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.

skimmed-milk powder into compound feedingstuffs.

I — The facts are as follows:

Article 10 (1) of Regulation (EEC) No 804/68 of the Council of 27 June 1968 (Official Journal, English Special Edition 1968 (I), p. 176) on the common organization of the market in milk and milk products provides for the granting of aid for *skimmed-milk powder produced in the Community and used as animal feedingstuffs* if that product reaches certain standards.

Trouw en Co., whose registered office is at Putten (Netherlands), a manufacturer of compound feedingstuffs, used skimmed-milk powder in the production of feed for calves to be used as a substitute for milk, the principal ingredient of which was maize starch. It was subsequently discovered that some of the maize starch was contaminated with mercury, as a result of which some calves died.[1]

On investigating these matters in April 1979, Commission staff established that the aid previously referred to was granted for dried milk used in the compound feedingstuffs in question; to be more precise, between 28 May and 13 July 1974, 7 385 300 kg of feedingstuffs were manufactured in this manner from 3 692 650 kg of skimmed-milk powder and 233 000 kg of maize starch, of which 60 000 kg contained 0.05% phenyl acetate of mercury.

The contaminated starch, which has certain industrial uses, was delivered in error by the manufacturers' supplier owing to confusion regarding the code number.

Trouw en Co. was the subject of legal proceedings before the Rechtbank [District Court], Zwolle, for infringement of the Netherlands legislations on animal feed. It would seem that the closure of the Italian frontier to imports of veal from the Netherlands, which received much publicity at the time, had some connection with this matter.

The legal proceedings in the Netherlands were subsequently discontinued but, pursuant to the decision of the court in Zwolle, the feedingstuffs containing the mercury which the manufacturer still had in storage on 13 July 1974 (614 748 kg) were seized on 14 August and 19 September 1974 by the Algemene Inspectie Dienst [General Inspection Department] or were recovered later from the manufacturer's customers. The Netherlands veterinary authorities also declared the meat of the animals to which the product in question had been fed to be unfit for consumption.

The Netherlands intervention agency which had paid the aid did not recover it and requested reimbursement by the Fund of the sum involved.

The officers of the Commission considered that the aid could only be paid in respect of a product which is "in fact used as feed". As that requirement was not complied with the request for reimbursement was rejected.

The Netherlands Government states, in the sole argument which it adduces, that the refusal to clear the amount in question is contrary to the provisions of Articles 3 and 5 of Regulation (EEC) No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy (Official Journal, English Special Edition 1970 (I), p. 218). It asserts that the aid was used exclusively for the purposes contemplated both in Article 2 of Regulation (EEC) No 986/68 of the Council of 15 July 1968 (Official Journal, English Special Edition 1968 (I), p. 260) and in Article 4 of Regulation (EEC) No 990/72 of the

1 — 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, p. 39.

Commission of 15 May 1972 (Official Journal, English Special Edition 1972 (II), p. 428) on the rules for granting aid for skimmed milk processed into compound feedingstuffs and for skimmed-milk powder for use as feed.

In support of its argument the Netherlands Government repeats the views which it put forward during the preparatory work for the clearance of the accounts:

The manufactured product complied with the conditions imposed by Community legislation, the sole purpose of which is to guarantee that the product in question can only be used as animal feed, and that aim was achieved.

The manufactured product satisfied the conditions imposed by Community legislation which does not provide for any checks after the denaturing of the powder.

The mortality rate for calves to which the product in question was fed was not abnormally high.

It was on grounds of equity and legal certainty that the aid paid to the manufacturer, who was the victim of a case of *force majeure*, was not recovered.

In any case, only part of the starch used was toxic so that only one-third of the compound feed was unfit for consumption by animals.

The Commission admits that Community law does not expressly require proof that the feed has been used in the prescribed manner; nevertheless it considers the interpretation adopted by the Netherlands authorities and Government to be contrary to both the letter and the spirit of the relevant provisions of Community law.

It is therefore necessary in the first place to examine the relevant texts.

II — Regulation (EEC) No 986/68 of the Council of 15 July 1968 [1] lays down general rules for granting aid for skimmed milk and skimmed-milk powder for use as feed.

It provides for the grant of aid for skimmed-milk powder and skimmed milk produced and processed in the dairy and used in the manufacture of compound feedingstuffs (Article 2 (1) (d)).

It states that such products may be used only as feed (Article 2 (5)).

Regulation (EEC) No 990/72 of the Commission of 15 May 1972 on detailed rules for granting aid for skimmed milk processed into compound feedingstuffs and for skimmed-milk powder for use as feed determines in more detail the composition of such feedingstuffs and adds that their composition must be *typical* of animal feedingstuffs and that the products must be *capable* of use directly as feed without being processed or mixed before they reach the farm or breeding or fattening concern where they are used (Article 4 (1) (b) and (c)).

In this case it is therefore necessary to determine whether, in order to benefit from the aid in question, compound feed made from milk powder (presumed to be of sound and pure quality) and maize starch contaminated with mercury, the ingestion of which has proved or might prove fatal, may be considered to be a product "whose composition is typical of animal feedingstuffs" and "which can be

1 — As amended by Regulation (EEC) No 1038/72 of the Council of 18 May 1972 (Official Journal, English Special Edition 1972 (II), p. 456).

used directly as feed" within the meaning of Article 4 (1) (b) and (c) of Regulation No 990/72, even where the addition of the starch was purely accidental.

According to the spirit, if not to the letter, of Community law the reply must be in the negative.

Even if the wording of the Community provisions is a little uncertain it is clear that their main purpose is to ensure that milk surpluses do not burden the market in milk for human consumption. One of the methods used to achieve this is to incorporate powdered milk in compound feedingstuffs. But from the point of view of Community law, the feedingstuffs of which such powder forms part must not thereby be allowed to constitute a danger to the health or life of animals (Article 36 of the EEC Treaty), even if that danger is only indirectly linked with the incorporation of the dried milk.

Furthermore, the third recital in the preamble to Regulation No 990/72 states that the skimmed milk and skimmed-milk powder for which aid is granted must *in fact* be used as feed.

The fifth recital states clearly that in order to receive aid the feedingstuffs must conform to certain minimum standards as regards composition customarily observed in the industry and must have reached the final stage of industrial manufacture.

Finally according to Article 2 (a) of Regulation No 986/68 [1] the aid is to be fixed on the basis of various factors, including *developments in the use as feed* of skimmed milk and skimmed-milk powder.

It is not therefore correct to say that the Community legislature has not concerned itself with what happens to the dried milk after it has been incorporated into the compound feed since the amount of the aid is fixed in particular on the basis that the dried milk is to be used *as feed.*

It is true that the supervisory procedures provided for by Community law are intended to ensure that the *powder* is in fact used to make compound feedingstuffs and that there is no system designed to prove how the feedingstuffs are in fact used — it would doubtless have been difficult to set up such a system.

Article 3 (1) of Regulation No 990/72 simply provides that denaturing is to be supervised on the premises and that each Member State is to appoint an agency to carry out this supervision.

But if it has been shown, as in the present case, that the product is not *capable* of use, it cannot be regarded as "compound feed" within the meaning of Article 2 (1) (d) of Regulation No 986/68.

The efficacy of the methods of supervision set out in Articles 3 and 8 of Regulation No 990/72 would otherwise be seriously jeopardized because there would no longer be any guarantee that the dried milk would be used for its intended purpose, that is to say for animal feedingstuffs. If the feed is not suitable for animals it can no longer be used *only* for its intended purpose.

Aid for skimmed-milk powder processed into animal feedingstuffs may not be lawfully granted unless the powder

1 — As amended by Regulation (EEC) No 666/74 of the Council of 28 March 1974 (Official Journal 1974, L 85, p. 58).

benefiting from the aid is at least capable of the intended use; [1] in fact the grant of aid must be consistent with the aim of relieving the market in milk for human consumption by ensuring that some of that milk is used as animal feed.

It has already been seen that the compound feed contained maize starch treated with mercury.

The Annex to Council Directive 74/63 of 17 December 1973 (Official Journal 1974, L 38, p. 31) on the fixing of maximum permitted levels for undesirable substances and products in feedingstuffs fixed that amount at 0.1 mg per kg of the product which is the same permitted level as for mercury in normal feedingstuffs. The Member States were given until 1 January 1976 to bring into force the provisions needed to comply with the directive.

But prior to that date the Netherlands Veevoederverordening [Animal-feed order] of 17 September 1970 prohibited manufacturers of animal feed from manufacturing feedingstuffs containing arsenic, antimony, mercury or combinations thereof (Article 5 (1) (a)).

Compound feedingstuffs which at the end of the manufacturing process do not conform to the minimum standards as regards composition customarily observed in the industry for such products do not qualify for Community aid.

1 — See the judgment of the Court of 18 February 1982 in Case 77/81 *Zuckerfabrik Franken GmbH* v *Federal Republic of Germany* [1982] ECR 681 and the Opinion of Mr Advocate General Reischl in that case.

Furthermore, the Netherlands Government stresses that the mortality rate for the calves was more or less normal. All that I shall say in that regard is that the national authorities brought legal proceedings against Trouw en Co. which resulted at least in the seizure of the remaining stocks of the product in question and even, where it was possible, of the contaminated meat.

The Netherlands Government also states that it cannot recover the amount which the Fund has refused to reimburse since the manufacturer to whom it was paid has a defence based on grounds of *force majeure*, equity or legal certainty.

However it appears from the file on the case that on 20 December 1974 when the intervention agency waived reimbursement of the aid, it expressly included the following proviso in case the Fund should adopt a differing view:

"If however Brussels insists upon recovery, the intervention agency may at any time review this decision."

That proviso does not seem to have been expressly withdrawn.

The good faith of the manufacturer is not in dispute but it is entitled to have recourse to its insurance company, to its supplier or to its supplier's insurance company. The Fund is under no duty to assume liability for such commercial risks in the place of others. If the Netherlands Government feels it has to give up its right of recovery on equitable grounds it should bear the consequences of so doing and not seek to hold the Fund responsible.

Finally the Netherlands Government claims that aid should be granted at least for the proportion of the powder (two-thirds) made into feedingstuffs which was not contaminated.

The Commission states in reply that it is impossible to establish any basis of calculation whereby the amounts which were not contaminated could be determined with any degree of accuracy and it therefore refuses to classify any of the manufacturer's products for the period from 28 May to 13 July 1974 as compound feedingstuffs capable of direct use as animal feed.

According to the documents of which the Court ordered the production the manufacturer stated that the amount of dried milk which was used between August and October of 1974 for the manufacture of 585 247 kg (and not for the 614 748 kg seized) of compound feedingstuffs and for which it received aid amounted to 312 990 kg.[1] The Netherlands intervention agency stated that "by virtue of Regulation No 990/72 the proper view is that reimbursement of the aid must be demanded in respect of 7 385 300 kg if the figures (quoted above) prove to be wholly correct. If the proportion of processed skimmed-milk powder is put at 50% on average, then that represents 3 692 650 kg . . . or HFL 4 255 409.86". That is precisely the amount in dispute in this case. The letter from the Netherlands intervention agency goes on to say that "this average proportion constitutes a *minimum*[2] rather than a maximum figure. This follows from the total figures given above".

In view of the foregoing considerations my opinion is that the action must be dismissed and that the Kingdom of the Netherlands must pay the costs.

1 — See the letter from the Netherlands intervention agency dated 27 November 1974.

2 — Emphasis added.