OPINION OF ADVOCATE GENERAL ALBER

delivered on 12 July 2001 [1]

I — Introduction

1. The present appeal proceedings against a judgment of the Court of First Instance dismissing an application for annulment concern the contesting of a decision by which the Commission withdrew in 1996 financial aid granted from the Guidance Section of the EAGGF in 1990. Together with the Italian authorities, the Commission found that some of the payments for which aid had been granted had been made before the date on which the Commission received the application for aid and therefore EC financial aid for that purpose could not, as a rule, be granted under the applicable provisions of Community law. The applicant at first instance claimed that the expenditure could, nevertheless, have been deemed to be eligible for assistance since it was incurred during the six months preceding the date on which application was made. The dispute also concerns whether, where the applicant provides partially incorrect information, aid granted for various investments may be recovered in its entirety or whether it must be reduced only by the amount to which the incorrect information relates.

1 — Original language: German.

II — Legal framework

2. The provisions referred to in paragraphs 7 to 11 below are of particular relevance to this case. The other legal provisions serve primarily to provide an overall view and a schematic classification.

3. Conserve Italia's application for aid (in 1988) was made pursuant to Regulation (EEC) No 355/77. Regulation (EEC) No 2515/85 specifies the information which the application must contain and the supporting documents which must be enclosed therewith. Commission working document V1/1216/86 stipulates in detail the conditions of eligibility for aid under Regulation No 355/77 and lays down other requirements and practices relating to the grant of such aid.

4. Regulation No 355/77 was replaced by Regulation (EEC) No 4256/88 as part of the coordination of the different Structural Funds (EAGGF, European Regional Development Fund and European Social Fund) carried out in 1988. However, the repeal of Regulation No 355/77 took effect only with the entry into force of Regulation (EEC) No 866/90 on 1 January 1990.

5. For its part, Regulation (EEC) No 4256/88 relates only to the EAGGF and must be read in conjunction with Regulation No 4253/88 which lays down general rules for the management of all structural funds.

(1) *Council Regulation (EEC) No 355/77 of 15 February 1977 on common measures to improve the conditions under which agricultural products are processed and marketed* [2]

6. Articles 1(3), 2 and 6(1)(a) of this regulation stipulate which projects may be funded from the Guidance Section of the EAGGF, and for what purpose.

7. Article 19(2) provides that:

'... the Commission may decide ... to *suspend, reduce or discontinue* aid from the Fund [3] ...

— if the project has not been carried out as planned, or

— if certain of the conditions laid down have not been fulfilled ...

...

The Commission shall recover any sums the payment of which was not or is no longer justified.'

(2) *Commission Regulation (EEC) No 2515/85 of 23 July 1985 on applications for aid from the Guidance Section of the European Agricultural Guidance and Guarantee Fund for projects to improve the*

2 — OJ 1977 L 51, p. 1.

3 — Emphasis added.

conditions under which agricultural and fish products are processed and marketed[4]

...

8. Under Article 1(1) of this regulation, applications for aid made by virtue of Regulation No 355/77 must contain the information specified in the annexes. The supporting documents specified therein must be attached to them. Under point 5.3 of the application to be completed by the applicant, a cross must be placed in the appropriate box to indicate whether the applicant undertakes not to start work on the project before the application reaches the Guidance Section of the EAGGF. According to the explanatory notes relating to this point, projects begun before the application reaches the Commission cannot qualify for aid.

(3) *Working document VI/1216/86 on the determination of the maximum possible aid from the Guidance Section of the EAGGF under Council Regulation (EEC) No 355/77*

9. The relevant passages of the working document read as follows:

'I. Measures to be excluded from calculation of the minimum possible aid

B.1. Measures to be totally excluded

...

5. Work or measures begun before the application was submitted, with the exception of the following:

(a) ...

(b) the purchase of machinery, equipment and building materials, including metal frames and prefabricated elements (order and supply), provided that their assembly, installation, incorporation, and on-site work in the case of building materials, did not take place before the application for aid was submitted;

(c) the cost of purchasing equipment and machinery temporarily installed for test purposes before the application was submitted;

4 — OJ 1985 L 243, p. 1.

(d) ...

Measures (a) and (b) are eligible while measures under (c) and (d) are ineligible but do not render the project itself inadmissible. Any other measure or work begun before the application concerning the project is submitted renders the project inadmissible.

...

12. The costs of hiring equipment and investments financed by a leasing arrangement. For example: hire costs for the use of tetra-pack machinery; projects financed partially or totally by a leasing arrangement.

These investments may be eligible, however, if the hire-purchase agreement provides that the beneficiary will become owner of the equipment or measures involved within five years of the date of the granting of the aid. This period is reduced to four years for projects financed from 1985 onwards.

...'

(4) *Council Regulation (EEC) No 4253/88 of 19 December 1988 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments* [5]

10. Article 15(2) of this regulation provides that:

'2. Except as provided for in Article 33 ... expenditure may not be considered eligible for assistance from the Funds if incurred before the date on which the corresponding application reaches the Commission.

However, for the part-financing of projects and aid schemes, expenditure *may* [6] be deemed to be eligible for assistance from the Funds *if incurred during the six months preceding the date on which the Commission received the corresponding application.*' [7]

5 — OJ 1988 L 374, p. 1.
6 — Emphasis added.
7 — Emphasis added.

11. Article 24 bears the heading '*Reduction, suspension and cancellation*[8] of assistance'. It provides that:

'1. If an operation or measure appears to justify only part of the assistance allocated, the Commission shall conduct a suitable examination of the case in the framework of the partnership, in particular requesting that the Member State or other authorities designated by it to implement the operation submit their comments within a specified period of time.

2. Following this examination, the Commission may *reduce or suspend*[9] assistance in respect of the operation or measure concerned if the examination reveals an irregularity and in particular a significant change affecting the nature or conditions of the operation or measure for which the Commission's approval has not been sought.

3. Any sum received unduly and to be recovered shall be repaid to the Commission. ...'

8 — Emphasis added.

9 — Emphasis added.

(5) *Council Regulation (EEC) No 4256/88 of 19 December 1988 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards the EAGGF Guidance Section*[10]

12. Article 10 of this regulation provides that:

'1. The Council, acting on a proposal from the Commission in accordance with the procedure laid down in Article 43 of the Treaty, shall by 31 December 1989 decide upon the forms of and the conditions for the Fund contribution to measures to improve the conditions under which agricultural [and] forestry ... products are processed and marketed ...

2. With effect from the date of entry into force of the Council Decision referred to in paragraph 1, Council Regulation (EEC) No 355/77 is hereby repealed.

...

3. By way of derogation from paragraph 2, Articles 6 to 15 and 17 to 23 of Regulation (EEC) No 355/77 shall continue to apply to projects submitted by the date of entry into

10 — OJ 1988 L 374, p. 25.

force of the Council Decision referred to in paragraph 1 ... .

4. ...'

13. The Council adopted Regulation (EEC) No 866/90 of 29 March 1990 on improving the processing and marketing conditions for agricultural products [11] on the basis of Article 10(1) of Regulation No 4256/88. It repeals Regulation No 355/77 pursuant to Article 10(2) cited above.

14. The derogation provided for in the second subparagraph of Article 15(2) of Regulation No 4253/88 was discontinued with effect from 3 August 1993 by Council Regulation (EEC) No 2082/93 of 20 July 1993 amending Regulation (EEC) No 4253/88 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments. [12]

III — Facts of the case

15. The following facts are evident from the paragraphs of the judgment set out below:

'20. On 27 October 1988 the Commission received an application for the grant of aid from the EAGGF lodged by the Italian Government under Regulation No 355/77. That application had been submitted on behalf of Fedital SpA ("Fedital") by the Federazione Italiana dei Consorzi Agrari, an association of agricultural cooperatives which administered a large proportion of the Italian agri-foodstuffs sector until it was wound up in May 1991. The aid for which the application was made was intended to support a project for the development, rationalisation and technical modernisation of a Fedital establishment in the municipality of Massa Lombarda.

...

22. While the application was being considered Fedital sold its Massa Lombarda establishment to Colombani Lusuco SpA, which the Federazione Italiana dei Consorzi Agrari also controlled, on 31 December 1989. The business name of the acquiring company was then changed to "Massalombarda Colombani SpA" (hereinafter "Massalombarda Colombani"). On 18 October 1994 that company was sold to Frabi SpA (which subsequently became Fincoserve SpA), the finance company of the group Conserve Italia Soc. Coop. arl (hereinafter "Conserve Italia"), the applicant. ...

23. On 23 March 1990 the Commission asked Fedital to specify the nature, cost

11 — OJ 1990 L 91, p. 1.
12 — OJ 1993 L 193, p. 20.

and starting and finishing dates of the work to be financed and to state whether it had been started before the date on which the application was received by the Commission (27 October 1988). Furthermore, the Commission asked for the balance sheet for 1988 and a copy of the contracts of sale relating to the various acquisitions made by the company.

24. On 17 April 1990 Massalombarda Colombani replied that the work had been started on 31 October 1988 and completed by 30 June 1990 and attached copies of the contracts to its reply. One of them, signed on 22 December 1988, concerned the sale of a Tetra Pak packing machine.

25. By decision of 29 June 1990 the Commission granted Massalombarda Colombani aid amounting to ITL 2 002 932 326 in respect of an overall investment of ITL 8 036 600 ("decision to grant aid").

26. By decision of 18 November 1991 the Italian Government awarded Massalombarda Colombani a grant of ITL 2 008 000 000 in addition to the financial aid from the EAGGF.

27. On 22 November 1991 the Italian authorities carried out a final inspection of the work and approved it on the ground that it satisfied all the conditions laid down in the decision to grant aid.

28. Following inspections carried out jointly by the Italian authorities and the Commission in March 1993 and from 26 to 30 September 1994, the Commission found that certain purchases had been made and work carried out before the date on which the application for aid had been received and that, contrary to the copy of the contract of sale relating to a Tetra Pak machine which had been forwarded to it on 17 April 1990 in response to its request for information of 23 March 1990, the original showed that the machine in question had already been installed at the purchaser's establishment, under a contract for hire, before the date on which the application was received. Furthermore, a large number of delivery notes relating to machines acquired for the project bore a date before the date on which the application was received, whereas others were missing.

29. By fax to the Commission of 3 November 1994 the Italian authorities stated that they were in favour of initiating a procedure for the discontinuance of the aid granted by the EAGGF in view of the serious irregularities that had been found.

30. On 22 May 1995 the Commission informed Massalombarda Colombani and the Italian authorities of its intention to initiate such a procedure and recover the amounts wrongly paid and asked them to submit their observations on this.

31. Massalombarda Colombani submitted its observations on 3 August and 22 September 1995. It stated that it had in fact purchased the equipment before the Commission received the application for aid, but that those purchases had been made on a trial basis. Moreover, it acknowledged that the project related to some work that was carried out before the application for aid was submitted. Following discussions with officials of the competent services of the Commission on 19 January 1996, it submitted an additional statement on 27 February 1996.

32. On 3 October 1996 the Commission adopted Decision C (96) 2760 discontinuing the aid granted to the company Massalombarda Colombani by Commission Decision C (90) 950/356 of 29 June 1990 on the grant of aid from the EAGGF Guidance Section pursuant to Regulation No 355/77 in connection with EAGGF project No 90.41.IT.109.0 entitled "Potenziamento e aggiornamento tecnologico degli impianti di uno stabilimento ortofrutticolo in Massa Lombarda (Ravenna)" ("the contested decision").

33. The main grounds of that decision are reproduced below:

"...

Whereas the aid was granted having regard in particular to the technical description of the planned work and the period set aside to carry out the work referred to in the file attached to the application for aid and contained in the wording of the decision;

...

Whereas during [a] check it was found that certain definitive purchases had been effected and certain work carried out before the Commission received the application for aid from the beneficiary, that is to say before 27 October 1988, and that was contrary to the undertaking which the beneficiary entered into pursuant to the provision laid down on page 5 of Annex A1 to Regulation ... No 2515/85 ..., in that application for aid;

Whereas it was also found that a contract of sale relating to a Tetra Pak packing machine had been falsified

to conceal the fact that it had already been installed at the establishment before the date on which the application for aid was received;

...

Whereas, in view of the information provided above, the irregularities found affect the conditions of the project in question ...".'

VI — Proceedings before the Court of First Instance and its judgment

16. On 23 December 1996 Conserve Italia brought an action against the Commission's decision.

It claimed that the Court of First Instance should

— annul the contested decision;

— in so far as may be necessary, annul any measure carried out in relation to the contested decision, in particular the working document;

— order the Commission to pay the costs.

However, in response to a question put to it by the Court of First Instance, the applicant stated that its application for the annulment of any measure related to the contested decision, in particular the working document, was based on Article 184 of the EC Treaty (now Article 241 EC).

The Commission contended that the Court of First Instance should

— declare inadmissible the claim for annulment, in so far as may be necessary, of the working document;

— as for the remainder, dismiss the action as unfounded;

— order the applicant to pay the costs.

17. Conserve Italia based its action on various infringements of rules of law relating to the application of the EC Treaty and in particular Article 15(2) of Regulation No 4253/88, paragraphs 5 and 12 of point B.1 of the working document, and Article 24(2) of Regulation No 4253/88. In the context of those pleas it complained in particular that the Commission failed to observe the principles of legality of penalties, the protection of legitimate expectations and proportionality and that it has misused its powers. Finally, the applicant also put forward a plea alleging infringement of essential procedural requirements on the ground that insufficient reasons were stated for the contested decision.

(1) *Plea alleging infringement of Article 15(2) of Regulation No 4253/88*

18. According to the contested judgment, Conserve Italia made the following submissions in that respect:

'43. The applicant submits that the condition contained in point 5.3 of the "Explanatory notes for each heading" in Annex A to Regulation No. 2515/85, whereby "projects begun before the application reaches the Commission cannot qualify for aid", must be construed in the light of Article 15(2) of Regulation No 4253/88 because the Commission decision on the eligibility of the project is governed by that provision.

44. The terms "expenditure" and "incurred" in the second paragraph of that article ... suggest that account must be taken of the date of payment for the purchases or work, or at least the date of invoicing.

45. In this case all the payments were made after the date on which the application for aid was received by the Commission (27 October 1988), all the invoices bear a date after the commencement of the operation, which the applicant gives as 1 October 1988 in its originating application, and no delivery note was drawn up more than six months before that date. Consequently, all the expenditure at issue is eligible.

46. Furthermore, the beneficiary never made any false declarations as to the date of the purchases or the work. The transactions carried out before the date on which the Commission received the application of aid (in particular the contract for the hire of the Tetra Pak machine) were not covered by definitive contracts but only by preliminary relationships or contracts subject to a condition having suspensory effect.

47. Finally, the defendant failed to observe the principle of the protection of legitimate expectations by discontinuing the aid at issue on the basis of criteria other than those referred to in Article 15(2) of Regulation No 4253/88 ...'.

19. In that regard the Court of the First Instance stated:

'59.... Article 19(2) of ... [R]egulation [No 355/77] states that the Commission may decide to suspend, reduce or discontinue aid "if the project has not been carried out as planned" and "if certain of the conditions laid down have not been fulfilled".

60. That provision does not state what those conditions are but refers expressly to the "financial or other conditions laid down for each project". It follows that all the conditions laid down for each project, irrespective of whether they are technical or financial or whether they lay down a time-limit, are covered by that expression.

61. Article 1(1) of Regulation No 2515/85 provides that "[a]pplications for aid from the EAGGF Guidance Section ... shall contain the information and documents specified in the Annexes."

It follows that the instructions contained in the aid application form, in particular those relating to the undertaking which the applicant must enter into when submitting his application, examined in the light of point 5.3 of the "Explanatory notes for each heading" in Annex A to that regulation ..., have binding force identical to that of the provisions of the regulation to which the models and explanatory notes are annexed (see, to this effect, the judgment of the Court of First Instance in Joined Cases T-551/93, T-232/94, T-233/94 and T-234/94 *Industrias Pesqueras Campos and Others* v *Commission* [1996] ECR II-247, at paragraph 84). Moreover, the company Massalombarda Colombani entered, by its signature, into an express, solemn and unequivocal personal undertaking not to start work on the project before receipt of the application for aid by the EAGGF Guidance Section. Since that undertaking was accepted by the Commission, it became part of the measure granting the aid and is imbued with the legal force of that measure. The condition relating to the point in time to which the undertaking refers, which, amongst other things, makes for legal certainty and helps to further equal treatment of applicants for aid, constitutes a "condition laid down" within the meaning of Article 19(2) of Regulation No 355/77 and failure to comply with it therefore means that the project financed has not been carried out as planned.

62. However, that undertaking — as prescribed in the aid application form and entered into by the beneficiary when he

submits his application — does not refer to a six-month period before the application is received. It is therefore necessary to consider whether, as the applicant claims, the entry into force of Article 15(2) of Regulation No 4253/88 on 1 January 1989 amended the undertaking so as to allow expenditure to be incurred during the six months preceding the date on which the Commission receives the application.

63. It is clear from the first subparagraph of Article 15(2) of Regulation No 4253/88 and the term "may" in the second paragraph thereof that, as a general rule, expenditure is eligible only if incurred after the date on which the Commission received the corresponding application. It is only in exceptional cases that the Commission has the power to consider expenditure eligible if it was incurred during the six months preceding the date on which the Commission received the application.

64. By the decision to grant aid ... the Commission approved the application containing the personal undertaking not to start work on the project before receipt of the application for aid, without specifying that it intended to use the power provided for in the second paragraph of Article 15(2) of Regulation No 4253/88.

65. Even if it were necessary to accept the argument that the undertaking must be interpreted in the light of Article 15(2) of Regulation No 4253/88, the criterion to be taken into consideration for determining the date from which the work may be started is that set out in the first subparagraph of that provision, unless otherwise indicated by the Commission.

66. It is therefore necessary to ascertain the date to be taken into consideration for determining whether the work was started before receipt by the Commission of the application for aid, bearing in mind the undertaking entered into at the time the application for the aid at issue was submitted. In particular, it is necessary to consider whether, as the applicant claims, that date is the date on which the initial purchases or subsidised work were paid for or, possibly, the date on which they were invoiced.

67. The conclusion of contracts, even subject to a condition having suspensory effect, as part of a supported investment project has a decisive effect on the manner in which it is carried out. Such contracts therefore constitute a measure executing a project. Accordingly, it is their conclusion which determines the date on which work is started for the purposes of the undertaking entered into by the beneficiary.

68. The applicant does not deny that the contracts relating to the machines which are covered by the supported project were concluded before the date on which the Commission received the application for aid.

69. Consequently, the beneficiary acted in breach of the undertaking, entered into in the application form, not to start work on the project before that date. It follows that the condition laid down in the decision to grant aid was not fulfilled and that the project was not carried out as planned.

70. The applicant's submission that the relevant date is the date of payment, or at least the date of invoicing, cannot be upheld. It is doubtful that the beneficiary of the aid could have thought that no start had been made on the work on the project before the invoices had been drawn up or paid. Even assuming that the beneficiary had no fraudulent intent, it must at the very least have had doubts as to its interpretation of the undertaking not to start work on the project before the Commission had received the application for aid. In such circumstances it was for the beneficiary to inform itself of the significance of the undertaking required, not only so as not to commit itself lightly but also to avoid any risk of misleading the Commission.

71. Applicants for, and beneficiaries of, aid are required to satisfy themselves that they are submitting to the Commission reliable information which is not liable to mislead it, otherwise the system of controls and evidence set up to determine whether the conditions for granting aid are fulfilled cannot function properly. In the absence of reliable information projects which do not fulfil the conditions required could become the subject of aid. It follows that the obligation on applicants for, and beneficiaries of, aid to provide information and act in good faith is inherent in the EAGGF aid system and essential for its effective functioning.

72. The fact that, in this case, the information relating to the date on which work was started was concealed or presented in such a way as to mislead the Commission constitutes breach of that obligation and, consequently, of the applicable rules.

73. Accordingly, there is no valid ground for charging the defendant with an infringement of Article 15(2) of Regulation No 4253/88.

74. Since the complaint alleging breach of the principle of the protection of legitimate expectations is based on the

premiss that Article 15(2) of Regulation No 4253/88 has been infringed and the argument which the applicant derives from the alleged infringement of that provision is unfounded for the reasons set out above, it must also be rejected.

— Falsification of a contract for the purchase of a packing machine

75. The applicant acknowledges that the copy of the contract for the sale of a Tetra Pak packing machine forwarded to the Commission in response to a request for information did not show, as the original did, that the machine in question had been installed at the beneficiary's establishment pursuant to a contract for hire ... by the date on which the Commission received the application for aid.

76. The beneficiary of the aid should have assumed that complete information concerning the contract in question was essential to enable the Commission to exercise its powers correctly, particularly as it had requested the relevant information. Consequently, the beneficiary should have forwarded a copy that was consistent with the original of the contract in question (see paragraph 71 above). The forwarding of a document that was not a true copy of that contract constitutes a manifest and serious irregularity which, even if it were not intentional, is at the very least the result of gross negligence.

77. Contrary to the contention of the applicant, that irregularity could have affected the amount of the aid. The purpose of Regulation No 355/77, as is clear from its title, the fourth recital in its preamble and the provisions under Title II, is to improve the conditions under which agricultural products are processed and marketed. Improvement is determined by comparing the situation which is intended to result from the measure financed with that which existed before the project was started. Since work on that project may not start before the Commission receives the application for aid, improvement must be assessed in relation to the situation prior to that date. However, it is possible that the definitive purchase of a packaging machine, which has already been installed, under a contract for hire, at the establishment of the undertaking receiving the aid, may not constitute such an improvement. The applicant has in any event failed to show that the purchase of the machine would bring about improvement in the conditions under which the agricultural products in question are processed and marketed.

78. It cannot be inferred from the working document that the irregularity in question has no effect. First, even assuming that paragraph 5(b) of point B.1 of the working document relates to machines of the type at issue, it applies, on any view, only to machines which were not

installed before the application for aid was submitted, which is not the case here. Second, paragraph 12 of point B.1 of the working document provides that investments financed by leasing are eligible only where the contract stipulates that the beneficiary will become the owner of the equipment financed during the four years following the date on which the aid is granted. In this instance the contract for hire contained no clause stipulating a transfer of ownership within such a period.

...

80. It follows from all the foregoing that the pleas alleging infringement of Article 15(2) of Regulation No 4253/88 and paragraphs 5 and 12 of point B.1 of the working document must be rejected.'

(2) *The legal basis for the discontinuance of the aid and the alleged infringement of Article 24(2) of Regulation No 4253/88*

20. Before the Court of First Instance Conserve Italia submitted that Article 24(2) of Regulation No 4253/88 was not applicable in this case since the irregularities found did not affect the conditions of the operation. In the alternative, it contended that Article 24(2) did not provide for the possibility of discontinuing the aid, but only for the possibility of reducing or suspending it. Consequently, the contested decision was unlawful because it had no legal basis.

21. In that regard the Court stated as follows in its judgment:

'90. As is clear from paragraphs 69 and 72 to 76 above, the beneficiary of the aid did not carry out the project as planned and certain of the conditions laid down were not fulfilled. Article 19(2) of Regulation No 355/77 allows the Commission to suspend, reduce or discontinue aid which has been granted beforehand where the project has not been carried out as planned or certain conditions laid down have not been fulfilled. Consequently, that provision constitutes a sufficient legal basis for the adoption of the contested decision.

91. The infringements found by the Court at paragraphs 69 and 72 to 76 above constitute irregularities within the meaning of Article 24(2) of Regulation No 4253/88. It follows that that provision is also applicable in this case.

92. Although the wording of Article 24(2) does not expressly provide for the possibility for the Commission to adopt a measure to cancel assistance, the fact remains that it is entitled "Reduction, suspension and cancellation of assistance". Where there is a discrepancy between the wording of a provision and the title thereof, both must be construed in such a manner that all the terms employed serve a useful purpose. Having regard, first, to that rule of interpretation and, second, to the existence of another provision, also applicable to the aid in question, which provides for the possibility of discontinuing aid from the EAGGF in certain circumstances (Article 19(2) of Regulation No 355/77; ...), Article 24(2) of Regulation No 4253/88 must be construed as meaning that all the terms employed by the legislature, in particular the word "cancellation" in the title of that provision, serve a useful purpose. That article must therefore be construed as meaning that it allows the Commission to discontinue aid from the EAGGF in the event of an irregularity, in particular where a significant change to the operation affecting its nature or the conditions governing its execution is involved, for which the Commission's prior approval has not been sought.

93. Since the existence of a legal basis empowering the Commission to discontinue aid has been established, the complaints alleging infringement of the principle of legality of penalties and a misuse of powers cannot succeed.'

(3) *Proportionality of the discontinuance of the aid*

22. Lastly, Conserve Italia submitted that the contested decision was disproportionate. Since the irregularities complained of did not result in any discrepancy between the project approved and the operation carried out and did not stem from any fraudulent intent or an effort to obtain financial assistance greater than the amount of the investments made, they did not justify the discontinuance of the aid at issue.

23. In that regard the Court ruled as follows:

'101. It is settled case-law that by virtue of that the principle of proportionality laid down in the third paragraph of Article 3b of the EC Treaty (now Article 5 EC) the measures adopted by Community institutions must not exceed what is appropriate and necessary for attaining the objective pursued ...

102. The Court of Justice has held, furthermore, that where the evaluation of a complex situation is involved, which is the case with respect to the common agricultural policy, the Community institutions enjoy a wide measure of discretion (see, to this effect, in particular Case 29/77 *Roquette* [1977] ECR 1835, at para-

graph 19). In reviewing the legality of the exercise of such discretion, the Court must confine itself to examining whether it discloses a manifest error or constitutes a misuse of powers or whether the institution has clearly exceeded the limits of its discretion ...

103. Furthermore, the Court of Justice has held that the infringement of obligations whose observance is of fundamental importance to the proper functioning of a Community system may be penalised by forfeiture of a right conferred by Community legislation, such as entitlement to aid (see, to this effect, Case C-104/94 *Cereol Italia* [1995] ECR I-2983, at paragraph 24, and the case-law cited therein).

104. As has been pointed out at paragraph 77 above, the purpose of Regulation No 355/77 is to improve the conditions under which agricultural products are processed and marketed, improvement being assessed by comparing the situation which was intended to be the result of the operation funded with that which existed before the commencement of the project. It also follows from the seventh recital in the preamble to Regulation No 355/77 that the legislature sought to lay down an effective control procedure in order to ensure that beneficiaries comply with the conditions laid down when the EAGGF aid is granted. It follows from paragraph 71 above that the submission by the applicants for, and beneficiaries of, aid of reliable information which is not liable to mislead the Commission is essential for the proper functioning of the system of controls and evidence set up in order to determine, in particular, whether the condition that work on the project is not to be started before the Commission has received the application for aid has been fulfilled.

105. At the hearing the applicant acknowledged, first, that the work had been started before the Commission had received the application for aid in the sum of ITL 1 780 663 116 and, second, that the irregularity relating to the contract for the sale of the Tetra Pak packing machine involved a sum of ITL 470 000 000. A total of ITL 2 250 663 116 was thus involved. Since the aid granted from the EAGGF was ITL 2 002 932 326 and the overall investment was ITL 8 036 600 000, the irregularities complained of therefore represent 112% of the aid and 28% of the investment. The fact that the applicant failed to comply with its undertaking not to start work on the project before receipt of the application for aid by the Commission, failed to inform the Commission of this and, in response to a request for information, forwarded a copy which was not consistent with the original of the contract for the sale of a machine referred to in the subsidised project constitutes a serious breach of fundamental obligations.

106. Although the circumstances of this case differ from those which the Court of First Instance had to consider in the case which gave rise to the judgment in *Industrias Pesqueras Campos and Others* v *Commission*, cited at paragraph 61 above, it was reasonable for the Commission to take the view that any measure other than discontinuance of the aid might constitute an invitation to commit fraud. Beneficiaries might be tempted to supply false information or to conceal certain information in order to increase artificially the amount of investment eligible for financing, so that greater financial aid from the Community could be obtained, their risk being confined to having that aid reduced only by the amount of the investment which did not fulfil a condition governing the grant of the aid.

107. Furthermore, the applicant's argument that the discontinuance of the aid is disproportionate, on the ground that Fedital but not the applicant itself can be held responsible for the irregularities complained of, must be rejected since the applicant assumed Fedital's rights and obligations following the successive purchases referred to at ... above.

108. ...

109. Consequently, the applicant has failed to show that the discontinuance of the aid was disproportionate in the light of the infringements committed and the objective of the legislation at issue.'

V — Appeal and appraisal

24. In its appeal lodged on 22 December 1999 the appellant puts forward four grounds of appeal:

— infringement of the second indent of the second subparagraph of Article 19(2) of Regulation No 355/77;

— infringement of the second subparagraph of Article 15(2) of Regulation No 4253/88;

— misinterpretation of Article 24(2) of Regulation No 4253/88 and paragraph 5 of point B.1 of working document V1/1216/86;

— breach of the principles of proportionality and non-discrimination.

(1) *Ground of appeal alleging infringement of the second indent of the second subparagraph of Article 19(2) of Regulation No 355/77*

(a) Submissions of the parties

(i) Conserve Italia

25. The appellant denies that it failed to fulfil certain of the conditions laid down. It complains of the, in its view, incorrect interpretation of the expression 'work is started'. The date to be taken into consideration is not the date on which the Tetra Pak machine was ordered or a contract was concluded, as the Court of First Instance concluded at paragraph 67 of the contested judgment, but rather the date on which the goods and services were paid for.

26. The view of the Court of First Instance is not supported by Commission working document VI/1216/86. At no point in this document is the date on which the contract is concluded specified as the date to be taken into consideration.

27. Conserve Italia considers that taking account of the date of payment is also compatible with point 5.3 of Annex A to Regulation No 2515/85, which merely makes clear that projects begun before the application reaches the Commission are ineligible for aid. However, it does not specify when a project is to be regarded as having been started.

28. In this context it complains of breach of the principle of the protection of legitimate expectations. The point of reference for the appellant and the Commission was working document VI/1216/86 in accordance with which the acquisition of machinery is permitted before the date on which the Commission receives the application.

29. As regards the Tetra Pak machine, Conserve Italia acknowledges that it had been already been installed on its premises, pursuant to a contract for hire, by the time the application was submitted. However, it considers, firstly, that this is not ruled out by the Commission working document, and in particular is not incompatible with paragraph 12 of point B.1. Secondly, the subsequent acquisition of ownership did in fact help improve the conditions under which the agricultural products in question

are processed and marketed as the subsidy conditions required, contrary to the assumption of the Court of First Instance at paragraph 77 of the contested decision.

However, this is not relevant to the appeal proceedings since the Court can rule only on points of law. Conserve Italia has not claimed that the Court committed an error in law in its appraisal of the evidence. Therefore, in that regard the appeal is in fact inadmissible.

(ii) Commission

30. By contrast, the Commission considers that the Court of First Instance's interpretation of Article 19(2) of Regulation No 355/77 is correct. Work on a project starts when the contracts are concluded. If the relevant date were the date on which the agreed work was paid for, the beneficiary of the subsidy could easily manipulate that date simply by delaying payment despite the fact that it was due.

33. Finally, working document VI/1216/86 is, under paragraph 5 of point B.1 thereof, applicable only to machinery which has not been installed at the relevant establishment before the date on which the application was received. Moreover, paragraph 12 of point B.1 excludes hired machinery from any form of aid. Consequently, in this regard too the contested decision is not vitiated by an error in law.

(b) Appraisal

31. As regards the Tetra Pak machine, it concurs with the Court of First Instance that the forwarding of a copy which was not consistent with the original of the contract constitutes a serious irregularity. For the management of financial resources to function properly, it is essential that information submitted to it be complete and correct.

34. Under the first paragraph of Article 51 of the EC Statute of the Court of Justice, an appeal may be brought only on the grounds of a lack of competence of the Court of First Instance, a breach of procedure before it which adversely affects the interests of the appellant and the infringement of Community law by the Court of First Instance.

32. Moreover, Conserve Italia failed to show that the acquisition of ownership of the machine has improved the conditions under which the agricultural products in question are processed and marketed.

35. Conserve Italia is not raising a point of law in claiming that the acquisition of

ownership of the Tetra Pak machine has indeed brought about an improvement in the conditions under which the agricultural products in question are processed and marketed, contrary to the assumption of the Court of First Instance. In particular, it does not complain of any error in law in the appraisal of the evidence by the Court. Therefore, this plea must be dismissed as inadmissible.

36. An error in law in the interpretation of Article 19(2) of Regulation No 355/77 could have been committed if the Court of First Instance failed to determine correctly the scope of the purported 'condition laid down', that is to say the time at which work on the project started.

37. In its examination of the conditions relating to the application of Article 24 of Regulation No 4253/88 and its consideration of the extent to which an 'irregularity' with the meaning of that provision had been committed, the Court of First Instance found that work on a project starts when the contracts are concluded. [13] The conclusion of the contracts before 27 October 1988, the date on which the Commission received the application for the aid, [14] was incompatible with the undertaking, which Conserve Italia entered into in its application for aid, not to start work on the project before the date on which the Commission received the application. Therefore, the Court concluded that a 'condition laid down' within the meaning of Article 19(2) of Regulation No 355/77 had not been fulfilled.

38. The Court of First Instance established that the Commission received the application for aid on 27 October 1988. This was before 1 January 1990, the date on which Regulation No 866/90 came into force pursuant to Article 24 thereof. Therefore, under Article 10(3) of Regulation No 4256/88, Articles 6 to 15 and 17 to 23 of Regulation No 355/77 apply to the application. That is because Regulation No 866/90 is the legal act referred to in Article 10(1) of Regulation No 4256/88 on whose entry into force Regulation No 355/77 will be repealed pursuant to Article 10(2) of Regulation No 4256/88.

39. Articles 6 to 15 and 17 to 23 of Regulation No 355/77, which are consequently applicable to Conserve Italia's application, lay down no provision concerning the date on which work on a project starts. However, Regulation No 2515/85 was adopted on the basis of Article 13(5). It stipulates the information which must be provided when applying for aid from the EAGGF. In accordance with Annex A, Part One — Beneficiary (A 1), the applicant under point 5.3 must place a cross in the appropriate box to indicate

13 — Paragraph 67 of the contested judgment.

14 — See paragraph 20 of the contested judgment.

whether it undertakes not to start work on the project until the application is received by the Guidance Section of the EAGGF. The 'Explanatory Notes and Instructions for Completion of Applications' state that projects begun before the application reaches the Commission cannot qualify for aid.

40. It is clear from those Explanatory Notes that only measures undertaken after the application has been received may be funded. However, they say nothing about the date from which work on a project starts.

41. Furthermore, the Court of First Instance did not determine the relevant date by reference to these provisions. Instead, it stated as follows at paragraph 67 of its judgment: 'The conclusion of contracts, even subject to a condition having suspensory effect, as part of a supported investment project has a decisive effect on the manner in which it is carried out. Such contracts therefore constitute a measure executing a project. Accordingly, it is their conclusion which determines the date on which work is started for the purposes of the undertaking entered into by the beneficiary.'

42. Since Conserve Italia concluded contracts before receipt of the application by the Commission, the Court of First Instance concluded that a 'condition laid down ' [*Auflage*] within the meaning of Article 19(2) of Regulation No 355/77 had not been fulfilled. [15]

43. The term *'Auflage'* is translated in the French version of the provision as *'conditions imposées'*, in English as *'conditions laid down'*, and in Spanish as *'condiciones exigidas'*. These language versions indicate that the term *'Auflage'* is to be understood as meaning the conditions laid down by the decision to grant aid. However, the undertaking pursuant to point 5.3 of Annex A to Regulation No 2515/85 is not a condition which is expressed only at the time the aid is approved, but a condition which must already be fulfilled on the date when the application is submitted. Therefore, it is more a *'Bedingung'* [condition] than an *'Auflage'* [obligation attached] in the terminology of German administrative law.

44. However, for the purposes of the present proceedings the question may ultimately be left open as to the extent to which the condition is an *'Auflage'*, as the Court of First Instance contends, [16] or a *'Bedingung'*, which is the requirement for the grant of aid, since Conserve Italia does not contest the classification of the obligation as an *'Auflage'*. Instead, the appeal

15 — See paragraphs 61 and 69 of the contested judgment, cited above.

16 — Paragraph 61 of the contested judgment.

is directed at the finding that this *'Auflage'* or *'Bedingung'* has not been fulfilled. What is at issue is the fact that the date on which the contracts were concluded is taken as the date on which work was started. Furthermore, the legal consequence is the same. Aid is not possible where there is failure to satisfy either an *'Auflage'* or a *'Bedingung'*.

45. As has already been stated, neither Regulation No 355/77 nor Regulation No 2515/85 contain any criterion for resolving the question raised in this case. It is therefore necessary to consider whether or not Commission working document VI/1216/86 reveals anything in favour of the appellant.

46. In accordance with paragraph 5 of point B.1 of the working document (see point 9 above), work or measures begun before the application was submitted in particular are to be excluded, with the exception of the following:

'...

(b) the purchase of machinery, equipment and building materials, including metal frames and prefabricated elements (*order and supply* [17]), provided that their assembly, installation, incorporation, and on-site work in the case of building materials, did not take place before the application for aid was submitted;

...

(d) ...

Measures (a) and (b) are eligible while measures under (c) and (d) are ineligible but do not render the project itself inadmissible. Any other measure or work begun before the application concerning the project is submitted renders the project inadmissible.'

47. Thus, paragraph 5 of point B.1 specifically takes account of order or supply. Therefore, it may be inferred that where the date of order and the date of delivery differ, the former must be taken as the reference point. However, an order is normally placed by concluding a contract. Con-

17 — Emphasis added.

sequently, working document VI/1216/86 clearly assumes that work on a project starts when a contract placing orders is signed and not when payment is made.

48. This assessment is based on the above-mentioned consideration of the Court of First Instance that the conclusion of a contract as part of a supported investment project — as cited above at paragraph 41 — 'has a decisive effect on the manner in which it is carried out. Such contracts therefore constitute a measure executing a project.'

49. This view is supported by the following consideration. If the date on which payment was made were taken into consideration, the applicant could determine independently the date on which work on a project was started. There would no longer be any direct link between the investment and the aid from the EAGGF. The investment would go ahead in any event. However, when the application is received by the Commission the institution knows which measures are envisaged and can take corrective action if necessary. It is not able to do so if the contracts necessary for the implementation of the investment project have already been concluded and thus fundamental decisions on the investment to be made have already been taken. The effective use of aid requires that work on the project and the conclusion of contracts be started only when the application for aid has been received by the EAGGF.

50. In accordance with paragraph 12 of point B.1 of the working document the following are also to be ineligible for aid: 'The costs of hiring equipment and investments financed by a leasing arrangement. For example: hire costs for the use of tetra-pack machinery; projects financed partially or totally by a leasing arrangement. These investments may be eligible, however, if the hire-purchase agreement provides that the beneficiary will become owner of the equipment or measures involved within five years of the date of the granting of the aid. This period is reduced to four years for projects financed from 1985 onwards.'

51. According to the findings of fact of the Court of First Instance, which cannot be reviewed in the appeal proceedings, the conditions in paragraph 12 of point B.1 were not fulfilled. The contract for hire, by virtue of which the Tetra Pak machine had already been installed on the premises of Conserve Italia before the application was submitted, did not fulfil the conditions set out in that provision. [18] Since this rule constitutes a derogation, it must, according to the settled case-law of the Court, [19] be interpreted strictly and therefore cannot support the view of Conserve Italia.

18 — See paragraph 78 of the contested judgment.

19 — In respect of this principle of interpretation see, for example, Case C-358/97 *Commission* v *Ireland* [2000] ECR I-6301, paragraph 52, and Case C-216/97 *Gregg* [1999] ECR I-4947, paragraph 12.

52. For these reasons, no legal objection may be raised to the Court's finding that the conclusion of contracts determines the date on which work is started. Therefore, the first plea must be rejected.

53. In light of the foregoing, the complaint which Conserve Italia derives from the protection of legitimate interests must likewise be dismissed. Paragraph 5 of point B.1 of the working document confirms the view that the date on which the contracts are concluded, and not the date of payments made, determines the date on which work is started on an investment project.

(2) *Ground of appeal alleging infringement of the second subparagraph of Article 15(2) of Regulation No 4253/88 (see paragraph 14 above)*

(a) Submissions of the parties

(i) Conserve Italia

54. Conserve Italia complains that the Court of First Instance was wrong to disregard this provision. All the expenditure in question was incurred during the six months preceding the date on which the Commission received the application. Contrary to the Court's finding at paragraph 63 of the contested decision, this provision does not grant the Commission a measure of discretion as regards which expenditure is to be considered eligible. 'May' does not mean that the Commission has discretion and that its silence must be interpreted as refusal. Instead, the provision enables undertakings to take swifter action and to adapt their facilities more easily.

(ii) Commission

55. By contrast, the Commission observes that the Court of First Instance had already ruled out the application of Article 15 of Regulation No 4253/88 because the Commission had not indicated that it intended to rely on this provision. Moreover, that derogation is intended merely to make it easier for the Member States to make the transition from the old to the new rules resulting from the reform of the Structural Funds. At any rate, this possible derogation, which had existed since 1 January 1989, was removed from 3 August 1993 as a result of an amendment to Article 15 by Regulation No 2082/93. Furthermore, the Commission points out that — irrespective of whether Article 15(2) of Regulation No 4253/88 can, in principle, be applied to

the present case — Conserve Italia undertook, in its application for aid, not to begin the work until the application had been received by the Commission.

(b) Appraisal

56. The second ground of appeal raises the question as to whether or not the Court of First Instance was right to rule out application of Article 15(2) of Regulation No 4253/88 to the aid applied for. The central issue is the meaning of the word 'may' in the second subparagraph under which expenditure may be deemed to be eligible for assistance if incurred during the six months preceding the date on which the application was submitted.

57. The Court of First Instance dismissed application of this provision on the ground that the Commission had not indicated that it intended to use the power granted to it. [20] It is not evident that the judgment is vitiated by an error in law in this regard.

58. However, it is uncertain as to how far the second subparagraph of Article 15(2) of Regulation No 4253/88 grants the Commission discretion and how far it is required to fund expenditure incurred during the six months preceding the date on which the application was received.

59. The wording of the provision initially indicates that the Commission does have discretion. The term 'may' normally grants the authority concerned discretion. If the legislature had intended to impose an obligation on the Commission to finance all expenditure incurred in this period, it would have opted for the expression 'must be funded'.

60. This interpretation is confirmed by the scheme of the provision. The first subparagraph establishes the principle that expenditure incurred before the date on which the application reaches the Commission cannot as a rule be funded. This reiterates a principle which already applies under Regulation No 355/77, read in conjunction with Regulation No 2515/85, as discussed above in connection with the consideration of the first ground of appeal. Therefore, for these reasons too, the view put forward by Conserve Italia must be dismissed.

61. The Commission also points to the spirit and purpose of the provision which is closely linked to the history of the regulation. It is intended to make it easier for

20 — Paragraph 64 of the judgment.

the Member States to make the transition from the previous system of managing the Structural Funds to the new system for coordinating the activities of the different Structural Funds as between themselves and with the operations of the European Investment Bank and the other existing financial instruments. Consequently, the second subparagraph of Article 15(2) constitutes a transitional provision. This is confirmed by the fact that it was repealed by Regulation No 2082/93 which entered into force on 3 August 1993. The provisional nature of the regulation also indicates that the legislature did not intend to establish a circumscribed system of management.

62. Conserve Italia's claim that the purpose of the provision is to enable the applicant undertakings to take swifter action is likewise unconvincing. This factor is already taken into account in that there is eligibility for aid from the time the Commission receives the application, not just when the applicant receives approval. The ability of undertakings to take swift action is thereby safeguarded, but at the same time the abovementioned ability of the Commission to exert influence over the investment decisions set out in the application is also secured. This constitutes a sensible balance of the interest in swift action on the one hand, and in effective management of the available aid, on the other.

63. Therefore, it must be held that the second subparagraph of Article 15(2) of Council Regulation No 4253/88 grants discretion as regards the recognition of expenditure incurred during the six months preceding the date on which the application for aid was received. Furthermore, no misuse of powers is evident. Therefore, the second ground of appeal must also be rejected.

(3) *The ground of appeal alleging misinterpretation of Article 24(2) of Regulation No 4253/88 and paragraph 5 of point B.1 of working document VI/1216/86*

(a) Submissions of the parties

(i) Conserve Italia

64. Conserve Italia takes the view that there is no legal basis for the contested decision of the Commission. The infringements found concern only 28% of the financial assistance which was granted. The legal consequence provided for in Article 24(2) of Regulation No 4253/88 is a pro rata reduction of the aid, not the complete cancellation thereof. The wording of the provision provides only for a reduction or suspension of the financial assistance, but not complete cancellation. Consequently, Conserve Italia considers that

the Court of First Instance interpreted the provision, at paragraph 92 of the contested judgment, contrary to the wording thereof.

65. Furthermore, Article 24 cannot be interpreted with reference to Article 19 of Regulation No 355/77, as the Court of First Instance maintains. Firstly, Article 24, as a more general rule, takes precedence. Secondly, a legal rule which had already been repealed by the time the contested decision was adopted cannot be relied on to interpret a provision in force. At paragraph 90 of the contested judgment the Court of First Instance wrongly concluded that Article 19(2) of Regulation No 355/77 is a sufficient legal basis for the cancellation of the financial assistance. This is erroneous in law since at the time the contested decision was adopted, that is to say 3 October 1996, Article 19 was no longer in force, and had not been since 1993.

66. Moreover, the *'effet utile'* referred to at paragraph 92 of the judgment likewise provides no argument to support the view of the Court of First Instance. The application of that principle of interpretation does not justify the interpretation of a rule contrary to its wording.

67. In the view of Conserve Italia, the heading of Article 24 of Regulation No 4253/88 must be read instead in the light of Article 24(3). This provision stipulates specifically when sums must be repaid to the Commission. *'Effet utile'* could thus be given to the heading without circumventing the wording of Article 24(2).

68. Furthermore, Conserve Italia complains of a breach of the principle of equality. If all infringements of the provision relating to aid could be penalised by the complete withdrawal of a benefit, even if, as in the present case, only 28% of the financial assistance were affected by irregularities, such a case would be treated in exactly the same way as cases in which the irregularities affected 100% of the aid. In that regard the findings at paragraph 93 of the judgment are erroneous in law.

(ii) Commission

69. The Commission, on the other hand, concurs with the Court of First Instance's interpretation of Article 24(2) of Regulation No 4253/88 as a sufficient legal basis for the recovery of the assistance. Firstly, the provision must be read in the light of its heading and the full effectiveness of each expression used must be safeguarded. Secondly, Article 19(2) of Regulation No 355/77, which is also applicable to the facts, confirms that it is possible to recover assistance which has been granted.

70. Even if a literal interpretation is placed on Article 24(2) of Regulation No 4253/88, this provision does empower the Commission to effect recovery. That is because there can also be a reduction of 100% and that amounts to a cancellation.

71. By adopting Article 24(2) of Regulation No 4253/88, the legislature merely intended to replace its forerunner, not in an attempt to restrict its importance but rather to extend its effectiveness (*effet utile*).

72. Furthermore, the interpretation by the Court of First Instance is consistent with the spirit of the provision. It is intended to facilitate proper, effective, and non-discriminatory management of the financial resources of the Structural Funds.

73. Conserve Italia's reference to Article 24(3) of Regulation No 4253/88 is devoid of any basis. The provision governs only the consequence of applying Article 24(2). The recovery of sums received unduly is the logical consequence of a reduction or suspension carried out under Article 24(2).

74. As regards the proposed pro rata reduction of the assistance, the Commission states that this would encourage undertakings acting in bad faith to commit abuse. If they had to fear only a reduction proportionate to the irregularities found, they would still retain the remainder of the assistance.

75. The Court of First Instance had no comment to make on the criteria used to determine the level of the reduction, that is the say on the alleged infringement of paragraph 5(c) of point B.1 of the working document. In that regard Article 24(2) of Regulation No 4253/88 grants the Commission a measure of discretion. The Commission has to consider measures in full knowledge of all the circumstances of the specific case.

(b) Appraisal

76. By its third ground of appeal, the appellant correctly points out that the wording of Article 24(2) of Regulation No 4253/88, which forms the legal basis for the contested decision of the Commission, makes no mention of cancellation of Community assistance. However, the Court of First Instance inferred this power from the heading of Article 24 and a comparison with Article 19(2) of Regulation No 355/77, the forerunner of Article 24. It is necessary to consider whether or not this interpretation is vitiated by an error in law.

77. Firstly, as regards the objection that the Court of First Instance was wrong to conclude that Article 19(2) of Regulation No 355/77 is applicable, it must be noted that this provision could in fact no longer form a legal basis for the contested decision of the Commission. Under Article 10(2) of Regulation No 4256/88, Regulation No 355/77 was repealed on 1 January 1990. It is true that, under Article 10(3), Articles 6 to 15 and 17 to 23 of Regulation No 355/77 continued to apply to projects submitted by 1 January 1990. To that extent, the application for aid which the applicant submitted on 27 October 1988 was also still subject to these provisions, as has already been discussed as part of the consideration of the first ground of appeal.

78. However, the decision to recover the aid was adopted on 3 October 1996. Regulation No 4256/88 had been amended by Regulation (EEC) No 2085/93 [21] since 3 August 1993. The transitional rule in Article 10 of Regulation No 4256/88 was not extended further. The version of Article 10 in force with effect from 3 August 1993 no longer contains a provision concerning projects for which an application was submitted before 1 January 1990. It merely lays down a further rule concerning the release of sums for projects which were decided on before 1 January 1989. That does not include the investment project of Conserve Italia approved by decision of 29 June 1990. Article 19 of Regulation No 355/77 was no longer applicable by the time the contested decision was adopted on 3 October 1996. Since Regulation No 4256/88, as amended by Regulation No 2085/93, contains no legal basis for the recovery of aid paid out, it was necessary to rely on the horizontal rules in Regulation No 4253/88, as amended by Regulation No 2082/93. This explains why the contested decision correctly cites only Article 24 of Regulation No 4253/88 as a legal basis.

79. However, the Court's mistake with regard to the scope of Article 19 of Regulation No 355/77 does not establish an error in law which would justify the annulment of the contested decision. The Court of First Instance also concludes that Article 24 of Regulation No 4253/88 forms the legal basis for the contested decision. It relied on Article 19 of Regulation No 355/77 only in its interpretation of Article 24. However, it is still necessary to consider whether that interpretation is possibly erroneous in law.

80. As the Court of First Instance held, there is an apparent contradiction between the heading of Article 24 of Regulation No 4253/88 and Article 24(2) thereof. Whereas the heading speaks of 'Reduction, Suspension and Cancellation', Article 24(2)

21 — Council Regulation (EEC) No 2085/93 of 20 July 1993 amending Regulation (EEC) No 4256/88 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards the European Agricultural Guidance and Guarantee Fund (EAGGF) Guidance Section (OJ 1993 L 193, p. 44).

empowers the authority merely to reduce or suspend assistance in respect of the operation or measure concerned.

81. The Commission proposes that this divergence between the wording of the heading and of Article 24(2) be overcome by considering that there can be a reduction of 100% and that would amount to a cancellation. That view has the advantage that it respects the wording of Article 24(2) and nevertheless permits cancellation as a result. However, it is unsatisfactory in so far as it fails to answer the question why the heading refers to the term 'cancellation' separately from the term 'reduction'. If the latter were the more comprehensive term and thus also covered a 'cancellation', then it would have been logical not only to omit the term 'cancellation' not only from Article 24(2) but also from the heading.

82. Conserve Italia considers that the term 'cancellation' used in the heading must be read in the context of Article 24(3). However, that provision governs only the recovery of sums unduly advanced. This is also the consequence of a cancellation, as the Commission correctly points out, but it is not tantamount to an act of cancellation per se which goes hand in hand with the withdrawal of the administrative decision granting an advantage. Such withdrawal is tantamount to a cancellation or a reduction and forms the basis for the obligation to repay laid down in Article 24(3). However, an obligation to repay is not a basis for enabling an administrative decision granting an advantage to be withdrawn. It must therefore be held that the term 'cancellation' in the heading of Article 24 is not to be read primarily in conjunction with the obligation to repay laid down in Article 24(3) but is at most relevant to this provision in so far as it also covers, according to its wording, repayment of the entire assistance granted.

83. In the context of the scheme of Article 24 it should be noted that Article 24(1) does indeed cover the possibility of the complete cessation of the assistance. It states that the Commission must conduct an examination if an operation or measure 'appears to justify neither part nor the whole of the assistance allocated'. This indicates that the consequences of the examination referred to in Article 24(2) can also cover the entire amount of assistance concerned.

84. The following Article 24(3) is couched in general terms. It speaks only of the obligation to repay any sum received unduly to the Commission. According to the wording thereof, this repayment is not restricted to a partial sum. The wording of the provision also covers repayment of the entire sum allocated.

85. The scheme of the provision set out above indicates that Article 24(2) must be regarded as the legal basis for any recovery by the Commission. This provision would be deprived of its 'effectiveness' (*effet utile*)

if it did not also cover the cancellation of a subsidy. Article 24(1) of the provision grants the Commission the right to conduct examinations where neither part nor the whole of the aid appears justified. It involves the Member State in clarifying the situation by requiring it to submit comments. As the representative of the Commission correctly emphasised at the hearing, this is merely a procedural safeguard which offers the Member State and the undertakings concerned an opportunity to submit comments on the Commission's findings. Article 24(2) deals with the possible measures the Commission may take on the basis of the results of the examination carried out. It would not be logical to be able to extend the examination provided for in Article 24(1) to the legality of the assistance as a whole but to seek to limit to part of the assistance the possible measures taken on the basis of the results of the examination. [22] Finally, Article 24(3) imposes a complementary obligation to repay on the beneficiary of the subsidy affected by the penalty, which can, naturally, cover the entire assistance.

86. If the scope of Article 24(2) were limited to cases of reduction (in particular a pro rata reduction corresponding to the irregularities found, as proposed by Conserve Italia) and of suspension, the recipient of a subsidy who had acted unlawfully would still retain the part of the subsidy which was not affected by the irregularity. If the figures given by Conserve Italia are taken as a basis, then only 28% of the subsidy allocated would be affected and 72% of the monies which the Commission paid to Conserve Italia would be retained by that undertaking. However, the risk of losing the entire subsidy as a consequence of providing false data and documents is an important deterrent in managing EAGGF resources. It contributes to the effective management of public aid. As the Court noted in the contested judgment, in managing the Funds the Commission is reliant on the applicants providing correct information on the planned investments.

87. This interpretation of Article 24(2) as a comprehensive rule for penalties resulting from irregularities found in the use of aid is supported by a comparison of the forerunner of that provision. Article 19(2) of Regulation No 355/77 which, as stated above, was applicable to cases such as the present until October 1993, empowered the Commission to carry out checks (first paragraph) and to suspend, reduce or discontinue aid from the EAGGF (second paragraph) and provided that the Commission was to recover any sums the payment of which was not or was no longer justified (paragraph 3). Therefore, that provision had the same structure as Article 24. It certainly made express provision for the possibility of cancelling the assistance completely. Nevertheless, there are no indications that the legislature intended to limit the Commission's power by the new wording in Article 24 of Regulation No 4253/88.

22 — See, to this effect, also Case T-143/99 *Hortiplant* v *Commission* [2001] ECR II-1665, paragraph 39.

88. Finally, it should also be noted that the Commission was also able, on the basis of general legal principles alone, to withdraw an administrative measure granting unlawful advantage such as the grant of assistance to Conserve Italia by the decision of 29 June 1990. This was done by the adoption of the decision of 3 October 1996.

89. As early as in its judgment in *Algera and Others* the Court ruled that any administrative measure granting unlawful advantage may in principle be withdrawn *ex tunc*.[23] The authorities must certainly comply with the principle of legal certainty[24] and in particular the principle of the protection of legitimate expectations.[25] As part of the balancing of interests which has to be carried out by the institution concerned, regard must also be had to whether the beneficiary was aware of its unlawfulness[26] or whether he provided incomplete or incorrect information.[27] By virtue of this case-law the Commission had the power to recover the aid from Conserve Italia since, as the Court of First Instance found in its judgment, the beneficiary had provided the Commission with incorrect information as to the date on which the Tetra Pak machine was installed on its premises. In that respect at least Conserve Italia has no legitimate interests which preclude recovery of the aid.

90. These considerations confirm the interpretation placed on Article 24(2) of Regulation No 4253/88 above as a sufficient basis for the adoption of the decision of 3 October 1996. Consequently, this ground of appeal must also be rejected.

(4) *The ground of appeal alleging infringement of the principles of proportionality and non-discrimination*

(a) Submissions of the parties

(i) Conserve Italia

91. Conserve Italia complains firstly of a breach of the principle of proportionality. The infringements found (the date on which work began and the delivery of the Tetra Pak machine) are relatively insignificant and do not justify the withdrawal of the entire assistance. Furthermore, they are

23 — Joined Cases 7/56 and 3/57 to 7/57 *Algera and Others* v *Common Assembly* [1957] ECR 39. Settled case-law, see Case C-90/95 P *de Compte* v *Parliament* [1997] ECR I-1999, paragraph 35, and the references contained therein; Case T-227/95 *AssiDomän Kraft Products and Others* v *Commission* [1997] ECR II-1185, paragraph 90, and the references contained therein.

24 — Joined Cases 42/59 and 49/59 *SNUPAT* v *High Authority* [1962] ECR 53; Case 14/61 *Hoogovens* v *High Authority* [1962] ECR 253.

25 — Case 111/63 *Lemmerz-Werke* v *High Authority* [1965] ECR 677; *de Compte* v *Parliament*, cited in footnote 23, paragraph 35.

26 — Case 14/81 *Alpha Steel* v *Commission* [1982] ECR 749, paragraph 10.

27 — *SNUPAT* v *High Authority*, cited in footnote 24; *de Compte* v *Parliament*, cited in footnote 23, paragraph 37.

less serious than in other cases in which the Commission has recovered aid. Moreover, the Commission has no measure of discretion. Contrary to the assumption of the Court of First Instance at paragraph 102 of the contested decision, Conserve Italia considers that the present situation is not comparable with the complex cases in which the case-law grants the Commission a wide measure of discretion in formulating agricultural policy. What is involved is merely the proper application of rules which result from previous political decisions.

92. Furthermore, the judgment in *Cereol Italia*[28] cited at paragraph 103 of the contested judgment cannot, in the view of Conserve Italia, be taken as a precedent in respect of the present case. It relates to the application of a regulation which made express provision for the imposition of penalties. This was precisely not so in the case of Regulation No 4253/88.

(ii) Commission

93. By contrast, the Commission points to the seriousness of the infringements found. They resulted in an artificial inflation of the investments eligible for aid. Furthermore, the Commission has to take extensive account of agricultural policy when taking decisions both to allocate and to recover aid. Therefore, it enjoyed a wide measure of discretion. The complete recovery of the subsidy was the only measure which enabled the desired objective to be attained.

(b) Appraisal

94. In the contested judgment the Court of First Instance correctly rejected the complaint alleging that the recovery of the aid was disproportionate. The risk of losing, where irregularities are found, the entire aid, and not merely the part affected by the irregularity on a pro rata basis, has a deterrent effect. This is not only an appropriate means of safeguarding the effective management of EAGGF resources, but is also necessary and proportionate. As the Commission correctly observes, if a beneficiary of a subsidy who acts unlawfully merely ran the risk of losing the aid only in so far as it was based on his misconduct, that would constitute encouragement to commit abuse. Therefore, there is no less stringent means of achieving the desired effective management of aid.

28 — Case C-104/94 *Cereol Italia* v *Azienda Agricola Castello* [1995] ECR I-2983.

95. In so far as Conserve Italia complains that the Court of First Instance was wrong to rely on *Cereol Italia*,[29] it should be noted that in that judgment the Court of Justice also considered the proportionality of a Commission measure, that is to say the compatibility of the adoption of a rule relating to penalties pursuant to powers granted in a Council regulation. It can therefore be held that the present case relates to a comparable situation. Here too the compatibility of a Commission measure — the recovery of aid — is being considered against the principle of proportionality. The Court of First Instance was therefore right to rely on this case-law in its judgment.

96. In light of the above findings, in the present case it is also irrelevant as to how far Regulation No 4253/88 grants the Commission a wide measure of discretion since a potentially complex situation has to be evaluated and political decisions have to be taken. The measure involving the complete recovery of the aid is proportionate and therefore it can also be held that the Commission did not exceed the powers granted to it.

97. In light of the considerations relating to proportionality, there is likewise no discrimination where a case in which 28% of the investment is affected by incorrect information is treated in exactly the same way as a case in which 100% is affected. The risk of losing the aid in its entirety is an important instrument in the effective management of resources. Therefore, the fourth ground of appeal must also be rejected.

98. Consequently, it must be held that judgment of the Court of First Instance is not vitiated by any error in law. The appeal must be dismissed.

VI — Costs

99. Under Article 122 of the Rules of Procedure, read in conjunction with Articles 118 and 69(2) thereof, the unsuccessful party is be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission applied for Conserve Italia to be ordered to pay the costs of the proceedings and the appeal must be dismissed, Conserve Italia must bear the costs of the proceedings.

29 — *Cereol Italia* v *Azienda Agricola Castello*, cited in footnote 28, paragraph 24.

VII — Conclusion

100. In light of the foregoing, I propose that the Court should rule as follows:

(1) The appeal is dismissed.

(2) Conserve Italia shall bear the costs of the proceedings.