OPINION OF ADVOCATE GENERAL JACOBS

delivered on 16 December 1992 *

My Lords,

In this case the Pretura Circondariale, Cuneo, has referred two questions for a preliminary ruling. The first concerns the validity of Commission Decisions 89/627 of 15 November 1989 (OJ 1989 L 359, p. 23) and 90/213 of 19 April 1990 (OJ 1990 L 113, p. 32) on the clearance of the accounts presented by the Member States in respect of the expenditure for 1987 of the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) (hereafter 'the Fund'). The second concerns the recovery by Member States of payments not accepted as chargeable to the Fund. The first question raises the issue whether the validity of a Commission decision on the clearance of the Fund's accounts can ever be challenged in the courts of the Member States.

The relevant legislation

1. Council Regulation (EEC) No 729/70 (OJ, English Special Edition, 1970 (I), p. 218) governs the financing of the common agricultural policy. Article 1(2) in combination with Article 3(1) provide that the Guarantee Section of the Fund is responsible for financing intervention intended to stabilize the agricultural markets which is undertaken according to Community rules. Article 4 requires Member States to designate authorities responsible to effect the expenditure necessary to finance the intervention. To ensure the proper administration of the Fund, the accounts of the national authorities must be cleared by the Commission according to the procedure specified in Article 5(2). Article 8(1) and (2) provide as follows:

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

— satisfy themselves that transactions financed by the Fund are actually carried out and are financed correctly;

— prevent and deal with irregularities;

— 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,

* Original language: English.

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.'

2. Fruit and vegetables are subject to a common organization of the market governed by Council Regulation (EEC) No 1035/72 (OJ, English Special Edition 1972 (II), p. 437) as amended. The regulation provides for the formation of producers' organizations and lays down a price support mechanism, under which producers' organizations may fix a withdrawal price below which products of their members will not be offered for sale. When a withdrawal price is fixed, producers' organizations are required to grant an indemnity to members for quantities that remain unsold of products that conform to the specified quality standards. Article 15 of the regulation provides that in order to finance these withdrawal measures, producers' organizations are required to establish an intervention fund, maintained by contributions assessed on quantities offered for sale. Under Article 18, Member States must grant financial compensation to producers' organizations which intervene, provided that the withdrawal price does not exceed a certain level. The value of the compensation is equal to the indemnities paid by the producers' organizations less net receipts from the disposal of products withdrawn from the market. The expenditure thereby incurred is eligible for finance by the Guarantee Section of the Fund.

The facts and the legal issues

3. The origin of the proceedings lies in the clearance by the Commission of the accounts presented by the Member States in respect of the expenditure for 1987 of the Guarantee Section of the Fund. In the course of that clearance of the accounts, the Commission examined the way in which the Italian authorities had supervised the operations of organizations of fruit and vegetable producers set up under Regulation No 1035/72. The summary report prepared by officials of the Commission on which the clearance of the accounts was based showed that the number and intensity of checks carried out by the Italian authorities were inadequate to ensure that producers' organizations were functioning in conformity with the requirements of Community law. In particular, the Commission claims that the Italian authorities had carried out checks on only six out of a total of 134 producers' organizations recognized in 1987. Of those six organizations only three had received Community aid, the amount of which represented just 2.12% of the total expenditure submitted by Italy. According to the Commission, its examination also showed that even the checks carried out in those few organizations were not sufficient to ensure that they operated in conformity with Community law.

4. As a result, in its decision on the clearance of the accounts for 1987 (Decision 89/627, cited above), the Commission disallowed 5% of the expenditure declared by Italy. According to the seventh recital of that decision:

'Whereas the expenditure disallowed for Italy comprises an amount of LIT 20 920 524 089 in respect of financial compensations paid by producers' organizations in the sector of fruit and vegetables; whereas this amount must be charged to this Member State pursuant to this Decision; whereas, the special circumstances of this case, however, justify re-examination by the Commission of the disallowance during the present clearance, provided this Member State provides the necessary evidence by 31 December 1989 at the latest; whereas this Decision is none the less immediately applicable.'

The Italian authorities did not provide any evidence to justify re-examining the disallowance in question. That disallowance was therefore confirmed by Commission Decision 90/213, the second recital of which reads as follows:

'Whereas the expenditure disallowed for Italy comprised an amount of LIT 20 920 524 089 in respect of financial compensation paid by producers' organizations in the sector of fruit and vegetables; whereas the Commission reserved the right to re-examine this amount provided this Member State produced the necessary evidence by 31 December 1989 at the latest; whereas this evidence was not produced by that date; whereas consequently the correction becomes definitive.'

5. Italy did not challenge the decisions of the Commission in so far as they imposed this disallowance. It should be noted, however, that Italy sought unsuccessfully the annulment of Decision 90/213 in so far as it refused to recognize as chargeable to the Fund certain other expenditure declared by Italy (Case C-197/90 *Italy* v *Commission* [1992] ECR I-1). Following the adoption of Decision 90/213, AIMA, the Italian intervention agency, sent to all fruit and vegetable producers' organizations in Italy a request for the reimbursement of 5% of the total amount of the financial compensation paid to them in 1987. One of those organizations was the Associazione tra Produttori Ortofrutticoli Piemontesi (Piedmont Association of Fruit and Vegetable Producers, otherwise known as Asprofrut). When it received the request for reimbursement from AIMA, Asprofrut informed its members that it intended to debit their accounts by an amount equal to 5% of the compensation paid to them in 1987 for the withdrawal of products from the market.

6. The plaintiff in the national proceedings is an agricultural cooperative known as Frutticoltori Associati Cuneesi (Associated Fruit Growers of Cuneo, hereafter 'FAC') which, as a member of Asprofrut, had received from it the sum of LIT 35 835 325 by way of compensation for the marketing year 1986/87 in respect of a quantity of apples which was withdrawn from the market. FAC challenged the legality of Asprofrut's decision to debit its account and in the course of this challenge, the national court requested a preliminary ruling under Article 177 of the EEC Treaty on the following questions:

(a) whether Commission Decisions Nos 89/627/EEC and 90/213/EEC are valid

in the light of provisions of Community law relating to the budget and financial relations between the Community and the individual Member States, to the extent to which those decisions charged to the Italian State the amount of LIT 20 920 524 089 corresponding to financial compensation granted by producers' organizations in the fruit and vegetables sector; and

(b) whether the Italian authorities' claim to charge to all fruit and vegetable producers' organizations without distinction the flat-rate amount of financial compensation for market withdrawals charged to the Italian State on the clearance of accounts in respect of the expenditure for 1987 of the EAGGF, Guarantee Section, is consistent with the general principles of the Community legal order on the lawfulness of administrative action, on protection and the rights of the defence, and on the supervision of Community incentives in the agricultural sector, together with a ruling on the liability of fruit and vegetable producers and their respective organizations.

7. By the second question the referring court effectively asks whether Community law must be interpreted in such a way as to prohibit a Member State from recovering unduly paid aid on a flat-rate basis from producers' organizations.

8. Written observations have been submitted by the Commission, the Greek Government and FAC. Italy has not taken part in the proceedings. Nor have observations been submitted by AIMA, which intervened in the proceedings before the national court. FAC regards the first question as the principal issue, arguing that if the contested decisions of the Commission were found invalid consideration of the second question would be rendered superfluous. The Commission, on the other hand, argues that the validity of the decisions on the clearance of accounts is not relevant to the outcome of the national proceedings. In its view, the obligation to recover unduly paid sums is imposed on the national authorities directly by Article 8 of Regulation No 729/70 and exists whether or not any irregularities have been recorded in its decision on the clearance of the accounts. I leave aside for the moment this argument of the Commission. In my view, it is clear from the questions referred and the dispute pending before the national court that if the second question is answered in the negative there will be no need to examine the validity of the Commission's decisions. In other words, if it is established that a Member State may not operate a policy of flat-rate recovery of unduly paid aid from producers' organizations, that finding will be sufficient to determine the outcome of the national proceedings. I start therefore with the second question.

The second question

9. It is clear from Article 8 of Regulation No 729/70 that under the system of financing of the common agricultural policy the recovery of unduly paid aids falls within the competence of Member States. It is also clear, however, that in exercising that function Member States must have regard to the requirements of Community law: see Joined Cases 205/82 to 215/82 *Deutsche Milchkontor* v

Germany [1983] ECR 2633, at paragraph 17 et seq. of the judgment. In particular, the Court stated at paragraph 22 that 'the application of national law must not affect the scope and effectiveness of Community law'. The submission of the Greek Government that the question concerns exclusively problems of Italian domestic law and as such falls beyond the jurisdiction of the Court is therefore without foundation.

10. In the present case the correction made to the accounts presented by Italy was not based on particular findings of fraud or negligence but on the failure of the Italian authorities to supervise adequately the functioning of the producers' organizations. After the second decision of the Commission which confirmed the disallowance of 5%, the Italian intervention agency proceeded to a mechanical application of the disallowance: it made no effort to establish the existence of irregularities on the part of specific producers' organizations but sought to recover indiscriminately from all organizations of fruit and vegetable producers 5% of the aid granted for the withdrawal of products in 1987. In my view, such action is plainly not compatible with Community law because it disregards the rights of producers' organizations to receive aid once they fulfil the requirements provided for by Community rules.

11. As the Commission points out, an integral part of the price support mechanism provided for by Regulation No 1035/72 is that when a withdrawal price is fixed in relation to a product, producers' organizations are required to grant an indemnity to their members for products that remain unsold (Article 15). Under Article 18(1) Member States are required to grant financial compensation to producers' organizations which intervene. Article 18(2) provides that the value of the financial compensation shall be equal to the indemnities paid by the producers' organizations, less any receipts from products withdrawn from the market. It follows from the text of Article 18(1) and the objectives of Regulation No 1035/72 that producers' organizations have a right to receive compensation when the conditions laid down by Article 18 are fulfilled. However, the flat-rate reduction of 5% was indiscriminately applied to all fruit and vegetable producers' organizations irrespective of whether they had complied with the conditions laid down by Article 18 and therefore had the right to receive Community aid.

12. In my view, therefore, a Member State may not recover unduly paid aid on a flat-rate basis, as was done by the Italian authorities in the present case. The obligation of Member States to recover aid presupposes, in my view, that it is established in the particular case that (e. g. because of irregularity, negligence or error duly proved) the recipient was not entitled to the aid; for the burden of proof in such cases, see *Deutsche Milchkontor*, paragraphs 34 to 39. In the present case, it was not established that the recipients were not entitled to the aid; as the Commission stressed at the hearing, there is no suggestion that the disallowance was

based on any failure to comply with quality standards or on any irregularities on the part of the producers. It follows that the action of the Italian authorities was unlawful. It may therefore be unnecessary for the purposes of the national proceedings to examine the validity of the Commission's decisions on the clearance of the accounts. For the sake of completeness, however, I proceed to discuss the first question.

The first question

13. The Greek Government argues that the first question is inadmissible because it relates to the validity of decisions on the clearance of past accounts. It points to the practical difficulties that would ensue if the accounts were found invalid after they had become final and argues that the issue of their validity should not be raised after the expiry of the time-limit laid down in Article 173 of the Treaty. I do not agree. Risk of inconvenience cannot be a ground for ruling a request under Article 177 of the Treaty inadmissible. In any event, it would be open to the Court to limit the effects of its judgment if it considered it appropriate to do so in order to protect the requirements of legal certainty.

14. The Commission, on the other hand, argues that its decisions on the clearance of accounts have as their purpose simply to declare that the expenditure effected by Member States conforms with the rules of Community law. It refers to Case 819/79 *Germany* v *Commission* [1981] ECR 21, where the Court said, at paragraph 8 of the judgment:

'... the function of a Commission decision relating to the clearance of accounts in respect of expenditure financed by the EAGGF is to establish whether the expenditure was incurred by the national authorities in accordance with Community provisions'.

15. According to the Commission, decisions on the clearance of accounts concern only the financial relations between the Community and the Member States and do not affect the rights or obligations of third parties. As already mentioned, the Commission considers that the obligation to recover unduly paid sums is imposed on the national authorities directly by Article 8 of Regulation No 729/70 and exists whether or not any irregularities have been recorded in its decision on the clearance of the accounts. Any change in the legal position of third parties results exclusively from the measures taken by Member States for the recovery of unduly paid sums. The Commission cites Joined Cases 89/86 and 91/86 *Étoile Commerciale and CNTA* v *Commission* [1987] ECR 3005 and *Deutsche Milchkontor* v *Germany* (cited above) in support of those arguments. It concludes that a decision on the clearance of accounts produces no legal effects vis-a-vis third parties in proceedings concerning the recovery of unduly paid sums. It follows, according to the Commission, that the validity of such decisions cannot be relevant to the outcome of such proceedings.

16. I do not accept the proposition that the validity of a decision on the clearance of accounts can never be relevant to the outcome of national proceedings initiated by producers or producers' organizations in

such circumstances. The cases referred to by the Commission do not support that proposition. In *Deutsche Milchkontor* v *Germany* the Court was concerned with the extent to which the principles of Community law restrict the rules of national law applicable to the recovery of unduly paid sums. The Commission's decision on the clearance of the accounts was not in issue in the proceedings. In *Étoile Commerciale and CNTA* v *Commission* the Court held that a decision on the clearance of accounts was not of direct concern to a producer within the meaning of Article 173, second paragraph, of the Treaty since the clearance of the accounts is a matter confined to relations between the Member State and the Commission. It is, however, clear that the lack of direct concern on the part of a producer does not prevent the Court from ruling on the validity of a Community measure in the context of a reference for a preliminary ruling made by a national court; nor does it mean that the validity of a decision on the clearance of accounts is of no relevance to the outcome of national proceedings involving economic operators who have been made subject to recovery measures undertaken by a national intervention agency.

17. It is true that the duty to monitor producers' organizations falls primarily upon the Member States. It is also true that the duty of Member States to recover unduly paid sums stems directly from Article 8 of Regulation No 729/70. It must be noted, however, that the Commission retains a residual supervisory function. This is clear from Article 9 of the regulation, which empowers officials appointed by the Commission to carry out on-the-spot inspections and to examine documents with a view to ensuring the effectiveness of the supervisory control exercised by Member States. It is therefore always possible that the Commission may uncover an irregularity by a particular trader missed by a Member State. The Member State must then recover the sums lost. The possibility cannot be excluded that the Commission may be mistaken in ascertaining the existence of the irregularity or in relation to the precise amount to be recovered. In my view, it is clear that in such a case the validity of the Commission's decision would be relevant to the outcome of the national proceedings concerning the lawfulness of the recovery measures undertaken by the Member State against the particular trader, and that this Court would then have to rule, under Article 177 of the Treaty, on the validity of the Commission's decision. The opposite solution would be incompatible with the principle of legal protection of the individual which Article 177 of the Treaty is designed to ensure. Equally, a decision to disallow expenditure might be taken by the Commission on the basis of a questionable interpretation of the Community regulations. If the Member State concerned did not challenge the Commission's decision but sought recovery from the traders concerned, national courts might properly be led to consider, and to refer to the Court under Article 177, the correctness of the Commission's interpretation of the regulations and the validity of the consequent decision.

18. As far as the present case is concerned, I consider that the issue of the validity of the contested decisions is not relevant to the outcome of the national proceedings because in my view AIMA was not entitled to recover on a flat-rate basis from all producers' organizations. If, however, that were not

a ground of challenge to the legality of AIMA's action, I cannot see any reason why the Court should not examine the validity of the contested decisions. At the hearing, the Commission sought to make it clear that it was not suggesting that the question was inadmissible, but rather that it was not relevant. I agree, for reasons given earlier, that that is likely to be the case. In principle, however, it is for the referring court to assess the relevance of a question for the outcome of the national proceedings. Since the national court considers that an answer to the question is necessary for it to give judgment, it is in principle in conformity with the division of competences between the Court of Justice and the referring court for this Court to address the question, and there is no reason to depart from that principle in the present case.

19. On the basis of the above considerations, I proceed to examine the issue of validity of the contested decisions. (It may be said that the question of validity could arise only in relation to the second, definitive decision, and not in relation to the first, which was only provisional; for convenience, however, the two decisions can be considered together.)

20. FAC and the Greek Government argue that the Commission did not explain sufficiently the grounds on which the disallowance was made. The Greek Government further argues that since the Fund constitutes part of the Community budget the clearance of accounts under Article 5(2) of Regulation No 729/70 must be made in conformity with official accounting procedures and provide justification for every entry. Any disallowance, therefore, must correspond to a precise sum of money charged to the Fund which should not have been so charged. According to the Greek Government, since the Commission's disallowance does not correspond to precise amounts paid irregularly it constitutes a financial penalty not provided for under Regulation No 729/70.

21. It should first be noted that the extent of the duty to state reasons provided for in Article 190 of the EEC Treaty depends on the nature of the act in question and the context in which it was adopted: see e. g. Case 13/72 *Netherlands* v *Commission* [1973] ECR 27, Case 819/79 *Germany* v *Commission* [1981] ECR 21. As FAC accepts, it is not the purpose of the decision clearing the accounts to make detailed reference to the findings of the inspections of the Commission nor to provide reasons for disallowance to third parties which may be affected as a result of action which may be taken by the national authorities. The reasons which led the Commission to make the disallowance are explained in the summary report preceding the clearance of the accounts. Moreover, as FAC again accepts, there were continuing negotiations between the Commission and the Italian authorities before the disallowance was made. It is true, however, that the Commission has not indicated how the figure of 5% was derived. It therefore falls to be examined whether the Commission was justified in making a flat-rate deduction of the expenditure submitted by Italy in view of the failure of the Italian authorities to

supervise adequately the application of Community subsidies.

22. It is beyond doubt that only aid granted in accordance with Community rules may be financed by the Fund and that the Commission is required to disallow all expenditure effected by the Member States unless satisfied that it was carried out strictly in accordance with Community law: see e. g. Case 11/76 *Netherlands* v *Commission* [1979] ECR 245. In Case 819/79 *Germany* v *Commission* [1981] ECR 21 the Court stated at paragraph 8 of the judgment:

'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, in principle, be charged to the EAGGF.'

Similar statements were made in Case 327/85 *Netherlands* v *Commission* [1988] ECR 1065, at paragraph 25 of the judgment, and in Case C-197/90 *Italy* v *Commission* [1992] ECR I-1, at paragraph 38 of the judgment. In the present case, neither the parties to the proceedings nor the Italian authorities have presented evidence to challenge the findings of the Commission's inspectors. I am therefore satisfied that Italy failed to carry out adequate supervision. It follows that any payments made in disregard of this obligation are not in conformity with Community law and in principle may not be charged to the Fund.

23. The case-law of the Court makes it clear that where the Commission refuses to charge certain expenditure to the Fund, it is for the Commission to establish that the Member State in question has infringed the rules of the common agricultural markets, while the burden of proving that the amount disallowed by the Commission is wrong falls upon the Member State: see Case 347/85 *United Kingdom* v *Commission* [1988] ECR 1749 and Case C-197/90 *Italy* v *Commission* (cited above). In the latter case the Court held that a flat-rate disallowance of 10% of the expenditure declared by Italy in relation to processing aid for skimmed milk powder imposed by Decision 90/213 was justified in view of the failure of the Italian authorities to carry out adequate inspections as required by Article 10(2)(d) of Regulation No 1725/79 (OJ 1979 L 199, p. 1). The Court stated, at paragraph 39 of the judgment, that since the controls were inadequate the Commission could have excluded the whole of the amounts in question; the Italian Government could therefore not complain of a flat-rate reduction of 10%. Similar reasoning could be used in the present case where the disallowance of 5% was made as a result of the failure of the Italian authorities to discharge their monitoring functions in the fruit and vegetable sector. As is made clear in the eighth recital to Regulation No 729/70 on the financing of the common agricultural policy and has been acknowledged by the Court (Case C-366/88 *France* v *Commission* [1990] ECR I-3571, paragraph 20), the responsibility for ensuring the proper administration of the Fund falls primarily on Member States. It is not the duty of the Commission to take over or to duplicate the monitoring duties of

Member States and any verification which the Commission decides to undertake has a supplementary character. The opposite conclusion would place an unreasonably heavy burden on the Commission: see my Opinion in Case C-32/89 *Greece* v *Commission* [1991] ECR I-1321, paragraph 54.

24. In the present case, in recognition of the special circumstances, the Commission followed a two-step approach. In its first decision it declared the disallowance provisionally, and invited the Italian authorities to submit evidence. But the Italian authorities failed to respond. As a result, the Commission confirmed the disallowance. It will be recalled that, according to the findings contained in the Commission's summary report, the Italian authorities had carried out inspections on only six out of a total of 134 producers' organizations; and that of those six organizations only three had received Community aid, the amount of which represented only 2.12% of the total expenditure submitted by Italy. Those findings have not been disputed. In view of the inadequacy of the checks carried out by the Italian authorities, the disallowance figure of 5% does not appear to me to be disproportionate. I conclude, therefore, that the decisions of the Commission have not been shown to be invalid.

Conclusion

25. I am accordingly of the opinion that the questions put by the Pretura Circondariale di Cuneo should be answered as follows:

(1) Consideration of the matters examined has disclosed no factor of such a kind as to affect the validity of Commission Decisions 89/627 and 90/213 on the clearance of the accounts presented by the Member States in respect of the expenditure for 1987 of the Guarantee Section of the European Agricultural Guidance and Guarantee Fund.

(2) Where the Commission disallows expenditure from the European Agricultural Guidance and Guarantee Fund on the ground that a Member State has failed adequately to supervise the functioning of producers' organizations, that Member State is prohibited from recovering the corresponding sums on a flat-rate basis from those organizations; it may recover such sums only where it is established that an organization was not entitled to the sums in question.