where those findings are considered satisfactory by the official responsible he is to issue the

4 — OJ 1985 L 205, p. 5.

appropriate certification to the successful tenderer.

22. Under Article 10, all the canned beef is to be delivered to the transporter against reception of a take-over certificate.

23. Article 11 provides that upon application for payment accompanied by the take-over certificate and certificate of conformity, the intervention agency concerned is immediately to pay the successful tenderer the amount laid down in his tender.

24. Article 12 stipulates that the delivery security provided for in Article 6(3) is to be released immediately after the successful tenderer has provided the intervention agency with both the abovementioned certificates.

25. Articles 2 and 3 of Regulation (EEC) No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy [5] provide that only expenditure incurred in accordance with the Community rules within the framework of the common organization of agricultural markets is to be borne by the EAGGF.

26. Under Article 5 of that regulation, expenditure incurred by the Member States in relation to a measure financed by the EAGGF is not to be charged to the Community budget until the accounts have been cleared by the Commission.

27. The system for clearing accounts is more than a mere accounting transaction: Article 9 of Regulation No 729/70 provides that the Commission may, in certain circumstances and in compliance with the procedures laid down, look for the evidence needed to check that the expenditure of the Member States is compatible with Community law.

The facts

Background to the case

28. Following a tendering procedure initiated under Regulation No 1582/91, certain member companies of the Italian BECA Group were awarded part of the contract for

5 — OJ, English Special Edition 1970 (I), p. 218.

the supply of canned beef intended for the people of the Soviet Union. The meat, which came from the German intervention agency (BALM), was accordingly processed by certain companies in that group. A large consignment of meat (1 153 926 cans, each weighing 2.6 kg) was processed and canned by Nuova Irpinia SpA in its factory at Avellino. The Commission decision relates solely to that consignment.

29. The Italian intervention agency (AIMA), responsible under Regulation No 1582/91 for checking the processing and canning, gave the National Institute for Canned Food ('INCA') the task of supervising the transactions relating to the beef. INCA certified that the canned produce originating from Nuova Irpinia's factory was in conformity with the requirements laid down by Regulation No 1582/91, whereupon AIMA paid to the successful tenderer the amount due for the processing of the beef and released the security relating thereto. Wesotra, a transport company, was selected by the Commission to transport the canned products to the people of the former Soviet republics.

30. In response to complaints by the authorities in some of those republics that the canned goods delivered were unfit for consumption, the Commission made investigations. It inspected Nuova Irpinia's factory and analysed several series of samples in order to check the quality of the suspect product. The results of those investigations convinced the Commission that the canned meat delivered to the former Soviet republics was unfit for consumption because it had not been properly sterilized by Nuova Irpinia. The Commission has produced the results of biological analyses which reveal the presence of bacteria indicating that the meat was not properly sterilized, and evidence that one of the factory's nine autoclaves was defective. Furthermore, since it was not possible to identify the lots produced by Nuova Irpinia, all the canned beef produced by that firm had to be recalled. Further tests carried out on the canned goods after they had been recalled by three laboratories appointed by agreement by AIMA, the BECA Group and the Commission confirmed the results of the initial investigation. The Commission therefore decided to exclude from Community financing the sum corresponding to the processing of meat by Nuova Irpinia.

The decision at issue

31. The grounds for that exclusion are set out in the fifth recital of the decision at issue:

'... a considerable part of the canned beef produced by certain Italian firms and supplied to the ex-USSR proved to be unfit for

human consumption; ... additionally, it was found that in certain cases the meat content of the cans did not correspond to the specifications laid down in the Annex to Regulation (EEC) No 1582/91; ... the affected canned beef not being identifiable by lot, the totality of the produce supplied had to be retrieved and will have to be destroyed; ... the deterioration of the produce was found to be due to the insufficiency of the sterilization operation for the meat to be processed and this is attributable to the producing firm; ... the permanent physical controls which had to be effected in accordance with Article 9 of the said regulation did not allow the detection of the abovementioned processing faults; ... in consequence, the Italian intervention agency incorrectly paid the processing costs to the successful tenderers and did not acquire the securities constituted in accordance with Article 6(3) of the aforementioned regulation; ... the associated positive and negative expenditure which was supported by the Fund in 1991 may [not therefore] be taken in charge by the Community budget'.

32. The Commission alleges that the Italian Republic has incurred expenditure incompatible with the Community rules. It maintains that in the context of the rules on the financing of the EAGGF, Guarantee Section, it is the responsibility of the Member States to ensure that operations financed by the Fund are actually carried out and are executed correctly, to prevent and deal with irregularities and to recover sums lost as a result of irregularities or negligence. [6] However, by allowing defective canned produce to be delivered to third countries, the Italian Republic has demonstrated that the controls carried out by its agencies were inadequate for the purposes of establishing whether the canned goods complied with the Community requirements.

The grounds for annulment

33. The Italian Republic claims that the Commission has violated Article 4 of Regulation No 598/91, Article 9 of Regulation No 729/70 and Article 9 of Regulation No 1582/91 and, in so doing, has misused its powers. Analysis of those regulations shows, it maintains, that following the tendering procedure for the canning of the meat the Commission entered into a contract with the successful tenderers. On the basis of that analysis it puts forward two interlinked pleas, which may be summarized as follows. In the first plea it claims that the legal relationship between BECA and the Commission is a contractual one. It refers in that regard to the rules of contract law. In the second plea it effectively challenges the results of the investigations carried out by the Commission, which appear to show that the sole cause of the products delivered to the former Soviet republics being unfit for consumption lay in the processing and canning operations.

6 — Article 8 of Regulation No 729/70.

The first plea

34. The Italian Republic relies on the rules on contractual liability. According to it, the legal relationship between the Commission and the successful tenderers was a contractual one. The Commission is alleged to have entered into a contract with the BECA Group. Consequently, in the context of this dispute, it is for the Commission to prove BECA's liability for the damage, in accordance with the rules of contractual liability. The Italian Republic acted merely in its capacity as the representative of the Commission, that is to say for and on behalf of the Commission within a pre-existing contractual relationship. Since the functions thus attributed to it were of a purely instrumental nature (concerning only compliance with the processing conditions and procedures), the actions it took are directly attributable, contractually speaking, to the Commission.

35. In this case, the consequences of damage arising out of the action of the BECA Group, the principal other party to the contract, cannot be attributed to the Italian Republic. If the results of the investigations carried out by the Commission are judged to be relevant, the source of the damage must lie in the failure of Nuova Irpinia to process the meat properly and not the failure of the Italian Republic to supervise or monitor those operations. The latter claims that the action brought against it by the Commission must be regarded as an action for recovery against a third party, which cannot lie, as a matter of principle, because the Commission has not brought an action against the other party to the contract — the party with prime liability —, that is to say the BECA Group.

36. The Italian Republic produces not a shred of evidence in support of that argument. It simply claims that a contract exists between the Commission and BECA. In its reply, it relies on the provisions of Regulations Nos 598/91 and 1582/91 which, it alleges, prove that that action does not fall within the scope of the common agricultural policy, so that the rules laid down in that area do not apply.

37. In the case of Regulation No 598/91, for example, both the reference to Article 235 of the Treaty and the provisions of Article 2(4) amply demonstrate that the Commission action is essentially a matter of humanitarian aid policy.

38. The Commission disputes that plea and the arguments put forward in support of it. Moreover, it points out that the argument that the provisions and principles peculiar to the common agricultural policy cannot apply to relationships arising out of an initiative

that is the subject of Regulation No 598/91 was not raised by the applicant in its application. It does not, however, ask the Court of Justice to declare that argument inadmissible.

39. I do not believe that the second paragraph of Article 42(2) of the Rules of Procedure of the Court of Justice could be applied here. The submission represents a necessary element in the line of argument expounded by the Italian Republic in relation to the first plea submitted in its original application. I therefore consider this argument to be closely connected with the plea founded on the applicability to this dispute of the rules of contract law, an argument put forward and expanded upon at length by the Italian Republic in its original application. The argument is, consequently, perfectly admissible. [7]

40. According to the Commission, analysis of the relevant Community regulations shows that this case falls within the legal context of the common agricultural policy. Regulation No 598/91 is also based on Article 43 of the Treaty and the fact that it provides for urgent action for the supply of agricultural products to the people of the Soviet Union certainly cannot have the effect of excluding that regulation from the common agricultural policy. Humanitarian action also serves to reduce intervention stocks and is therefore an instrument of agricultural policy. By way of example, the Commission cites the free distribution of goods to the underprivileged, cut-price sales to various groups and 'Christmas butter'. Furthermore, it rebuts the argument that the sole purpose of intervention in agricultural policy is to stabilize the prices of agricultural products.

41. Having defined the legal framework, the Commission cites the rules governing the operation of the EAGGF (Guarantee Section) account. Article 9 of Regulation No 1582/91 specifically accords responsibility for supervising all operations related to the beef in question to the intervention agencies; according to that article, that supervision includes permanent physical control to verify that the canned beef produced fully corresponds with the canned beef to be delivered. By issuing the take-over certificate and the certificate of conformity for the canned beef in question, AIMA allowed spoiled produce to be dispatched. That failure to comply with the Community rules laid down by Regulation No 1582/91 more than justifies the refusal to charge the sum corresponding to the processing and canning operations to the EAGGF account for the 1991 financial year in connection with the urgent action.

42. I take the view that the first plea put forward by the Italian Republic must be rejected. It is clear not only from the formal analysis but also from the general scheme and purpose of the Community legislation

7 — See on that point in particular Case 306/81 *Verros* v *Parliament* [1983] ECR 1755, paragraphs 9 and 10.

invoked that the decision at issue falls naturally within the ambit of the rules governing the operation of the EAGGF and forms part of the common agricultural policy.

43. In the first place, Regulation No 598/91 is expressly based on Article 43 of the Treaty, which concerns the common agricultural policy. Furthermore, in the first and second recitals, the Community legislator makes it quite clear that the humanitarian action proposed is intended to be an instrument of agricultural policy, that is to say a way of reducing stocks of beef in order to regularize the agricultural markets. Moreover, Article 3 of the regulation makes express reference to Regulation No 729/70.

44. Secondly, the Commission was made responsible for implementing that common agricultural policy measure decided upon by the Council, [8] which it did by adopting Regulation No 1582/91.

45. An analysis of Regulation No 1582/91 shows clearly that the national authorities have a critical role to play in executing the policy measure thus decided upon by the Council. Furthermore, the Commission has no direct contact with the tenderers before or after the contract has been awarded: it is the national intervention agencies alone which deal with the successful tenders. Since there is no direct link between the Commission and the successful tenderers, there can be no contract between them.

46. The Commission does not, for example, choose between the successful tenderers, but simply fixes a maximum amount of costs on the basis of the tenders transmitted by the competent intervention agency (Article 4(2)); it is not the successful tenderers that the Commission notifies of its decision but the Member States (Article 4(3)).

47. However, close scrutiny of the regulation reveals clearly that the role of the Member States is crucial to the success of the action.

48. The tenderers are required to provide proof of their competence in the beef sector to the competent national authorities (Article 3(1)); the tenders are to be submitted in writing to the competent intervention agencies (Article 3(2)); the latter forward them to the Commission (Article 4(1)), then inform all tenderers of the Commission decision on the

8 — Article 5 of Regulation No 598/91.

tenders (Article 4(3)); the tender security is lodged with the intervention agency (Article 3(3)(j)); again, it is the intervention agency with which the delivery security is lodged (Article 6(3)); and it is the intervention agency which the tenderer informs in writing of the details of the establishment in which the meat is to be processed and from where the delivery of the canned beef is to take place (Article 6(2)); the intervention agency of the Member State in which the processing is carried out (in this case, AIMA) must authorize the successful tenderer (the members of the BECA Group) to take delivery of the meat and de-bone it (Article 6(5)). That authorization is accorded only if the Member State concerned can ensure the necessary control related to the transport and de-boning operations (Article 6(6)). Article 9, a fundamental provision of Regulation No 1582/91, expressly provides that the intervention agencies are to be responsible for the supervision of all movements and operations related to the beef until the canned meat is taken over by the transporter. It also specifies what is meant by supervision (Article 9(2)). Finally, the intervention agency must draw up a report stating the findings of the supervision; the successful tenderer will then be issued with a certificate of conformity (Article 9(3)). A take-over certificate is issued on delivery of the canned produce to the transporter (Article 10). Submission of those two certificates entitles the successful tenderer to be paid by the intervention agency and to have its security returned (Articles 11 and 12).

49. It is apparent from that analysis that Regulation No 1582/91 establishes and defines mutual and reciprocal obligations between the intervention agencies and the tenderers and that those obligations can be equated with the traditional relationship based on the existence of a contract involving reciprocal obligations. Moreover, the Community legislator uses the term 'contract' on several occasions to describe the relationship between the intervention agencies and the tenderers. [9] Consequently, the contract exists not between the Commission and the tenderers but between the Member States and the tenderers. The normal rules governing the operation and financing of the EAGGF, Guarantee Section, apply to the relationship between the Member States and the Commission. In accordance with Article 1(2)(b) of Regulation No 729/70, the EAGGF, Guarantee Section, finances intervention intended to stabilize the agricultural markets.

50. I have shown that the urgent action for the supply of agricultural products intended for the people of the Soviet Union falls clearly within the scope of Regulation No 729/70. However, if an action of that type is to be financed by the Community, the Community rules must be complied with. [10] The issue now to be considered is whether the Commission has proved that the Italian Republic failed to fulfil the obligations provided for generally in Article 8 of Regulation No 729/70 and specifically in Article 9 of

9 — At the end of Article 4(3), for example, and in Article 9(3).
10 — Article 3(1) of Regulation No 729/70.

Regulation No 1582/91. In its second plea, the Italian Government claims that such proof has not been provided.

The second ground for annulment

51. The complaints of the Italian Republic relate to the fact that it was not involved in the investigations carried out by the Commission and to the evidential value of the Commission's findings. According to the Italian Government, the Commission has not demonstrated that there were serious failings on the part of the competent national authorities in the way the procedure was conducted. It also claims that the Commission ought to have applied the rules of evidence relating to contract. It maintains that the Commission and the successful tenderers are linked by contracts. It acted only for and on behalf of the Commission and the action taken by the Commission must be regarded as an action for recovery against a third party. Consequently, in its view, the action is admissible only if the Commission has taken action against the successful tenderers and been unable to recover the sums paid to the successful tenderer at fault.

52. The Commission contends that in the context of the common agricultural policy and the normal rules governing the operation and financing of the EAGGF, Guarantee Section, it must be shown that the meat was spoiled when it was delivered by the processing undertaking to the transporter; if it was, it must be demonstrated that the Italian Government failed properly to fulfil its duty of supervision under Article 9 of Regulation No 1582/91 if payment of the sums accorded to the successful tenderer at fault is to be excluded from Community financing.

53. The argument put forward by the Italian Republic cannot be accepted. It is in fact calling for the rules of contractual liability to be applied while furnishing not a shred of evidence that a contract of that type exists; furthermore, it explains neither the scope nor the substance of that liability.

54. In accordance with my analysis of the first plea, it is my view that the rules of contractual liability do not apply. It is in fact the rules on the operation and financing of the EAGGF, Guarantee Section, that provide the framework here.

55. The Court of Justice has pointed out that: '... as far as the financing of the common agricultural policy is concerned, it is first for the Commission to prove an infringement of the rules of the common organization of the agricultural markets. Once such an infringement has been established, the Member State concerned must then, if appropriate, demonstrate that the Commission committed an error as to the

financial consequence to be attributed to it'. [11]

56. Let us consider whether the Commission has demonstrated that the Italian Republic failed to meet its specific obligations under Article 8 of Regulation No 729/70 and Article 9 of Regulation No 1582/91.

57. In accordance with Article 9(3) of Regulation No 1582/91, the Italian Republic must draw up a report stating the findings of the supervision referred to in Article 9(1). That supervision includes, in particular, permanent physical control which must be carried out in accordance with the specifications in Annex I to Regulation No 1582/91. [12]

58. It is not apparent, however, from the reports drawn up by INCA [13] that the canned beef produced in the Nuova Irpinia factory met the specifications of Annex I. For example, there is no reference to any lot identification number, the composition of the content of the cans is not specified, there is no reference to the result of bacteriological testing and no information concerning the quality of the autoclaves.

59. At this stage in the examination of the facts of the dispute, it must therefore be concluded that the supervision and control were not carried out satisfactorily.

60. Furthermore, other documents provided by both the applicant and the Commission confirm that conclusion (transport on site and bacteriological analyses of samples taken at different stages in the proceedings) and establish that the canned produce manufactured at the Nuova Irpinia factory was unfit for consumption because it was not properly sterilized, [14] notwithstanding the fact that the Italian Government disputes this.

61. Let us now consider whether the Commission conducted its investigations properly.

62. The Court of Justice has ruled that in the system set up under Regulation No 729/70, the role of the Commission is complementary to that of the Member States. [15] That those two forms of control complement each other is clear, in particular, from Article 9(2) of the regulation which indicates that the purpose of the checks carried out on the spot by the Commission is to determine the

11 — Case C-55/91 *Italy* v *Commission* [1993] ECR I-4813, paragraph 13.

12 — Article 9(2)(a).

13 — Annex 11 to the application and Annex 9 to the defence.

14 — See, in particular, Annex 29 to the application and Annex 6 to the defence.

15 — See, to that effect, Case C-366/88 *France* v *Commission* [1990] ECR I-3571, paragraph 20.

accuracy of the controls carried out by the Member States. [16] The Court of Justice concluded that Article 9 of Regulation No 729/70 did not empower the Commission to define procedures governing its intervention or to take samples in cases where it acts independently of the Member States, but stated that '... the Commission may, on the conditions laid down in the fourth subparagraph of Article 9(2), carry out certain other inspections or inquiries, including the taking of samples on the spot ... subject to the prior agreement of the Member States, and ... in the presence of representatives of the national administrative authorities concerned'. [17]

63. In this case, it is obvious that the first samples analysed by laboratories appointed by the Commission were taken by the authorities of the former Soviet republics for which the humanitarian aid was intended. Those investigations do not, however, form part of the verification required by Article 9 of Regulation No 729/70. It was the outcome of those investigations that led to the verification provided for by that article. The subsequent investigations by the Commission, concerning either the on-site transport at the premises of the Nuova Irpinia factory situated in Avellino, [18] the analyses of the samples taken on the spot by the authorities for which the humanitarian aid was intended [19] or the samples taken in Italy once the canned beef had been recalled, [20] were all carried out jointly with representatives of the Italian administrative authorities and the latter were duly informed of them. The Italian Republic produced analyses proving that some of the canned beef was safe but it neither demonstrates nor does it even dispute that the lots were not identifiable. That being the case, the Commission was entitled to recall all of the canned beef produced by Nuova Irpinia.

64. There remains the argument that the sums unduly paid to the successful tenderer cannot be recovered because the Commission has not demonstrated that there were serious irregularities in the procedure conducted by the competent national authorities.

65. The Court of Justice has had on several occasions to respond to that argument and has ruled that once the Commission has proved an absence of supervision by the competent national authorities, it is entitled to disallow certain expenditure incurred by the Member State in question. In this case, by issuing the certificate of conformity provided for in Article 9 of Regulation No 1582/91 to the successful tenderer, an undertaking of the BECA Group, without ascertaining that the operations to process and can the beef intended for urgent action for the supply of agricultural products to the people of the Soviet Union had actually been carried out and executed correctly, and by paying to the successful tenderer the amount laid down in its tender and releasing the

16 — Case 55/91 (cited above), paragraph 32.
17 — Idem, paragraph 33.
18 — Annex 29 to the application.
19 — Annex 5 to the defence.
20 — Annexes 6 and 7 to the defence.

delivery security, the Italian Republic failed to fulfil its obligations under the Community rules and permitted the dispatch of spoiled goods to the people of the Soviet Union. [21]

66. Furthermore, the Court of Justice has on several occasions made clear that: '... the obligation for Member States to recover sums unduly paid to traders by way of aid from the EAGGF stems from Article 8 of Regulation (EEC) No 729/70. That provision is regarded as expressing, as regards the financing of the common agricultural policy, the duty of general diligence imposed by Article 5 of the EEC Treaty. Article 8(1) imposes on Member States an obligation to recover sums lost as a result of irregularities or negligence ... Furthermore, Article 8(2) provides that, in the absence of total recovery, the financial consequences of irregularities or negligence attributable to administrative authorities or other bodies of the Member States are to be borne by them'. [22] Moreover, at the hearing, the representative of the Italian Government indicated that proceedings had been instituted against a successful tenderer belonging to the BECA Group.

67. Consequently, the Italian Government has failed to demonstrate any shortcomings in the inquiry conducted by the Commission or to produce evidence to refute the results of those investigations, and therefore the application must be rejected.

Conclusion

68. In the light of the foregoing I propose that the Court:

(1) dismiss the application;

(2) order the Italian Republic to pay the costs.

21 — Case C-55/91, cited above, paragraph 55; Case C-8/88 *Germany* v *Commission* [1990] ECR I-2321, paragraph 21.

22 — Case C-55/91, cited above, paragraph 56.