OPINION OF MR ADVOCATE GENERAL JACOBS
delivered on 12 July 1990 *

My Lords,

1. In this case, Italy seeks the partial annulment of Commission Decision 88/630/EEC on the clearance of the accounts presented by the Member States in respect of the expenditure for 1986 of the Guarantee Section of the European Agricultural Guidance and Guarantee Fund ('the Fund') (Official Journal 1988 L 353, p. 30). In that decision, the Commission refused to accept as chargeable to the Fund LIT 10 410 055 894 which had been paid by AIMA, the Italian intervention agency, to a number of producers of olive oil by way of advances on aid for production between 1978 and 1984.

2. Italy originally put forward a separate complaint, but that was withdrawn after the close of the written procedure.

3. Aid for the production of olive oil was introduced by Article 5 of Regulation No 136/66/EEC on the establishment of a common organization of the market in oils and fats (Official Journal, English Special Edition 1965-66, p. 221), as amended by Regulation (EEC) No 1562/78 (Official Journal 1978 L 185, p. 1). Article 5 requires the aid to be 'fixed annually before 1 August for the marketing year beginning the following year . . .'. By Article 12 of Regulation (EEC) No 2753/78 laying down general rules in respect of production aid for olive oil for the 1978/79 marketing year (Official Journal 1978 L 331, p. 10), producer Member States were 'authorized to advance up to 70% of the aid requested to producer organizations as soon as they submit their aid applications'. Similar provisions were laid down for the marketing years 1979/80, 1980/81, 1981/82, 1982/83 and 1983/84.

4. Pursuant to those provisions, AIMA made advance payments of production aid for olive oil between 1978 and 1984. The sums advanced turned out to be in excess of the aid actually payable. As a result, AIMA was obliged by Article 8 of Regulation (EEC) No 729/70 on the financing of the common agricultural policy (Official Journal, English Special Edition 1970 (I), p. 218) to recover the difference. The first two paragraphs of that provision are in the following terms:

'1. The Member States in accordance with national provisions laid down by law, regulation or administrative action shall take the measures necessary to:

(i) satisfy themselves that transactions financed by the Fund are actually carried out and are executed correctly;

(ii) prevent and deal with irregularities;

* Original language: English.

(iii) recover sums lost as a result of irregularities or negligence.

The Member States shall inform the Commission of the measures taken for those purposes and in particular of the state of the administrative and judicial procedures.

2. In the absence of total recovery, the financial consequences of irregularities or negligence shall be borne by the Community, with the exception of the consequences of irregularities or negligence attributable to administrative authorities or other bodies of the Member States.

The sums recovered shall be paid to the paying authorities or bodies and deducted by them from the expenditure financed by the Fund.'

The Italian Government does not contest the Commission's view that advance payments of aid which turn out to be in excess of the amount due constitute 'irregularities' within the meaning of Article 8(1). I consider that that view is correct. Accordingly, the Italian authorities were required to recover the excess production aid which had been paid.

5. When the Commission carried out its investigations relating to the clearance of Member States' accounts for the financial year 1983 at the end of 1985, it informed the Italian authorities that they had not taken sufficient steps to secure repayment. Letters concerning repayment in respect of the marketing years 1978/79 to 1983/84 were subsequently sent by the Italian authorities to the recipients of the aid at the end of June 1988. The Commission takes the view that that delay of between four and nine years in seeking to recover the excess amount constitutes negligence within the meaning of Article 8(2) of Regulation No 729/70 and that the amount in question, over LIT 7 000 000 000 of which relates to the marketing years 1979/80 and 1980/81, must therefore be borne by the applicant.

6. The Italian Government points out that the sum in question represents an extremely high number of individual requests for advances (namely 94 094), many of which were for very small amounts. Some LIT 2 000 000 000 has apparently been recovered, but a large number of disputes has arisen. The Italian Government denies it has been negligent and claims to have encountered a number of practical difficulties in connection with recovery. It argues that no provision of Community law requires national authorities to seek to recover advance payments in circumstances such as these within a period shorter than that laid down by national law, which in this case is 10 years. According to the Italian Government, that period had not expired in respect of any of the recipients when its letters relating to recovery were dispatched at the end of June 1988.

7. Article 8(1) of Regulation No 729/70 makes it clear that disputes between the Member States and recipients of sums paid out under Community legislation are to be resolved in accordance with national law. Proceedings between the Commission and the Member State responsible for the payments, however, must in my view be resolved by applying Community law. According to Article 8(2) of Regulation No 729/70, the financial consequences of irregularities or negligence are only to be borne by the Community where the default in question is not attributable to the

Member States. That provision reinforces the general duty imposed on Member States by Article 5 of the EEC Treaty to act diligently in seeking to recover amounts which have been wrongly paid. Member States must therefore act with reasonable dispatch in taking steps to correct irregularities, for as the Court emphasized in another context in Case 343/85 *Italy* v *Commission* [1987] ECR 4711, the necessary checks 'are likely to become impossible after a certain time for reasons such as the fact that undertakings may have ceased trading or accounting documents may have been lost, etc.' (paragraph 22). It is true, as the Italian Government points out, that the Court was dealing in that case with time-limits expressly laid down by the relevant Community rules, but the same considerations have equal force in the present case.

8. I am unable to accept the view of the Italian Government that a Member State cannot be said to have been negligent within the meaning of Article 8(2) of Regulation No 729/70 if it acted within the applicable limitation period laid down by national law. In circumstances such as those of the present case, a Member State must be able to show that it has acted within any such period, for otherwise it will be unable to recover the excess payments at all. But the mere fact that a Member State has met that minimum requirement does not in my view suffice to establish that it has not been negligent for these purposes. The view of the Italian Government, if adopted, would mean that the effect of Article 8 would vary from State to State and could be altered by Member States at will. Such an outcome would be inconsistent with the purpose of the common agricultural policy, which is to lay down common rules concerning agricultural products applicable throughout the Community, and would mean that the cost of implementing that policy might not be shared equitably among the Member States. It could also lead to discrimination between producers in different Member States contrary to Article 40(3) of the Treaty.

9. The length of the period within which Member States must act in cases such as this in order to comply with the duty imposed on them by Article 8(2) of Regulation No 729/70 will vary according to the circumstances. The obligation to act arises in my view as soon as a Member State becomes aware, or ought to have become aware, that an irregularity within the meaning of Article 8(1) has occurred. In the instant case, it is not disputed that the Italian authorities knew that the advance payments exceeded the amount due shortly after the end of each of the marketing years in question.

10. It is not necessary here for the Court to specify how quickly the applicant should have sought to recover the excess payments once it became aware of them. In my view, it is reasonable, as the Commission suggests, to expect a Member State, in circumstances such as these, to set the process of recovery in motion as soon as it becomes apparent that the amount of aid actually payable is less than any advance which has been made. Indeed, a Member State which does not do so may be said not to have complied with the obligation imposed on it by Article 8(1) of Regulation No 729/70 to 'take the measures necessary' to recover sums lost as a result of irregularities. It is sufficient for the purposes of these proceedings, however, for me to say that a delay exceeding three years is clearly too long.

11. I therefore conclude that Italy has failed to comply with the requirements of Article 8(2) of Regulation No 729/70. It cannot in my view be contended that the Commission did not alert the Italian authorities early enough to the consequences of failing to take steps to recover promptly the excess payments which had been made (see Case C-10/88 *Italy* v *Commission* [1990] ECR I-1229). It appears from the file that the Commission first warned the Italian authorities about the matter at the end of 1985 during the clearance of the accounts for 1983. That warning was repeated during the clearance of the accounts for 1984 and 1985. These warnings were evidently noted by the Italian authorities and any practical difficulties overcome, for letters notifying each of the producers concerned of the amounts they were liable to repay were subsequently printed. However, when the Commission carried out an on-the-spot inspection in February 1988, it transpired that those letters had not yet been posted. In a note dated 15 April 1988, the Commission warned the Italian authorities that the delay in seeking to recover the sums which had been overpaid might result in their not being accepted as chargeable to the Fund. Still the Italian authorities failed to act, and it was not until the Commission formally proposed, in its Summary Report dated 15 June 1988, to deduct the sums in question from the expenditure declared by the Italian Republic for 1986 that the Italian authorities responded, the letters concerning recovery finally being despatched at the end of June 1988.

12. In these circumstances, the Commission cannot in my view be criticized for failing to inform the applicant early enough of its view that insufficient steps were being taken to recover the excess aid. The Italian authorities were made well aware of the Commission's view on the matter during previous clearances but do not seem to have been willing to make a real attempt at recovery until confronted with the immediate prospect of bearing the financial consequences of the failure to recover.

13. I therefore consider that the Court should dismiss the action and order the applicant to pay the costs, with the exception of those relating to the complaint which was withdrawn, in respect of which the parties have agreed that each should bear its own costs.