OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 3 October 1991 *

Mr President,
Members of the Court,

1. In this action, the Italian Republic requests the Court to annul in part Commission Decision 90/213/EEC of 19 April 1990,[1] by which the Commission amended, with regard to three Member States including Italy, Commission Decision 89/627/EEC [2] on the clearance of the accounts for 1987.

2. According to the first recital in the preamble to the disputed decision, Decision 89/627 did not clear the accounts so far as concerns, in particular, expenditure declared by Italy relating to processing aid for skimmed-milk powder or expenditure relating to aid for the consumption of olive oil. Those accounts were accordingly cleared by the decision which is the subject of this action and which refused to charge to the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (hereafter 'EAGGF') expenditure declared by the applicant State totalling LIT 10 214 635 858.

3. The criticisms expressed by Italy concern aid both for the processing of milk and for the consumption of olive oil. They will accordingly be considered in turn.

I — Aid for the processing of skimmed-milk powder

4. The expenditure disallowed by the Commission totals LIT 5 862 632 980, corresponding to 10% of the aid for milk processing paid by the Italian authorities during the financial year in question.

5. The submissions jointly relied upon by the applicant State are based on the infringement of the relevant Community regulations and on the failure to give reasons. [3] It appears, however, that the failure to give reasons thus raised is being confused with the submission based on infringement of the law. Italy complains that the Commission did not sufficiently take into account the further scrutiny carried out by the Italian authorities or the information which was as a result brought to its knowledge. On the other hand, there is no submission at all alleging even a partial failure by the Commission to cooperate in the process of adopting the contested decision or to state reasons for that decision. Those are the only complaints which can found a submission based on failure to give reasons, since in its case-law concerning the clearance of accounts the Court normally observes that the

* Original language: French.

1 — OJ 1990 L 113, p. 32. The Italian text of the decision is set out in Annex 2 to the application.

2 — OJ 1989 L 359, p. 23.

3 — See pp. 4 and 16 of the application.

governments of Member States are closely involved in the process by which the clearance decision came about. [4]

6. Before considering the specific facts by virtue of which, according to the applicant government, the Commission wrongly considered the scrutiny to be inadequate, it is appropriate to note the reasons for which Decision 89/627/EEC cannot have related to the aid for milk-processing. As the Commission states in its defence without being contradicted by the Italian Government, a visit by EAGGF inspectors from 2 to 6 May 1988 to the undertakings Wessanen, Frabes and Plodari in the Province of Brescia revealed that the checks carried out by the Ispettorato Provinciale per l'Agricoltura did not extend to the undertakings' commercial documents, that the inspection reports, which were drawn up in standard form, did not indicate that the records had been compared with the financial accounts, and that certain quarterly checks were no more than the conclusion of work carried out during the previous quarter. [5]

7. The Commission accordingly decided to ask the Italian authorities to carry out further scrutiny at the premises of the three abovementioned undertakings and, that being so, disjoined the expenditure declared relating to the aid for milk processing from Decision 89/627.

8. Further scrutiny was carried out in October 1989. Three Community officials were present during part of the inspection, and on 19 October 1989 the EAGGF sent the Italian authorities further instructions on the procedure for that inspection. Those instructions called for a comparison between the particular book records, [6] the stock records and the undertaking's general accounts, between the figures in the annual report approved by the external auditor and the particular book records, between stocks of raw materials, current output and stocks of finished products. They also called for a detailed description of all the checks carried out, information on the extent and result of the scrutiny, 'statistics relating to the totals of securities released and the total amount of aid paid for 1987 by each firm inspected', information on the composition of the inspection teams and the duration of those checks. The abovementioned instructions also noted that Wessanen did not possess certain required documents, namely the results of the laboratory analyses requested by the firm, manufacturing records and the inventory for 1987. [7]

9. The Italian authorities sent the Commission at the end of November 1989 a summary report accompanied by analytical reports for each of the three undertakings as well as various documents. The parties dispute in these proceedings the thoroughness of that further scrutiny and the

4 — For example, the judgments in Case 819/79 *Germany* v *Commission* [1981] ECR 21, at paragraphs 20 and 21, and Case 347/85 *United Kingdom* v *Commission* [1988] ECR 1749, at paragraph 60.

5 — See the Summary Report of 30 June 1989, Doc. VI/200/89-FR, and the letter from the Commission, Directorate-General for Agriculture, EAGGF, of 2 August 1989 (No 061178) addressed to AIMA, in Annexes I and II to the defence.

6 — These records note in particular the origin of the raw materials used, the quantities used, the quantities and composition of the products manufactured and the percentage of their components, the date on which those products left the undertaking and the names and addresses of the buyers: Article 8(5) of Commission Regulation (EEC) No 1725/79 of 26 July 1979 on the rules for granting aid to skimmed milk processed into compound feedingstuffs and skimmed-milk powder intended for feed for calves (OJ 1979 L 199, p. 1).

7 — See Annex V to the defence.

probative value of the documents produced in that regard.

10. The Italian Republic brings its criticisms to bear on the findings made by the EAGGF officials in their Further Summary Report of 12 March 1990. [8] Paragraph 3 of that report states that the reports forwarded by the Italian authorities do not mention the comparison, *for all the transactions*, of the undertakings' particular book records with their accounts. It also specifies five specific facts constituting deficiencies in the checks carried out. I will consider first the complaint as to the lack of an overall comparison, then the five points concerning the alleged deficiencies.

11. So far as concerns the lack of an overall comparison, the applicant State asserts that the inspectors compared all the accounts and, in particular, the entries in the registers of AIMA, the Italian intervention agency, with those kept by the undertakings by virtue of Italian law. However, only the most important transactions were recorded. [9]

12. The Commission replies in that regard that it did not find any trace of a note in the undertakings' accounts or any calculation proving that the the comparison had been carried out. [10]

13. It is true that, in the documents sent by the Italian authorities to the Commission, there is no information as to the number of transactions selected nor as to the results of their scrutiny. During the oral procedure, the EAGGF confirmed, furthermore, that the Commission had received only photocopies of certain transactions.

14. It must also be stated that the Italian Government has not produced evidence over and above that which it had sent to the Commission before the adoption of the contested decision. The Court has already held that, if

'without contradicting those findings by producing evidence, the applicant government merely contends that administrative checks were in fact carried out, as well as on-the-spot inspections . . .', [11]

that does not make it possible

'to show that the Commission's findings were inaccurate' [12]

with the result that the Court has to dismiss the application for annulment of the decision refusing Community financing. [13]

8 — Doc. VI/200/89-FR, in Annex 3 to the application.

9 — P. 8 of the application, French version.

10 — Pp. 15 and 16 of the defence. French version.

11 — Judgment in Case C-8/88 *Germany* v *Commission* [1990] ECR I-2321, at paragraph 27.

12 — Paragraph 28.

13 — Paragraph 29.

15. Without doubt the outcome would be different in an action against a Member State for failure to fulfil its obligations under the Treaty, but the burden of proof in this case is on the applicant State. I accordingly consider the lack of thorough scrutiny within the meaning of Article 10(2)(d) of Regulation (EEC) No 1725/79 to have been established.

16. During the oral procedure, there was a discussion between the parties as to whether the instructions of 19 October 1989, sent by telex, clearly called for all the documents subject to scrutiny to be submitted. The telex in question states: 'Please retain the various documents, inspection notes and reports which will be used as a basis for the final report. The report and the various inspection documents must be submitted by 30 November 1989 at the latest'.

17. Even if those instructions are somewhat ambiguously worded as to the requirement to communicate all the inspection documents, it suffices to note that Italy has not offered, in these proceedings, to communicate additional documents either to the Commission or to the Court. Following the case which I have just cited, I accordingly remain of the view expressed above.

18. As stated earlier, the Commission's Further Summary Report also specifies five facts constituting deficiencies in the checks carried out by the Italian authorities. It seems, however, according to the Commission's defence,[14] that the circumstances set out in points (d) and (e) had been abandoned by the Commission during the procedure for adopting the contested decision. Those points concern sales made by Plodari to the Caseificio Stabiumi Giacomo SpA and to the Latteria Soresinese Coop., and purchases of whey by the same undertaking. Accordingly, they do not provide the necessary basis for the contested decision and must be considered as unconnected with this discussion.

19. Point (a) concerns the failure to examine the results of the analyses carried out by the three undertakings' laboratories and of the manufacturing records, as well as, for Plodari only, the lack of records of raw materials and finished products.

20. The applicant State claims, as to the first criticism, that the analyses made by private laboratories, at the request of the undertakings themselves, are not mandatory and have no official status. In this case, analyses were in fact carried out at the request of the three undertakings in question but, according to the Italian Government, the results were examined by the Italian inspection authorities.

21. The Commission replies that the analyses carried out by the public laboratories should have been compared with the unofficial analyses carried out at the request of the undertakings.

22. While the report sent by the Italian authorities to the Commission following further scrutiny contains in an annex the results of the analyses carried out by the public laboratories, only the results of the analyses carried out by Wessanen's laboratory were sent to the Commission

14 — P. 14 of the French version.

without its being established, however, that the Italian authorities carried out any comparison between the results of those two types of analysis. The analytical reports for Plodari and Frabes do not mention the existence of analyses carried out by private laboratories, while the Italian authorities' Summary Report seems to indicate that those two undertakings did carry out such analyses. [15] Accordingly, no evidence that a comparison was actually made between the results of those different analyses has been furnished by the applicant State.

23. The second criticism concerns the failure to examine the manufacturing records. Italy maintains that neither Community legislation nor national legislation requires that manufacturing records be retained. It is not disputed that the manufacturing records of the three undertakings for 1987 no longer existed.

24. The Commission considers that manufacturing records are commercial documents within the meaning of Article 10(2)(d) of Regulation No 1725/79.

25. It is true, in my view, that the concept of 'commercial documents' in that provision must be interpreted broadly in so far as it specifies the documents which may be scrutinized and, in consequence, the effectiveness of the inspections carried out in order to determine whether the transactions in respect of which aid has been granted complied with Community requirements. Manufacturing records must therefore, in my view, be considered as commercial documents within the meaning of Article 10(2)(d) of Regulation No 1725/79. The effectiveness of that provision would otherwise be seriously undermined.

26. The concept of 'commercial documents' which also appears in Article 1 of Council Directive 77/435/EEC of 27 June 1977 on scrutiny by Member States of transactions forming part of the system of financing by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund [16] includes, according to the wording of Article 1(2), 'all the books, registers, vouchers and supporting documents, accounts and correspondence relating to the undertaking's business activity, in so far as these documents may be useful to the scrutiny . . . '.

27. Obviously, it is appropriate for that concept in the two abovementioned Community provisions, both referring to scrutiny of EAGGF expenditure, to have the same definition.

28. Italy does not deny that manufacturing records are an aid to scrutiny. The records for 1989 were moreover scrutinized by the Italian authorities. According to Article 4 of the abovementioned directive, Member States 'shall require undertakings to keep the commercial documents . . . for at least three calendar years, starting from the end of the calendar year in which they were drawn up'. Accordingly, the manufacturing records for 1987 should, under Community

15 — P. 5 of the French version, Annex VI to the defence.

16 — OJ 1977 L 172, p. 17.

law, have been kept until 31 December 1990, which was not the case.

29. The Italian Summary Report states, moreover, that those manufacturing records are confidential since they include the formulas showing how the raw materials are used.[17] Besides the fact that consulting those records facilitates supervision which, according to Article 10(2)(a) of Regulation No 1725/79, must have particular regard to the composition of the mixtures utilized and the compound feedingstuffs manufactured, their confidential nature is not affected inasmuch as Article 8(1) of the abovementioned directive provides that 'information collected in the course of scrutiny as provided for ... shall be protected by professional secrecy'.

30. Hence the deficiency regarding the Italian authorities' checks has, in that respect, been established.

31. The third criticism concerns the lack, for Plodari, of any records of raw materials and finished products. The Italian Government points out that, because of its low production, Plodari was not required by Italian law to keep such records.

32. The fact remains, however, that Article 8(1) of Regulation No 1725/79 makes the grant of aid conditional on approval of the undertaking or the keeping by it of the accounts referred to in Article 8(5). That paragraph provides that 'the undertaking ... shall keep accounts, as determined by the competent agency in each Member State, which shall show:

(a) the origin of the raw materials used;

...

(c) the quantities and composition of the products manufactured ...'.

33. Under Community law, Plodari was accordingly required to draw up records of raw materials and finished products.

34. Point (b) of the Commission's Further Summary Report concerns the lack of evidence that an inventory of raw materials or finished products was carried out. Italy points out that a comparison was made between the accounting data provided by AIMA's registers and the undertakings' 'traditional' accounts. It admits, however, that a direct comparison between the records of raw materials and the data relating to stocks provided by AIMA's registers could not be carried out for 1987 but only for the period subject to the scrutiny.[18]

35. The Commission counters that those arguments constitute general assertions which are not supported by any document sent to it demonstrating that such checks were actually carried out.

17 — P. 6 of the French version, Annex VI to the defence.

18 — P. 18 of the application, French version.

36. It is true that the three analytical reports sent to the Commission in November 1989 contain no specific information on the actual carrying out of an inventory of raw materials or finished products. [19] Moreover, the Court has already held that the absence of scrutiny as required by Community legislation cannot be regularized after the event by scrutiny of a different kind. [20] Accordingly, the deficiencies in question seem to be established.

37. Point (c) of the Commission's Further Summary Report refers to two sales made by Wessanen in respect of which the security was forfeited. During the oral procedure, the Commission acknowledged that, in the light of the information in the Italian Government's reply, that criticism was no longer justified. It considers, however, that the evidence adduced by Italy is out of time.

38. In my view, it is for the Member States, on the basis of Article 5 of the EEC Treaty [21] and the specific provisions of Community law which I have just considered, to communicate in due time the information needed by the Community institution concerned to take its decision on the clearance of accounts. The case-law of the Court, moreover, does not allow rectification of the formal requirements relating to proof after the event. [22] Even if the evidence so adduced during the written procedure before the Court were taken into account, the fact none the less remains that such evidence produced out of time would not be capable of resulting in the annulment of the contested decision. The deficiencies as to the thoroughness of the scrutiny have, as I said, been established and are sufficient to justify the Commission's refusal of EAAGF assistance for certain sums.

39. Accordingly, the applicant state has not adduced evidence that the deficiencies alleged by the Commission in support of its decision were unfairly relied upon as against the applicant.

40. There remains to be examined, however, the argument of the Italian Government that the Commission was not entitled to set at a flat rate of 10% of the aid granted the amounts which would not be borne by the EAGGF.

41. The Court has already resolved that difficulty in its case-law. In its judgment in *Netherlands* v *Commission*, [23] it held that:

'in cases where Community rules authorize payment of aid only on condition that certain formalities relating to proof or supervision are observed, aid paid in disregard of that condition is not in accordance with Community law and the expenditure incurred therein may not therefore be charged to the EAGGF, even if it were established that no substantive irregularity has been committed'. [24]

42. As the Court confirmed in a later judgment, the Commission may, after demonstrating the existence of deficiencies

19 — Annex VI to the defence.

20 — Judgment in Case 327/85 *Netherlands* v *Commission* [1988] ECR 1065, at paragraphs 18 and 19.

21 — Applied, moreover, by the Court in the context of financial relations between Member States and the Community so far as concerns the common agricultural policy: judgment in Case C-34/89 *Italy* v *Commission* [1990] ECR I-3603, at paragraph 12.

22 — Judgment in Joined Cases 15/76 and 16/76 *France* v *Commission* [1979] ECR 321, at paragraph 11.

23 — Case 327/85, cited above.

24 — Paragraph 25.

in the scrutiny or in the piecing together of evidence, endeavour:

'to establish the financial impact of the unlawful action by means of calculations based on an assessment of what the situation on the relevant market would have been if the infringement had not occurred'. [25]

The Court added that:

'In such a case, the burden of proving that those calculations are not correct rests on the State seeking to have the disallowance annulled'. [26]

43. It must be stated that no such evidence has been adduced by Italy in these proceedings.

44. Accordingly, none of the submissions put forward as regards the aid for the processing of skimmed-milk powder appear to me to be of such a kind as to vitiate the legality of the contested decision.

II — Aid for the consumption of olive oil

45. The contested decision refused to charge to the EAGGF a sum of LIT 4 352 012 388 relating to aid for the consumption of olive oil.

46. Let me point out at once, so as not to have to come back to this point, that the action also concerns certain reservations allegedly expressed by the Commission, not in the contested decision but in a letter of 10 May 1990,[27] with regard to the sum of LIT 28 688 711 294. The Commission lodged an objection that the application was inadmissible on that point. [28] In its reply, the Italian Government abandons that head of claim. Accordingly, Italy's submission concerns only the refusal to charge to the EAGGF the abovementioned sum of LIT 4 352 012 388.

47. Formally, that submission concerns both infringement of the applicable Community law and failure to state reasons. My observations concerning aid for the processing of skimmed-milk powder are equally valid here.

48. The discussion between the parties is essentially legal. It is not disputed that the abovementioned sum corresponds to aid which the Italian authorities noted was undue because of irregularities. Legal proceedings are in progress before the Italian courts. The Italian Government considers, for its part, that the Commission should have awaited the final outcome of those proceedings before taking the decision to refuse EAGGF assistance for those sums. The Commission takes the opposite view on that point.

49. It appears, moreover, that the securities have been released.

25 — Case 347/85, cited above, at paragraph 15.

26 — Ibidem.

27 — Document 21 of the annexes to the application.

28 — P. 27 of the defence, French version.

50. In that regard, Article 29 of Commission Regulation (EEC) No 2220/85 of 22 July 1985 laying down common detailed rules for the application of the system of securities for agricultural products [29] provides as follows: 'Once the competent authority is aware of circumstances giving rise to forfeiture of the security, in whole or in part, it shall without delay demand that the party required to meet the obligation to pay the sum forfeited, allowing up to 30 days from the day of issue of demand for payment'; it goes on to state that: 'Where payment has not been made at the end of this period, the competent authority shall ... (b) without delay require the guarantor ... to pay ...'.

51. That provision is unambiguous. We are dealing, let me point out, with a system of advance aid. Accordingly, where irregularities have been established by the administrative authority, it is not clear for what reasons the parties concerned should have the right, on the ground that the matter is before a court, to retain *advances* on the aid in question and therefore to object to the securities being forfeited by the competent national authorities. Neither the Community budget nor indeed that of the Member States has to bear that financial burden where the eligibility of the producers concerned to receive aid has not yet been established and is, on the contrary, strongly disputed.

52. The position of the Italian Government perhaps derives from the fact that, contrary to the requirements of the abovementioned regulation, the securities have been released. According to the applicant State, the period of validity of the securities had expired by the time of the checks which enabled the irregularities to be detected.

53. Article 11 of Commission Regulation (EEC) No 2677/85 of 24 September 1985 laying down implementing rules in respect of the system of consumption aid for olive oil [30] provides that the security is only to be released once the competent national authority has recognized entitlement to the aid.

54. The application accordingly seems unfounded on that point as well.

55. I therefore propose that the Court dismiss the application in this case and order the applicant State to pay the costs in their entirety.

29 — OJ 1985 L 205, p. 5.

30 — OJ 1985 L 254, p. 5.