feed. It may be seen from the whole corpus of the relevant rules that the purpose of those rules is not solely the marketing of a product and the relief of pressure on the market in milk but also the employment of the product for useful economic ends, that is to say to make available to breeders compound animal feed which is rich in high-quality protein and is reasonably priced. In those circumstances the attainment of the objective of disposing of surplus skimmed milk is not, of itself, sufficient to warrant the grant of Community aid in respect of a product which is unfit for animal consumption because it contains a toxic substance.

3. Article 2 (5) of Regulation No 986/68 laying down general rules for granting aid for skimmed milk and skimmed-milk powder for use as animal feed, according to which "any product referred to in paragraph (1) in respect of which aid is granted may be used only as feed", applies equally to "skimmed-milk powder which has been denatured", which is referred to in paragraph (1) (c) of the same article. Thus there is no difference in treatment between denatured skimmed-milk powder and skimmed-milk powder used for animal feed, since both products must be capable of use as animal feed in order to be eligible for Community aid.

In Case 45/82

KINGDOM OF THE NETHERLANDS, represented by A. Bos, acting as Agent, with an address for service in Luxembourg at the Embassy of the Netherlands,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Jean-François Verstrynge, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Oreste Montalto, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for the annulment of Decision 81/1047/EEC of the Commission of 16 November 1981 (Official Journal 1981, L 375, p. 33) concerning the clearance of the accounts presented by the Netherlands in respect of expenditure of the financial year 1974 financed by the European Agricultural Guidance and Guarantee Fund, Guarantee Section,

THE COURT

composed of J. Mertens de Wilmars, President, P. Pescatore, A. O'Keeffe and U. Everling (Presidents of Chambers), Lord Mackenzie Stuart, G. Bosco, T. Koopmans, O. Due and K. Bahlmann, Judges,

Advocate General: S. Rozès
Registrar: P. Heim

gives the following

# JUDGMENT

## Facts and Issues

I — Facts and written procedure

*(a) Introduction*

Regulation No 729/70/EEC of the Council of 21 April 1970 on the financing of the common agricultural policy (Official Journal, English Special Edition 1970 (I), p. 218) contains provisions relating, *inter alia*, to the financing of operations intended to regulate the agricultural markets by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (hereinafter referred to as "the Fund"). In particular under Articles 4 (2) and 5 (2) thereof the Commission must make available to the Member States the necessary credits so that the designated authorities and bodies may, in accordance with Community rules and national legislation, make the payments referred to in the regulation; for their part the Member States must ensure that such credits are used without delay and solely for the purposes laid down and must at regular intervals transmit to the Commission the documents relating to the payments made, and in particular the annual accounts accompanied by the documents required for making up the balance sheets. The Commission must make up the accounts of the authorities and bodies on the basis of those documents.

The present litigation concerns a payment made within the framework referred to above by the Netherlands Government in the form of an aid for the production of animal feeding-stuffs from skimmed milk. Such aid is provided for by Article 10 (1) of Regulation No 804/68/EEC of the Council of 27 June 1968 on the common organization of the market in milk and milk products (Official Journal, English Special Edition 1968 (I), p. 176), and the rules governing its use in the financial year in question were laid down in Regulation No 986/68/EEC of the Council of 15 July 1968 (Official Journal, English Special Edition 1968 (I), p. 260) and in Regulation No 990/72/EEC of the Commission of 15 May 1972 (Official

Journal, English Special Edition 1972 (II), p. 428).

With regard to the accounts presented by the Netherlands Government in respect of the financial year 1974 (Guarantee Section of the Fund) the Commission, by its Decision 81/1047/EEC of 16 November 1981 (notified on 2 December 1981), refused to clear an item of HFL 4 255 909.86 granted as an aid to a Netherlands manufacturer of animal feed processed from skimmed-milk powder. That decision is the subject of this application.

*(b) The facts*

The facts of the case are not disputed. They are to be found in the applicant's statement and in the Summary Report, Conclusions from the preliminary work for the clearance of the accounts of the Guarantee Section of the Fund for the years 1974 and 1975 (Document No VI/208/80-Fr).

Trouw en Co., a company manufacturing compound feedingstuffs, whose registered office is at Putten in the Netherlands, had at the time in question been using skimmed-milk powder for the manufacture of feed for calves to be used as a substitute for milk for many years and on a large scale in the context of the aid system referred to above.

Article 4 (1) (a) of Regulation No 990/72, cited above, provides that in order to be eligible for Community aid all compound feedingstuffs manufactured from skimmed milk or skimmed-milk powder must contain, *inter alia*, at least 2% of starch. In order to satisfy that requirement Trouw en Co. added between 2% and 2.5% of gelatinized maize starch to the skimmed-milk powder in its compound feedingstuffs. It regularly purchased its starch from two suppliers. One of those suppliers who had not been able at the relevant time to supply a product manufactured by himself delivered to Trouw en Co. a product, bearing the same code number, manufactured by an English company. However, that code number did not indicate an identical product because the coding system used in the United Kingdom did not correspond to that used in the remainder of Europe. In fact the starch which was delivered was an industrial product used to combat mould in the manufacture of glue and briquettes, which had been treated in the proportion of 0.05% with a toxic substance, that is to say phenyl acetate of mercury. Between 28 May and 13 July 1974 Trouw en Co. used 60 000 kg of starch contaminated with mercury without realizing that the product was defective and 173 000 kg of uncontaminated starch in the production of 7 385 300 kg of compound feedingstuffs for calves and received Community aid for that product in proportion to the amount of skimmed-milk powder used in the production.

The error was discovered only in July 1974 when it was reported that calves which had been fed the product in question became sick or died. Trouw en Co. immediately ceased to manufacture the feed in question and withdrew from the market consignments which had been manufactured during the period in question and had not yet been used by the purchasers. Criminal legal proceedings were brought against Trouw en Co. by the authorities in the Netherlands for breach of the Netherlands Veevoederverordening [Animal feed order] and in the course of those proceedings (which were not in fact pursued to their conclusion because the Public Prosecutor withdrew

them) the feed which was still in storage was seized. For their part the Netherlands administrative authorities took preventive veterinary measures declaring, *inter alia*, that the organs of calves which had been fed the product in question were unfit for consumption; they did not however consider it necessary to seek the reimbursement of the Community aid paid to Trouw en Co.

The Commission refused to clear the item in the accounst relating to that aid because it considered that by virtue of the recitals and provisions contained in Regulation No 990/72 the grant of Community aid was conditional first on the use of skimmed-milk powder in animal feed, and secondly on the composition of the compound feed manufactured from the skimmed-milk powder being typical of animal feedingstuffs and being capable of use directly as feed, which was not the case in the present dispute since there was a toxic substance in the feed.

The Government of the Netherlands did not agree with the Commission's point of view and brought the present proceedings which were registered at the Court on 5 February 1982.

*(c) Procedure*

Upon hearing the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. However, it requested the Commission to produce two documents before the hearing.

## II — Conclusions of the parties

The Government of the Netherlands claims that the Court should:

1. Declare that Commission Decision 81/1047/EEC of 16 November 1981 concerning the clearance of the accounts presented by the Kingdom of the Netherlands in respect of the European Agricultural Guidance and Guarantee Fund, Guarantee Section, Expenditure for 1974, (Official Journal 1981, L 375, p. 33) is void, on the ground of infringement of the EEC Treaty or of a rule of law relating to its application, inasmuch as the Commission failed to clear the sum of HFL 4 255 409.86, as stated in the first point of the statement of claim, as aid for the processing of skimmed-milk powder into animal feed;

2. Order the Commission to pay the costs.

The Commission contends that the Court should:

1. Declare the application to be unfounded;

2. Order the applicant to pay the costs.

## III — Submissions and arguments of the parties

The *Netherlands Government* submits, as the sole ground of its claim, that the expenditure at issue was not cleared although it had been incurred in accordance with the provisions of the regulations in force at the time. Those provisions do not provide for the imposition of any condition regarding the quality of the animal feed. Thus the failure to clear that expenditure amounts to an infringement of Articles 3 and 5 of Regulation No 729/70, Article 2 of

Regulation No 986/68 and Article 4 of Regulation No 990/72.

The applicant's submission is based on the different wording used in the provisions of the regulations governing the matter at issue. Article 10 of Regulation No 804/68 and the first recital in the preamble to Regulation No 986/68 refer to "skimmed milk ... *for use as feedingstuffs*" and "skimmed milk ... for use as feed" respectively; Article 2 (1) (d) and the third recital in the preamble to Regulation No 986/68 use the expressions "skimmed milk ... *used in the manufacture of compound feedingstuffs*" and "skimmed milk ... *used as feed*"; Article 4 (1) (c) of Regulation No 990/72 states however that "compound feedingstuffs ... shall be *products ... which can be used directly as feed*".

In view of the differences in the wording of the aforementioned provisions and the different ways in which the articles in question are formulated in the various languages of the Community it is difficult to decide, in the interpretation of the provisions, whether the sole requirement to be taken into account is that the powdered milk must actually be used in the manufacture of compound animal feed or whether it is also necessary that the compound animal feed must subsequently have actually been used as such feed.

Be that as it may, it is clear that in the present case the skimmed-milk powder, once it had been processed into compound animal feed, was actually used as such feed and was therefore not used for human consumption; it follows that the purpose of the relevant rules has been achieved, namely the relief of the market in milk.

The applicant contends furthermore:

1. That the product was manufactured subject to due observation of the checks required by Article 8 of Regulation No 990/72;

2. That the Netherlands courts would in any case have dismissed any action brought against Trouw en Co., whose good faith is unquestionable;

3. That only one-third of the product in respect of which the aid is contested contained the contaminated starch, so that two-thirds was beyond reproach;

4. That consumption of the product in question did not lead to any fatalities since the mortality rate for calves during the period in question remained normal.

The *Commission* contends on the other hand that the applicant's reference to the rules to be found in the regulations governing the matter at issue was incomplete and that a comprehensive reference to them would lead to conclusions contrary to those suggested by the Netherlands Government. According to the Commission Article 10 (1) of Regulation No 804/68 provides that aid is to be granted for skimmed milk and skimmed-milk powder used as feed only "if these products reach certain standards". Regulation No 986/68 laying down general rules for granting such aid emphasizes in Article 2 (4) that the compound feed into which the skimmed milk has been processed "must meet minimum standards as to composition". Furthermore, Regulation No 990/72 on detailed rules for granting aid for skimmed milk processed into compound feedingstuffs and for skimmed-milk powder for use as feed contains the following recitals in its preamble:

"... it should be ensured that the skimmed milk and skimmed-milk powder for which aid is granted are in fact used

as feed: ... to that end the conditions which these products must satisfy should be specified; ... consequently provision should be made to ensure that aid is granted only for skimmed milk and skimmed-milk powder processed into feedingstuffs in accordance with certain requirements or for skimmed-milk powder used after denaturing; ..., if skimmed-milk powder or skimmed milk is used in the manufacture of compound feedingstuffs, aid should be granted only if those feedingstuffs conform to certain minimum standards as regards composition customarily observed in the industry ...".

Article 1 (1) and (2) of the same regulation provides:

"(1) Aid shall be granted for skimmed-milk powder which has either denatured ... or been used in the manufacture of compound feedingstuffs under the conditions laid down in Article 4.

(2) Aid may be granted for skimmed milk used in the manufacture of compound feedingstuffs meeting the definition in Article 4";

whilst Article 4 (1) of the regulation states:

"(1) Compound feedingstuffs within the meaning of Article 2 (1) (d) of Regulation (EEC) No 986/68, shall be products:

(a) containing less than 80% of skimmed-milk powder with the addition of at least:

5% of non-butyric fats and at least 2% of starch or puffed starch; or

2.5% of non-butyric fats and at least 2% of starch or puffed starch where 2.5 kilogrammes of lucerne meal or grass meal are incorporated per 100 kilogrammes of skimmed-milk powder under the conditions referred to in Article 2 (1),

(b) whose composition is typical of animal feedingstuffs,

(c) which can be used directly as feed and which will not be processed or mixed before they reach the farm or breeding or fattening concern where they are used."

The Commission considers that a mere perusal of those provisions is sufficient to show that the view that the Community regulations contain no requirement as to the quality of compound feed manufactured from skimmed milk and skimmed-milk powder has no justification whatsoever. In fact, in the Commission's view, the fact which gives a right to Community aid consists of adding skimmed milk to a compound feed whose composition is typical of such feed and which may be used directly as cattle feed; thus if any substance is added to the compound feed, even accidentally, which prevents its being used as animal feed it is no longer eligible for aid.

As regards the purpose of the Community rules the Commission disagrees with the view put forward by the applicant which it regards as too narrow. In fact the Community legislature did not restrict itself to intervening so as to find just any outlet

for a product which is in surplus, but, on the contrary, intended that the surplus milk should be used for sound commercial ends in such a way that, on the one hand, manufacturers should not be prompted to increase production and, on the other hand, the production of meat at reasonable prices should be encouraged. This follows from the whole corpus of the relevant rules and in particular from the second and third recitals in the preamble to Regulation No 986/68.

Furthermore the Commission disputes the suggestion that there is any contradiction between the wording of the 1968 regulations referred to above and that of Regulation No 990/72. In fact the wording of the earlier regulations, which is practically identical, shows without any ambiguity that *skimmed milk and skimmed-milk powder,* in order to be eligible for aid, must be used in the manufacture of compound animal feed whilst the wording employed in Regulation No 990/72 provides that *that compound animal feed* must be capable of use directly as cattle feed.

The Commission considers further that, for the provisions of Article 4 (1) of Regulation No 990/72 to be applied, it is necessary to check whether the presence of any quantity of mercury in animal feed may be tolerated without a breach of the requirement that compound animal feed must be capable of use directly as such. At the material time Directive 74/63 EEC of the Council of 17 December 1973 (Official Journal 1974, L 38, p. 31) had still not come into force so that the question was governed by national law. With regard to the Netherlands the Verordening Veevoeder 1970, adopted by the Produktschap voor Veevoeder [Production board for animal feed] and approved on 17 September 1970 under reference J 1740 by the Minister for Agriculture, which was in force at the time, totally prohibited in Article 5 (1), *inter alia,* the manufacture of animal feed which contained mercury. The Commission therefore considers that, even from that point of view, it is not possible to maintain that feed which contains mercury complies with the requirements of Regulation No 990/72.

Finally the Commission criticizes the conduct of the Government of the Netherlands, since it is clear from the file that the Netherlands authorities did not inform the Fund of that matter although they were sufficiently aware of it in 1974 to issue a reservation with regard to Trouw en Co., dealing with precisely the problem at issue. The staff of the Fund discovered the facts only when making a check in April 1979.

The *Netherlands Government* contends, in its reply, that it is not possible to deduce any argument in support of the Commission's view from the terms of Article 10 (1) of Regulation No 804/68 ("aid shall be granted for skimmed milk and skimmed-milk powder which ... are for use as feedingstuffs if these products reach certain standards"). In fact the product which has to reach certain standards is not the compound feed which is to be manufactured but the skimmed milk and skimmed-milk powder which are to be processed.

On the contrary, according to the applicant the relevant rules may be interpreted only in the light of their true purpose which is the relief of the market in milk by the provision of outlets for the surplus product other than its use for human consumption. That follows in particular from the rules on the denaturing of skimmed milk, whereby denaturing of itself gives a direct right to the aid, irrespective of the use of the

denatured milk as cattle feed. It is difficult to see why different rules should apply to the denaturing and the processing of skimmed milk. The requirements as regards the quality of the compound animal feed manufactured by the processing of skimmed milk are therefore solely intended to guarantee that the processed milk shall henceforth be capable only of use as animal feed. In those circumstances there is no doubt that had Trouw en Co. used denatured milk in manufacturing its feed for calves it would have been entitled to Community aid even though the final product could not have been used as cattle feed. There is no justification for such different treatment.

Then again the Commission itself admits that Community aid for the processing of skimmed milk is not subject to proof that the final product has actually been used as animal feed but simply that the compound feed must be "capable" of such use. That admission deprives the defendant's view on the purpose of the relevant Community rules of any basis since the question of encouraging the production of meat at reasonable prices could not arise if use of the product as animal feed were not in fact required.

In addition it is not possible to maintain, according to the applicant, that to grant aid even for the processing of skimmed milk into animal feed which does not reach certain standards will amount to giving additional encouragement to the production of powdered milk of which there is already a surplus. In fact the aid is not intended to promote powdered skimmed milk but simply to ensure a price level for that product which will allow it to compete with other products which are appreciably cheaper; consequently the grant of the aid in question does not reduce the cost of meat production in any way. Then again compound feed made from processed skimmed milk may become incapable of use as animal feed for many reasons at any time subsequent to its manufacture. Yet aid cannot be refused in such cases even though the objective of cheaper meat production cannot be attained.

As regards national legislation, the Netherlands Government maintains that Article 5 of the Verordening Veevoeder, 1970, cited above, does not contain an absolute ban on the addition of mercury to animal feed; at all events that prohibition relates to additions made consciously and not to accidental additions. Furthermore the seizure by the Netherlands authorities of the feed which was still in storage does not amount to an admission that the product was unfit for use, since the seizure was simply carried out on the assumption that there had been a breach of the relevant national provisions, although such a breach was never definitively established.

As an alternative argument the applicant states that only one-third of the product in question was contaminated so that aid could only be refused to that extent and no further.

Finally the Netherlands Government reiterates its good faith in the matter; the aid was paid because, after careful consideration, it was thought to be due; if at any given time the authorities did issue a written reservation with regard to Trouw en Co. that is explained by the fact that at that time the court had ordered the seizure of the product but

the exact cause of the problem had not been established and it was possible that there might be irregularities which would prevent the payment of aid; once it was discovered that that was not the case the reservation was withdrawn. The Commission for its part was certainly not "unaware" of the affair since much was written about it in the press, in particular in respect of the decision by Italy to close its borders to veal coming from the Netherlands, which it regarded as dangerous to health. Furthermore the investigation carried out by the Fund's officers had been undertaken precisely because the Commission wished to know all the details of the affair. Then again it would have been pointless for the Netherlands authorities to inform the Fund of the reservation it had issued because it was a purely precautionary and temporary measure.

In its rejoinder the *Commission* contends that if the relevant Community rules are intended to encourage the disposal of surplus quantities of powdered milk their purpose is equally to enable products manufactured from processed surplus milk to be marketed in the normal manner and to encourage the production of meat at a reasonable price. That is shown by the relationship laid down by Article 2 (3) of Regulation No 986/68 between the amount of the aid, the maximum price which may not be exceeded and the price of comparable feedingstuffs, and by the wording of the second recital in the preamble to that regulation.

Animal feedingstuffs containing mercury, in so far as they are poisonous, can neither achieve those purposes nor compete in any way with other types of cattle feed. The fact that the grant of the aid does not depend on proof that the final product has actually been used as animal feed does not prevent its being stated that the Community rules do have the purposes referred to above. It is possible to encourage the production of meat at reasonable prices at the same time as ensuring that the processed product made from surplus milk is capable of use as animal feed.

In particular the Commission emphasizes that in order to be eligible for aid the compound feed in question must, pursuant to Article 4 (1) of Regulation No 990/72, be composed in a manner typical of animal feedingstuffs and be capable of use directly as such. In fact feed which contains mercury complies with neither of those requirements.

As regards the argument relating to the rules on denaturing, the Commission contends that Article 2 of Regulation No 990/72 contains detailed provisions whereby only products which may be fed to animals may be added to achieve the denaturing. It follows that those rules have the same objective as those on the processing of skimmed milk. Compound feed made with denatured milk to which mercury has been added does not comply with the requirements of the article referred to above, as milk which has not been properly denatured has been used to make the feed. In that sense the problem would be no different if Trouw en Co. had used denatured milk instead of skimmed-milk powder in its product. Furthermore it is irrelevant

whether the mercury was added intentionally or accidentally.

The applicant's argument in relation to possible contamination of the final product which might come to light subsequent to the production phase is not relevant because the relevant rules provide that the checks are to be effected at the time of the manufacture of the compound feed or at the time the milk is denatured, and not subsequently. It must therefore be at the time at which the finished product is ready that it "can be used" as cattle feed and any contamination which occurs subsequently does not prevent the grant of aid.

As regards the national legislation the Commission considers that the wording of the Netherlands Law extends to any addition of mercury to animal feed, whether intentional or not, and that the ban on the addition of mercury is practically absolute because, whilst Article 33 of the Verordening Veevoeder may provide in general that there may be derogations, the Netherlands Government has never allowed any derogations in respect of the addition of mercury.

Finally as regards the question of the view to be taken of the applicant's conduct the Commission emphasizes that the Netherlands authorities never informed the Fund's officers of the reservations they had issued with regard to Trouw en Co., and that that was a breach of the obligations imposed by Article 5 of the EEC Treaty and that the reservation in question was not issued as a precautionary measure on the seizure of the feed but later after the decision not to require reimbursement of the aid and precisely because the matter might be disputed by the Commission.

The defendant did not reply, either in its defence or in its rejoinder, to the applicant's argument with regard to the amount of contaminated feed produced at the relevant time or whether as a result the aid in question could only be refused for some proportion of the feed. Nevertheless it seems appropriate, for the sake of completeness, to recall the observations relating to that question contained in the Summary Report, cited above. In that report the Commission's officers stated that the calculations of the Netherlands authorities seeking to make a distinction between contaminated and uncontaminated amounts were based solely on working assumptions which could not be verified against the facts since the results of the sampling of the products in storage in the Netherlands at the material time did not make it possible to establish the quantities which might have been manufactured using only uncontaminated maize starch. In those circumstances it was inevitable that the whole of the produce manufactured during the relevant period must be regarded as being compound feed which could not "be used directly as feed".

## IV — Oral procedure

The Government of the Kingdom of the Netherlands, represented by Adriaan Bos, acting as Agent, and the Commission of the European Communities, represented by Jean-François Verstrynge, a member of its Legal Department, acting as Agent, presented oral argument at the sitting on 23 November 1982.

The Advocate General delivered her opinion at the sitting on 18 January 1983.

## Decision

1 By application lodged at the Court Registry on 5 February 1982, the Government of the Kingdom of the Netherlands brought an action under the first paragraph of Article 173 of the EEC Treaty for a declaration that Commission Decision 81/1047/EEC of 16 November 1981 concerning the clearance of the accounts presented by the Kingdom of the Netherlands in respect of the European Agricultural Guidance and Guarantee Fund, Guarantee Section, Expenditure for 1974 (Official Journal 1981, L 375, p. 33), was void inasmuch as the Commission had failed to clear an item of HFL 4 255 409.86 representing aid for the processing of skimmed-milk powder into animal feed.

2 It appears from the file that at the relevant time the Netherlands undertaking, Trouw en Co., was using skimmed-milk powder in the manufacture of compound feed for calves and receiving Community aid in respect of that manufacture under Regulations Nos 804/68 of the Council of 27 June 1968 (Official Journal, English Special Edition 1968 (I), p. 176), 986/68 of the Council of 15 July 1968 (Official Journal, English Special Edition 1968 (I), p. 260) and 990/72 of the Commission of 15 May 1972 (Official Journal, English Special Edition 1972 (II), p. 428).

3 In manufacturing its product Trouw en Co. added to it, under Article 4 (1) (a) of Regulation No 990/72, cited above, which provides that for compound animal feed made from skimmed milk to be eligible for Community aid it must contain at least 2% of starch, between 2% and 2.5% of gelatinized maize starch purchased from its usual suppliers.

4 Owing to an error on the part of a supplier who delivered maize starch intended for industrial use other than the manufacture of feed and containing a toxic substance, namely phenyl acetate of mercury, Trouw en Co. used, during the period between 28 May and 13 July 1974, 60 000 kg of starch so contaminated and 173 000 kg of uncontaminated starch in the manufacture of 7 385 300 kg of feed for calves.

5 On the discovery of that fact the manufacture of the calf feed was terminated and those consignments which had not been used were withdrawn from the market. Criminal proceedings for breach of the national

rules regarding animal feed were brought against Trouw en Co. and those quantities of feed which were still in storage were seized. However, the proceedings were withdrawn because the Public Prosecutor considered that Trouw en Co. had acted in good faith and that there had been no negligence on its part.

6 For their part the Netherlands administrative authorities took preventive veterinary measures to limit the dangerous effects of putting contaminated feed on to the market but did not consider it necessary to require reimbursement of the Community aid already paid to Trouw en Co.

7 The Commission, relying on the provisions of Regulation No 990/72 which provide that a condition for the grant of Community aid is that the animal feed made with skimmed milk shall have a composition which is typical of animal feedingstuffs and shall be capable of use directly as feed, considered that those requirements had not been complied with in this case in view of the presence of a toxic substance in the feed, and therefore refused to clear the item in the accounts relating to that aid.

8 The Netherlands Government bases on the following arguments its application for a declaration that that decision to refuse clearance is void:

(a) The provisions of the relevant regulations are ambiguous and sometimes contradictory so that it is impossible to deduce from their wording a principle that animal feed made with skimmed milk must in order to be eligible for Community aid, comply with certain requirements as to its quality and composition.

(b) The said provisions should therefore be interpreted in the light of the aims of the Community legislature. Those were not to ensure that cattle received the correct nourishment but, in principle, to relieve the market in milk and to dispose of surplus produce.

(c) The said purpose was achieved in this case, since the skimmed milk was used in the manufacture of animal feed in such a way that it was no longer possible to use it for human consumption and the Community aid was therefore properly paid.

(d) Equally the aid could not be refused to Trouw en Co. because it acted in good faith and without negligence, since it had become apparent that the accident was due solely to the fault of the supplier.

9 As a subsidiary point the Netherlands Government maintains that the feed which was manufactured during the period in question was only partly contaminated since only one-third of the starch used in its manufacture had been treated with mercury. The proportion of the Community aid corresponding to the uncontaminated portion of feed was therefore properly paid and consequently the relevant item in the accounts should have been cleared at least in part.

10 The applicant's first argument is based on the differences in wording between certain provisions in the regulations governing the matter at issue. Regulations Nos 804/68 and 986/68 contain the expression skimmed milk "used in" or "for use as" animal feed, or even "used in the manufacture of compound feedingstuffs" (for animals); furthermore Article 4 (1) (c) of Regulation No 990/72 provides that in order to be regarded as compound animal feed it is necessary that the product "can be used directly as feed". The applicant considers that since those provisions are contradictory, it is impossible to decide whether, in order to be eligible for aid, the skimmed milk must solely be "for use" as animal feed or whether it must also actually be used as such feed.

11 In that connection it must be pointed out that the provisions quoted by the Netherlands, far from excluding the concept of the quality of feed made with skimmed milk, contain no contradictions or differences in relation to the requirement that feed made with skimmed milk must satisfy certain conditions as regards its quality and composition and, in particular, as regards its intended use as cattle feed.

12 In fact Regulation No 986/68, which lays down general rules for granting the aid in question, provides, in Article 2 (4), that compound feedingstuffs in

which skimmed milk is used must meet "minimum standards as to composition" in order to be eligible for aid. The same principle is laid down in the third and fifth recitals in the preamble to Regulation No 990/72.

13 Furthermore Article 1 (1) and (2) of Regulation No 990/72 provides that skimmed milk which has been used in the manufacture of compound animal feedingstuffs shall not be eligible for aid unless the feed complies with the conditions laid down in Article 4. That provision, in laying down minimum requirements as regards the composition and quality of the feed in question, provides, *inter alia*, that it must be feed "whose composition is typical of animal feedingstuffs" and "which can be used directly as feed".

14 It follows that the aforementioned regulations lay down requirements as to quality and composition which are not complied with in the case of feed which is unfit for animal consumption because it contains a toxic substance in the proportions mentioned above.

15 That finding is in agreement with national legislation to which Article 4 (3) of Regulation No 990/72 refers in connection with composition considered "to be typical of compound feedingstuffs". In fact, the legislation in force in the Netherlands at the material time, that is to say Article 5 (1) of the Verordening Veevoeder 1970 [Animal feed order] of the Produktschap voor Veevoeder [Production board for animal feed], expressly prohibited the addition of any mercury to animal feed.

16 Consequently the argument relating to the allegedly ambiguous wording of the relevant provisions cannot be accepted.

17 Nor can the argument as to the purpose of the system of aids in question be accepted. The foregoing considerations indicate that achieving the aim of disposing of surplus skimmed milk is not, of itself, sufficient to satisfy the conditions laid down for the grant of Community aid. It may be seen from the whole corpus of the relevant rules and in particular from the second and third recitals in the preamble to Regulation No 986/68 that the purpose of those rules is not solely the marketing of a product and the relief of the market in milk but also the employment of the product for useful economic

ends, that is to say to make available to breeders compound feed which is rich in high-quality protein and is reasonably priced.

18 The applicant also contends that by virtue of the aforementioned regulations the denaturing of skimmed milk, which is provided for as an alternative to its use in the manufacture of compound feed, is sufficient, of itself, to give rise to the entitlement to aid on the ground that it is not necessary for the denatured milk also to be capable of use in the feeding of animals. The applicant deduces from that that if other conditions were to be imposed in respect of the manufacture of compound feed that would lead to an unacceptable difference in treatment as between denatured milk and milk used in the manufacture of compound feed.

19 In that connection it must be stated that Article 2 (5) of Regulation No 986/68, which was inserted by Regulation No 1038/72 of the Council of 18 May 1972 (Official Journal, English Special Edition 1972 (II), p. 456), and according to which "any product referred to in paragraph (1) in respect of which aid is granted may be used only as feed" applies equally to "skimmed-milk powder which has been denatured" which is referred to in paragraph (1) (c) of the same article. Thus the alleged difference between denatured skimmed-milk powder and skimmed-milk powder used for animal feed does not exist, since both products must be capable of use as animal feed in order to be eligible for Community aid.

20 The applicant's final argument concerning its good faith and the absence of negligence on the part of the undertaking concerned is equally irrelevant, since the question is whether or not certain standards necessary for the grant of aid have been complied with. In that regard it is sufficient to state that the Netherlands Government has not shown that the good faith of the undertaking relieves the State concerned of the need to comply with the requirements for the grant of aid.

21 As the requirements laid down by the relevant regulations have not been complied with in this case it follows that the applicant's principal claim must be dismissed.

22 As regards the alternative claim seeking at least a partial clearance of the disputed item in the accounts it should be noted that the letter of 20 November 1974 sent by the directorate of the Algemene Inspectie Dienst [General Inspection Department] of the Netherlands Ministry of Agriculture

and Fisheries to the Produktschap voor Veevoeder and produced prior to the hearing by the Commission in response to the Court's questions, refers to the fact that 60 000 kg of contaminated starch were mixed with 173 000 kg of starch obtained elsewhere. In fact in that document the Ministry expresses the position as follows:

"The 60 000 kg of Amijel maize starch (contaminated starch) were mixed with 173 000 kg of starch obtained elsewhere and used at the same time between 28 May 1974 and 13 July 1974 in three production cycles to be processed into:

| | |
|---|---|
| Complete animal feed | 7 385 300 kg |
| Premixture | 16 700 kg |
| Feed for fur-bearing animals | 42 000 kg |
| | 7 444 400 kg" |

23 The contents of that document are confirmed by another letter dated 27 November 1974 which was sent to the Produktschap voor Veevoeder by the Hoofproduktschap voor Akkerbouwprodukten [Central Board for Agricultural Products] in which reference is made to the undertaking's declaration that the consignment of Amijel maize starch containing mercury "was incorporated into 7 385 300 kg of milk feed during the period from 28 May 1974 to 13 July 1974". Furthermore, during the oral procedure the parties admitted that according to analyses of 24 samples taken from the products which were seized 21 of them contained phenyl acetate of mercury.

24 It may be deduced from those circumstances that as a result of the mixing of the two consignments of starch the whole of the compound feed manufactured during the relevant period was contaminated. In any case, as is rightly stated by the Commission, it is not possible in this case to distinguish between the contaminated and the uncontaminated products in such a way as to determine precisely the quantities of each.

25 It must therefore be concluded that the applicant's alternative claim must be dismissed.

## Costs

26 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. Since the applicant has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Dismisses the application;**

2. **Orders the Kingdom of the Netherlands to pay the costs.**

Mertens de Wilmars Pescatore O'Keeffe Everling

Mackenzie Stuart Bosco Koopmans Due Bahlmann

Delivered in open court in Luxembourg on 15 March 1983.

P. Heim
Registrar

J. Mertens de Wilmars
President

## OPINION OF MRS ADVOCATE GENERAL ROZÈS DELIVERED ON 18 JANUARY 1983 [1]

*Mr President,*
*Members of the Court,*

The Government of the Kingdom of the Netherlands, by an application lodged at the Court Registry on 5 February 1982, seeks a declaration that a decision of the Commission (Decision 81/1047 of 16 November 1981) concerning the clearance of the accounts presented by the Netherlands in respect of expenditure for the financial year 1974 financed by the European Agricultural Guidance and Guarantee Fund ("the Fund"), Guarantee Section, is void, in so far as it excludes a sum of HFL 4 255 409.86 in relation to aid for the processing of

1 — Translated from the French.