OPINION OF ADVOCATE GENERAL STIX-HACKL

delivered on 29 November 2001 [1]

I — Introduction

1. This is an action for annulment by the Kingdom of Belgium against two decisions of the Commission of 5 July 2000 [2] ('the contested decisions'), to the extent to which they excluded from Community financing certain expenditure incurred by the Kingdom of Belgium under the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF), the first decision relating to the financial year 1995 and the second decision to the financial years 1996 and 1997.

2. The action relates to Community aid for the sale of butter at reduced prices and the granting of aid for butter and concentrated butter intended for the manufacture of pastry products, ice-cream and other food products. The question is essentially whether the Kingdom of Belgium was entitled to grant aid for a form of technologically adapted butter known as TAIB (technologically adapted industrial butter, hereinafter referred to as 'TAIB') under Article 1 of Commission Regulation (EEC) No 570/88, [3] or whether this product, as the Commission believes, is governed by the aid provisions in Articles 9 and/or 9a of that regulation.

II — Legal framework

A — *Aid for butter-based products*

Article 1 of Regulation No 570/88

3. As part of measures to promote the use of butter, the Commission, on 16 February 1988, enacted Regulation No 570/88 on the sale of butter at reduced prices and the granting of aid for butter and concentrated butter for use in the manufacture of pastry products, ice-cream and other foodstuffs ('Regulation No 570/88').

1 — Original language: German.

2 — Commission Decision 2000/448/EC of 5 July 2000 amending Decision 1999/187/EC on the clearance of the accounts presented by the Member States in respect of expenditure for 1995 of the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) (notified under document number C(2000) 1813) and Decision 2000/449/EC of 5 July 2000 excluding from Community financing certain expenditure incurred by the Member States under the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (notified under document number C(2000) 1847 (OJ 2000 L 180, p. 46 and p. 49 respectively).

3 — Commission Regulation No 570/88 of 16 February 1988 on the sale of butter at reduced prices and the granting of aid for butter and concentrated butter for use in the manufacture of pastry products, ice-cream and other foodstuffs (OJ 1988 L 55, p. 31).

4. Article 1 of that regulation governs the conditions under which aid can be granted for butter or concentrated butter. At the date when the aid in dispute was granted under that article, following the amendments under Commission Regulation (EEC) No 1048/89, [4] Commission Regulation (EEC) No 1157/91 [5] and Commission Regulation (EEC) No 2443/93, [6] its wording was as follows:

'Subject to the conditions laid down hereinafter, butter bought in pursuant to Article 6(1) of Regulation (EEC) No 804/68 and taken into storage before a date to be determined shall be sold and special aid shall be granted for the use of butter and concentrated butter as referred to in the second paragraph.

Notwithstanding Article 9a(a), only the following may qualify for aid:

(a) butter which, in the Member State of manufacture, meets the definition and grading requirements laid down in Article 1(3)(b) of Regulation (EEC) No 985/68 and the packaging of which is marked accordingly. Where the butter is manufactured in the same establishment as that in which the tracers are added, the packaging of the butter prior to the addition of tracers shall not be required;

(b) concentrated butter produced from butter or cream at an establishment approved in accordance with Article 10 and meeting the specifications laid down in Annex IV;

(c) cream covered by CN codes ex 0401 30 39 and ex 0401 30 99 with a fat content not less than 35% and not more than 49%, in which tracers have been incorporated as provided in the second subparagraph of Article 6(1) and directly used in the final products referred to in Article 4, point 2.'

5. By Article 1(4) of Commission Regulation (EC) No 455/95 of 28 February 1995 amending Regulation (EEC) No 1547/87 and Regulation (EEC) No 1589/87 as regards the buying-in of butter by the intervention agencies and Regulations (EEC) No 2191/81 and (EEC) No 570/88 as regards the grant of aid for the purchase and sale of butter at a reduced price to certain categories of consumers, [7]

4 — Regulation (EEC) No 1048/89 of 21 April 1989 (OJ 1989 L 111, p. 24).

5 — Regulation (EEC) No 1157/91 of 3 May 1991 (OJ 1991 L 112, p. 57).

6 — Regulation (EEC) No 2443/93 of 2 September 1993 (OJ 1993 L 224, p. 8).

7 — OJ 1995 L 46, p. 31.

Article 1(2)(a) of Regulation No 570/88 was again amended:

'... butter produced directly and exclusively from pasteurised cream and which, in the manufacturing Member State, satisfies the conditions laid down in Article 6(2) of Regulation (EEC) No 804/68 and the requirements of the national quality class listed in Annex II to Regulation (EC) No 454/95 and the packaging of which is marked accordingly...'.

6. Although this amendment, which provides that the grant of aid is expressly dependent on the butter having been *directly and exclusively* produced from pasteurised cream, came into force only on 1 March 1995, that is, after the period of the aid in dispute, it ought to be cited with regard to the submissions of the parties.

Article 1 of Regulation No 985/68

7. At the date on which Regulation No 570/88 entered into force — and unchanged at the time when the aid in dispute was granted in the passages relevant to this case — Article 1 of Regulation (EEC) No 985/68 of the Council laying down general rules for intervention on the market in butter and cream,[8] as amended by Regulation (EEC) No 2714/72 of the Council[9] and by Council Regulation (EEC) No 1897/87[10] ('Regulation No 985/68'), was in part worded as follows:

'1. Intervention agencies shall buy in only such butter as:

(a) is produced by an approved undertaking;

(b) meets the definition and classification contained in paragraph 3(a) and (b);...

2. Until the date of implementation of the provisions adopted pursuant to Article 27 of Regulation (EEC) No 804/68 an undertaking shall only be approved if it manufactures butter meeting the requirements laid down in paragraph 3(a) and (b).

8 — Regulation (EEC) No 985/68 of 15 July 1968 (OJ, English Special Edition 1968 (I), p. 256).

9 — Regulation (EEC) No 2714/72 of 19 December 1972 (OJ, English Special Edition 1972 (28-30 December), p. 15).

10 — Regulation (EEC) No 1897/87 of 2 July 1987 (OJ 1987 L 182, p. 35).

3. Until the date referred to in paragraph 2, the butter referred to in paragraph 1:

(a) must have the following composition and characteristics:

either

(aa)— a minimum butterfat content, by weight, of 82%,

— a maximum water content, by weight, of 16%,

— be manufactured from sour cream,

or

(bb)— a minimum butterfat content, by weight, of 82%,

— a maximum water content, by weight, of 16%,

— be manufactured from sweet cream;

(b) must be:

— graded "beurre marque de contrôle", as regards Belgian butter,...' [11]

B — *Aid for intermediate products of butter* [12]

8. *Article 9 of Regulation No 570/88* provided for the possibility of granting aid even if 'the concentrated butter or the butter, to which tracers have or have not been added, is incorporated at an intermediate stage in products other than the final products and in an establishment other than that of final processing'. In this case, the grant of aid was made contingent on specific conditions, in particular the approval of the establishment of intermedi-

11 — There follow the classifications of butter from the other Member States. In what follows this is referred to as the 'list of national classifications'.

12 — See the remarks in points 55 to 58.

ate processing and placing the words 'intermediate products' on the packaging.

9. This article was amended and supplemented by Commission Regulation (EEC) No 1813/93, which came into force on 1 August 1993. [13] The following requirement for the approval of intermediate products was added to Article 9(1)(a) of Regulation No 570/88:

'in accordance with Article 10, the processing establishment and the intermediate products shall or shall not be approved on the basis of an application which specifies in particular the composition of the manufactured products and their butterfat content and which sets out that incorporation into those intermediate products is justified for the manufacture of the final products referred to in Article 4...'.

10. In addition, Regulation No 1813/93 added to *Regulation No 570/88 an Article 9a* on the definition of intermediate products with the following wording:

'The intermediate products referred to in Article 9 shall, without prejudice to Article 4, be products other than the products falling within CN codes 0401 and 0405.

However

(a) products with a butterfat content of not less than 82% manufactured exclusively from the concentrated butter referred to in point (b) of the second paragraph of Article 1 at an establishment approved to that effect in accordance with Article 10, on condition that the tracers referred to in Article 6(1) have been added to them shall be considered as intermediate products; in this case, the minimum selling price paid and the maximum amount of aid granted shall correspond respectively to the minimum selling price and the maximum amount of aid fixed in accordance with Article 18 in respect of traced butter with a fat content of 82%;...'

C — *Clearance of the accounts*

11. *Regulation (EEC) No 729/70* of the Council of 21 April 1970 on the financing of the common agricultural policy, [14] as amended by Council Regulation (EC) No 1287/95 [15] ('Regulation No 729/70'), governs the financing of the common agricultural policy.

13 — Regulation (EEC) No 1813/93 of 7 July 1993 (OJ 1993 L 166, p. 16).

14 — OJ, English Special Edition 1970 (I), p. 218.

15 — Regulation (EC) No 1287/95 of 22 May 1995 (OJ 1995 L 125, p. 1).

12. Articles 2 and 3 of Regulation No 729/70 set out the general financing framework for the EAGGF. Under those provisions, the EAGGF finances refunds on exports to non-member countries, 'granted in accordance with the Community rules within the framework of the common organisation of agricultural markets' (Article 2) and finances interventions intended to stabilise the agricultural markets, 'undertaken according to Community rules within the framework of the common organisation of agricultural markets' (Article 3).

13. Article 5(2) reads (in part) as follows:

'The Commission, after consulting the Fund Committee:...

(c) shall decide on the expenditure to be excluded from the Community financing referred to in Articles 2 and 3 where it finds that expenditure has not been effected in compliance with Community rules... .

The Commission shall evaluate the amounts to be excluded having regard in particular to the degree of non-compliance found. The Commission shall take into account the nature and gravity of the infringement and the financial loss suffered by the Community....'

14. Reference should also be made to Article 8 of the regulation, under which the Member States have a duty to satisfy themselves that transactions financed by the EAGGF are actually carried out and are executed correctly, to prevent and deal with irregularities and to recover sums lost as a result of irregularities or negligence.

15. Article 8(2) of the regulation provides that the Community will not bear the financial consequences of irregularities or negligence attributable to administrative authorities or other bodies of the Member States.

III — Facts and submissions of the parties

16. In the contested decisions, the Commission made financial corrections for the financial years 1995, 1996 and 1997, as a result of which a total amount of BEF 116 684 858 was excluded from Community financing as part of the Guarantee Section of the EAGGF.

17. It is common ground that this amount represents the sum of the aid paid out by the Kingdom of Belgium between 22 February 1994 and 14 February 1995 under Article 1 of Regulation No 570/88 to N. Corman SA for the production of TAIB.

18. TAIB is obtained in a process in which the raw materials — 65% butter and 35% cream — are concentrated, the pure fat (concentrated butter) thus obtained is then fractionated and finally, depending on the products to be made and the qualities desired, is recomposed.

This makes it possible to obtain a standardised butter containing 82% fat, 16% water and 2% fat-free dried milk extract and is particularly suitable for producing pastry products.

19. Since 1989, aid under Article 9 of Regulation No 570/88 has been granted for TAIB.

20. When TAIB was imported into France in 1991, there was correspondence between the Commission on the one hand and the French and Belgian authorities on the other. In this correspondence, the Commission took the view that TAIB was to be regarded as an intermediate product within the meaning of Article 9 of Regulation No 570/88 and could not possibly be classified as butter within the meaning of Article 1(3)(b) of Regulation No 985/68. The Belgian Ministry of Agriculture confirmed this view in a letter of 22 August 1991.

21. After the national rules on the evaluation of butter were amended, however, the Kingdom of Belgium on 28 February 1994 classified TAIB under the category 'Beurre de laiterie: qualité extra'.

22. TAIB had hitherto received aid as an 'intermediate product' within the meaning of Article 9 or — after the amendment by Regulation No 1813/93 — Article 9a of Regulation No 570/88, but following this, the Kingdom of Belgium granted Community aid under Article 1 of that regulation.

23. It was possible to grant the aid under Article 1 without adding a tracer to TAIB and without marking the packaging with the words 'intermediate product', as has been required for the grant of aid under Article 9a since Article 9a was introduced. There was no change in the amount of the aid.

24. On 28 February 1995, the Commission enacted Regulation No 455/95, which introduced into Article 1 of Regulation No 570/88 the requirement that the butter was produced 'directly and exclusively' from pasteurised cream.

25. From 1 March 1995, the date on which this amendment entered into force, the Kingdom of Belgium again granted aid for TAIB as an interim product on the basis of Article 9a of the regulation.

26. In connection with the adoption of Regulation No 455/95 there was correspondence between the Belgian authorities and the Commission. The Kingdom of Belgium stated that Regulation No 455/95 had restricted the scope of Article 1 of Regulation No 570/88, and that that provision therefore no longer applied to TAIB. The Commission rejected this presentation of the situation and pointed out that TAIB was an intermediate product within the meaning of Article 9a of Regulation No 570/88 and as such could not at the same time be a base product for the purposes of Article 1 of that regulation.

27. Regulation No 455/95 was also the subject of an application by Corman SA initiating proceedings against the Commission before the Court of First Instance; [16] in the procedure for clearing EAGGF accounts, the Commission relied in part on the judgment in that case.

28. In letters of 16 February 1998 and 19 June 1999, the Commission announced its intention to undertake a financial correction; the Kingdom of Belgium replied in a pleading which it handed over on 28 June 1999 at a meeting with the EAGGF accounts clearing unit. On 2 September 1999, the Commission formally gave notice that it would not recognise expenditure in connection with the support of TAIB in the amount of BEF 116.7 million. On 14 October 1999, the Kingdom of Belgium applied for a conciliation procedure to be conducted.

29. In the conciliation report, which was presented on 7 April 2000, the conciliation body stated inter alia that, although it was clear that TAIB was at that time not covered by the aid provision for base products under Article 1 of Regulation No 570/88, it could nevertheless, as an intermediate product, be granted aid in the same amount, in particular on condition that a tracer was added to it. According to the Belgian authorities, TAIB stocks for which aid was granted were marked with tracers with the exception of 84 tonnes.

16 — Judgment of 30 January 1997 in Case T-117/95 *Corman* v *Commission* [1997] ECR II-95. The application was dismissed as inadmissible for lack of individual concern.

The conciliation body therefore queried in its report whether it was appropriate to undertake a correction in the amount of 100% of the aid granted.

The conciliation procedure failed to bring the parties' standpoints closer together.

30. On 5 July 2000, the Commission adopted the decisions that are now being challenged by the application lodged at the Registry of the Court of Justice on 11 September 2000.

31. The Kingdom of Belgium claims that the Court should:

(1) declare the application admissible and well founded;

(2) annul Commission Decision 2000/448/EC of 5 July 2000 amending Decision 1999/187/EC on the clearance of the accounts presented by the Member States in respect of the expenditure for 1995 of the Guarantee Section of the European Agricultural Guidance and Guarantee Fund to the extent to which it excludes from Community financing expenditure of BEF 50 763 827 incurred by the Kingdom of Belgium in connection with aid relating to the sale of butter at reduced prices and the granting of aid for concentrated butter intended for the manufacture of pastry products, ice-cream and other food products, and partially annul Commission Decision 2000/449/EC of 5 July 2000 excluding from Community financing certain expenditure incurred by the Member States under the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) for the financial years 1996 and 1997, in so far as it excludes from Community financing expenditure in the amount of EUR 1 602 256.45 and EUR 31 883.22 also incurred by the Kingdom of Belgium in connection with aid relating to the sale of butter at reduced prices and the granting of aid for concentrated butter intended for the manufacture of pastry products, ice-cream and other food products;

(3) order the Commission to pay the costs of the proceedings.

32. The Commission claims that the Court should:

(1) dismiss the application as unfounded;

(2) order the applicant to bear the costs.

IV — Pleas in law

33. The Belgian Government bases its application on four pleas in law by which it alleges breach of Regulation No 570/88 and of several principles of Community law by the contested decisions.

34. The first plea asserts that there was no legal basis. This plea consists of three parts. In the first part the Belgian Government denies that it breached Article 1 of Regulation No 570/88, as amended by Regulation No 1157/91. In the second part it asserts that no irregularities or negligence are attributable to the Belgian authorities. The third part relates to the residual jurisdiction which permitted the Kingdom of Belgium to classify TAIB as 'beurre marque de contrôle'.

35. The other three pleas allege infringement of the principle of proportionality, of the principle of genuine cooperation, and of the principle of protection of legitimate expectations.

V — Legal analysis

A — *First plea in law: lack of legal basis*

1. First and third parts of the first plea in law

(a) Submissions of the parties

36. In the opinion of the Belgian Government, it was permissible to grant Community aid under Article 1 of Regulation No 570/88, in the version in force at the relevant time, for TAIB from the date on which the Belgian authorities classified it as 'beurre de laiterie: qualité extra'.

37. Article 1(2) of the regulation, which deals with the conditions for the grant of aid, refers only to Article 1(3)(b) of Regulation No 985/68, that is, to that classification, and therefore the appropriate classification is the only condition subject to which aid may be granted for butter under Article 1 of Regulation No 570/88; Article 1(3) of Regulation No 985/68 contains no general definition of the butter that

should be taken into account as a condition of granting aid.

38. In the view of the Commission, it is not sufficient under Regulation No 570/88 that the formal condition of classification is satisfied; the butter must also conform to the standards of composition and production as set out in Article 1(3)(a) of Regulation No 985/68.

39. Both parties also refer to the amendment of Article 1(2) of Regulation No 570/88 by Regulation No 455/95, the purpose of which, according to the Belgian Government, can only have been to prohibit aid for TAIB under that article from that date, whereas the Commission regards this amendment as being merely a clarification of the legal situation that already existed.

40. The Belgian Government also, in the third part of this plea of law, invokes the principle of subsidiarity and its residual jurisdiction to classify the butter.

41. Without in principle denying the existence of this residual jurisdiction, the Commission is of the opinion that the Kingdom of Belgium was not entitled to exercise this jurisdiction in order to disregard or circumvent the standards applying to the manufacture and composition of butter as set out in Regulation No 570/88 in conjunction with Regulation No 985/68.

(b) Assessment

42. According to the settled case-law of the Court, 'it is one of the fundamental characteristics of a common organisation of the market that in the sectors concerned the Member States can no longer take action through national provisions adopted unilaterally. Their legislative competence can only be residual; it is limited to situations which are not governed by the Community rules and to cases where those rules expressly give them power to act'. [17]

43. The latter situation applies in the present case in so far as Article 1(2)(a) of Regulation No 570/88 refers as a condition for the granting of aid for butter to the classifications set out in Article 1(3)(b) of Regulation No 985/68 that are to be undertaken by the Member States of manufacture. In the case of Belgian butter, this must be classified under the Belgian provisions as 'beurre marque de contrôle' in order to be covered by the aid provision in Article 1 of Regulation No 570/88.

17 — See in particular Case 48/85 *Commission* v *Germany* [1986] ECR 2549, paragraph 12, and Case 154/77 *Procureur du Roi* v *Dechmann* [1978] ECR 1573, paragraph 16.

44. For the purposes of the case-law cited, therefore, this can be only a residual jurisdiction, which exists within the limits laid down by Community law. It is for that reason necessary to examine whether under Regulation No 570/88 in conjunction with Regulation No 985/68 standards exist for the eligibility of butter for aid with regard to its manufacture and composition which are to be observed when the butter is classified by the Belgian authorities.

45. Account should be taken in this connection not only of the express provisions of Regulation No 570/88, but also of their meaning and purpose. [18] This follows in particular from the status of this regulation within the corresponding common organisation of the markets.

46. Regulation No 570/88, like Regulation No 985/68, has its legal basis in the intervention rules of Article 6 of Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organisation of the market in milk and milk products. [19]

47. That article, in addition to the fundamental principles of the intervention system, contains provisions in its third paragraph on the disposal of the butter bought in by the intervention agency ('intervention butter') and provides that special measures may be taken for butter held in public storage which cannot be marketed on normal terms during a milk year.

48. The general rules governing the intervention measures and the conditions governing the application of such measures provided for in Article 6 were laid down, in accordance with Article 6(6), in Regulation No 985/68. That regulation governs the purchase and sale of intervention butter by the intervention agencies and its storage, and in particular specifies what standards the butter must satisfy if it is to be bought by the intervention agencies.

49. In the 1970s, as a result of the butter surplus, it was no longer possible to dispose of butter stocks under normal conditions, and after this use was made of the possibility provided for in Article 6 of Regulation No 804/68 to adopt measures to promote the disposal of butter.

50. In order to increase disposal, provision was first of all made for the sale at reduced prices of intervention butter bought in on the basis of Regulation No 985/68 for the manufacture of particular products; this was done in Regulation (EEC) No 262/79. [20]

18 — See Case 51/74 *Van der Hulst* [1975] ECR 79, paragraphs 25 to 29.

19 — OJ, English Special Edition 1968 (I), p. 176.

20 — Commission Regulation (EEC) No 262/79 of 12 February 1979 on the sale of butter at reduced prices for use in the manufacture of pastry products, ice-cream and other foodstuffs (OJ 1979 L 41, p. 1).

51. The same purpose was served by the introduction of a system of aid for butter and concentrated butter by Regulation (EEC) No 1932/81. [21] This aid system was intended to make it possible for manufacturers who had previously benefited from the above disposal arrangements for intervention butter to obtain market butter at a price comparable to that of intervention butter if there was a (temporary) shortage of these stocks. [22]

52. Regulation No 570/88 replaces the above two regulations and combines the measures to promote the use of butter — that is, on the one hand the arrangements for the disposal of intervention butter and on the other hand aid which reduces the price of market butter to a level comparable to that of intervention butter — in one set of rules. [23]

53. The connections set out between Regulation No 570/88 and Regulation No 985/68 make it clear that the measures provided for in Regulation No 570/88 to promote the disposal of butter form a mechanism complementary to the intervention system for butter laid down in Regulation No 985/68: as a result of these measures, either the butter taken into storage under Regulation No 985/68 is channelled towards consumption again or the butter on the market is reduced to the price level of intervention butter.

54. Against the background of this systematic connection, we must agree with the Commission that if butter is to be eligible for aid under Article 1 of Regulation No 570/88, it must necessarily be butter such as can be bought by the intervention agencies under Article 1 of Regulation No 985/68. In order to be eligible for aid under Article 1 of Regulation No 570/88, therefore, butter must in particular meet the standards of manufacture and composition described in Article 1(3)(a) of Regulation No 985/68.

55. This assessment is not altered by the fact that TAIB, as an 'intermediate product', can be granted aid on the basis of Article 9a. The fact that such intermediate products are eligible for aid represents, in reality, a subsequent addition which is probably in contradiction to the original system of Regulation No 570/88.

56. The original version of the wording and preamble of Regulation No 570/88 show that aid was allowed to be granted for butter, concentrated butter or — after

21 — Commission Regulation (EEC) No 1932/81 of 13 July 1981 on the granting of aid for butter and concentrated butter for use in the manufacture of pastry products, ice-cream and other foodstuffs (OJ 1981 L 191, p. 6). This regulation sets out in more detail the aid arrangements with regard to manufacturers of pastry products and ice-cream provided for in Council Regulation (EEC) No 1723/81 of 24 June 1981 establishing general rules relating to measures designed to maintain the level of use of butter by certain categories of consumer and industry (OJ 1981 L 172, p. 14).

22 — See in this connection the second recital in the preamble to Regulation No 1723/81.

23 — See the first and second recitals in the preamble to that regulation.

amendment by Regulation No 1157/91 — cream within the meaning of Article 1 if that product is either processed directly under Article 3 into one of the final products named in Article 4 or is first processed, under Article 9, into an 'intermediate product' which is intended to be processed into such a final product.

57. The original system therefore distinguishes between the *basic products* (butter, concentrated butter or cream), for which aid could be granted, and the *products which are themselves not eligible for aid*, into which these basic products are processed, that is, the final and intermediate products.

58. The fact that 'intermediate products' as defined in Article 9 were introduced in addition to the products in Article 1 as products eligible for aid is the result of three amending regulations which were enacted by the Commission as a result of misunderstandings with regard to the term 'intermediate product'.[24] Therefore Article 9a(a) was introduced, which now provides that products from concentrated butter with particular characteristics are to be regarded as intermediate products for the purposes of Article 9. It was further made clear that 'aid may be requested for the products referred to in Article 9a(a), even if such products are not covered by Article 1',[25] and an exception to this effect was introduced into Article 1 of Regulation No 570/88,[26] with the result that, in addition to butter, concentrated butter and cream, intermediate products within the meaning of Article 9a(a), that is, recomposed types of butter such as TAIB, were henceforth expressly eligible for aid.

59. The above observations make it clear that the eligibility of TAIB for aid under Article 9a of Regulation No 570/88 is in the nature of an exception[27] and therefore does not alter the principle established above.

60. Finally, it must also be pointed out that the list of national classifications in Article 1(3)(b) of Regulation No 985/68 contains only such classifications of butter as correspond to the characteristics set out in heading (a) of that provision. This is illustrated, for example, by the fact that this list of national classifications was supplemented by butter manufactured in the United Kingdom and in Ireland — after their accession to the European Communities — in such a way as 'to make this butter satisfy the conditions corresponding

24 — Commission Regulation (EEC) No 1813/93 (cited above in footnote 13), Commission Regulation (EEC) No 2443/93 (cited above in footnote 6) and Commission Regulation (EEC) No 3049/93 of 4 November 1993. In the preambles to all three regulations, reference is made to the uncertainty with regard to 'intermediate products'.

25 — Second recital in the preamble to Regulation (EEC) No 2443/93.

26 — The second paragraph now begins as follows: 'Notwithstanding Article 9a(a), only the following may qualify for aid:...'

27 — At the hearing, the Commission submitted with regard to Article 9a that its inclusion was the result of a compromise between the interest of the Kingdom of Belgium in granting aid for TAIB and the principle that as a rule only 'classic' butter can be the subject of Community butter promotion.

to those applicable to butter to which intervention may at present apply in the Community'. [28].

61. All of this shows that Article 1 of Regulation No 570/88 in conjunction with Regulation No 985/68 proceeds on the basis of particular standards for the manufacture and composition of butter.

62. Returning to the question of the scope of the residual jurisdiction in the present case and the case-law mentioned at the beginning, it must therefore be concluded that a Member State may exercise its jurisdiction to undertake the classification mentioned in Article 1(3)(b) of Regulation No 985/68 only if it takes into account the appropriate standards.

63. Any other interpretation would allow Member States to extend the scope of application of the intervention or aid system to further products in addition to those which are intended to be covered under the terms of this system, which would be contrary to the principle of uniform application of Community law and to the principle of equality between the citizens of the Community in the implementation of the common agricultural policy. [29]

28 — Regulation (EEC) No 2714/72 of the Council (cited above in footnote 9) amending Regulation No 985/68 (cited above in footnote 8), final recital in the preamble.

29 — With regard to this principle, see Case 11/76 *Netherlands* v *Commission* [1979] ECR 245, paragraph 9.

64. It follows from the above considerations that both the first and the third parts of the first plea in law fail.

2. Second part of the first plea in law

(a) Submissions of the parties

65. The Belgian Government submits essentially that its authorities did not commit any irregularities or negligence within the meaning of Articles 2 and 3 of Regulation No 729/70 on the financing of the common agricultural policy, on the basis of which the Commission made the corrections. If it was mistaken in its interpretation of Regulation No 570/88, this is to be attributed to the uncertainty of the legal situation, which continued on the relevant issue until Regulation No 455/95 came into force and for which the Commission is responsible as a breach of the principle of legal certainty.

66. In the opinion of the Commission this submission is irrelevant, as the contested decisions were adopted primarily on the basis of Article 3(3) and Article 5(2)(c) of Regulation No 729/70, and more specifically as a result of the finding that the expenditure was not in conformity with Community law; any irregularities or neg-

ligence were therefore not to be taken into account.

(b) Assessment

67. Article 5(2) of Regulation No 729/70 is the *procedural basis of the Commission's decision* on the exclusion of Member States' expenditure from Community financing. The *framework* for this Community financing for the EAGGF is created by Articles 2 and 3 of that regulation. In the present case, Article 3 is relevant; under Article 3, the EAGGF finances interventions in order to regulate the agricultural markets. These interventions are 'made under Community law as part of the common organisation of the agricultural markets'. Article 8 of the regulation relates to the *correct implementation* of the measures: firstly, it imposes an obligation on the Member States to ensure that the measures are implemented correctly, and secondly, it contains provisions on the consequences if there should be irregularities or negligence in such implementation.

68. In the light of these provisions, when deciding to make exclusions from common financing under Article 5(2), it is in principle necessary to draw a distinction between the situation in which Member States have incurred intervention expenditure for which there is no legal basis under Community law and the situation in which a material legal basis existed in Community law for the financing, but in which, when the measures were implemented, irregularities or negligence within the meaning of Article 8 occurred.

69. In the latter case, the Commission makes a financial correction under Article 5(2), the amount of which it determines according to the nature and gravity of the breach and the damage to the EU budget caused, and which is calculated either on the basis of errors in individual cases or on the basis of the risk of financial loss.

70. If, however, as in the present case, a Member State has incurred intervention expenses as a result of an incorrect interpretation or application of a provision of Community law, it follows from the case-law of the Court of Justice that 'such a situation cannot fall under Article 8 but must, on the contrary, be examined in the light of the general provisions of Articles 2 and 3 of the same regulation... . Those provisions permit the Commission to charge to the EAGGF only sums paid in accordance with the rules laid down in the various sectors of agricultural production, while leaving the Member States to bear the burden of any other sum paid, and in particular any amounts which the national authorities wrongly believed themselves authorised to pay in the context of the common organisation of the markets'. [30]

30 — Case 347/85 *United Kingdom* v *Commission* [1988] ECR 1749, paragraph 52, and Case 11/76 (cited above in footnote 29), paragraph 8.

71. In a case such as the present, therefore, the expenditure incurred on an incorrect legal basis is from the outset outside the financing framework laid down in Articles 2 and 3 of Regulation No 729/70 and should therefore be excluded completely from Community financing, without any irregularities or negligence within the meaning of Article 8 being relevant.

72. From all of this it follows that the first plea in law must be dismissed in its entirety.

B — *Second plea in law: infringement of the principle of proportionality*

1. Submissions of the parties

73. The Belgian Government asserts that the Corman company received aid on the basis — which is contested — of Article 1 of Regulation No 570/88 which was no higher than if that aid had been granted under Article 9a. But even if the necessity of adding tracers to intermediate products under Article 9a is affirmed, 96% of TAIB for which the disputed aid under Article 1 of the regulation was granted could have fulfilled this requirement and received aid under Article 9a, as appears from the report of the conciliation body.

74. Under the principle of proportionality, which must also be observed when exclusive competence of the Community is being exercised and also where there is no discretion, the Commission was therefore entitled to exclude only a maximum of 4% of the aid sum from financing.

75. The Commission, however, again points out that its powers in applying Article 5 of Regulation No 729/70 are restricted to merely establishing that it is applied in conformity with Community law and that therefore any exercise of discretion going beyond this would represent a clear breach of law. According to the case-law of the Court, the Commission is not even permitted to take account of a lack of conformity in financing if this would have the effect of reducing the burden of the EAGGF, let alone if its effect would be neutral as in the present case.

2. Assessment

76. The Court has consistently held that the principle of proportionality requires that acts of the Community institutions should not exceed the bounds of what is appropriate and necessary to achieve the intended goal and that, if several appropri-

ate measures are available to choose from, the least onerous should be chosen. [31]

77. First, the Belgian Government is correct in so far as it submits that the principle of proportionality also applies to Commission measures in connection with the common agricultural policy. [32]

78. There cannot, however, be any infringement of the principle of proportionality if a Community institution carries out a legal measure on the basis of provisions which give it no discretionary scope to take any other measure or to choose any other legal consequence.

79. As was stated in the examination of the first plea in law, under Article 5(2)(c) in conjunction with Articles 2 and 3 of Regulation No 729/70 the Commission must refuse to finance refunds and interventions if they were not granted 'under Community law'.

80. In applying these provisions, therefore, the Commission had no discretion, if aid was granted on an objectively incorrect legal basis, to choose a different legal consequence from that of excluding the total amount of aid in question from financing by the Community.

81. In particular, under the applicable interpretation of the requirements for the expenditure to be taken over by the EAGGF, according to the case-law of the Court of Justice, [33] it probably cannot be assumed that the Commission has a power to review expenditure that a Member State wrongly based on a particular legal foundation in order to determine whether there is another legal basis which would be correct and then to take over the expenditure to that extent. [34]

82. In the absence of discretion on the Commission's part in the *application* of Regulation No 729/70, the question as to the proportionality of excluding the total amount of aid could be raised only with regard to that regulation alone. However, the applicant made no submission that provisions of Regulation No 729/70 were incompatible with the principle of proportionality.

31 — See, for example, Case 15/83 *Denkavit Nederland* [1984] ECR 2171, paragraph 25, and Case 265/87 *Schräder* [1989] ECR 2237, paragraph 21.

32 — See, for example, Joined Cases C-296/93 and C-307/93 *France and Ireland* v *Commission* [1996] ECR I-795, paragraphs 30 and 31.

33 — Cited above in footnote 29, paragraph 9.

34 — Such an application of the procedure for clearing EAGGF accounts might induce the Member States to choose financial bases which in their opinion were more beneficial and would thus endanger its objective, which is to ensure that 'refunds granted and the intervention undertaken were in accordance with the Community rules within the framework of the common organisation of the agricultural markets'. With regard to this objective, see Case 347/85 (cited above in footnote 30), paragraph 53.

83. The charge that there was a breach of the principle of proportionality is therefore incorrect.

C — *Third plea in law: infringement of the principle of genuine cooperation*

1. Submissions of the parties

84. In the opinion of the Belgian Government, under the principle of genuine cooperation the Commission had a duty in the conciliation procedure, in the course of which the Commission never stated the true grounds for the contested decisions, to make greater efforts towards the Belgian side and to discuss thoroughly with it the interpretation of the regulation and the application of the principle of proportionality.

85. The Commission counters this argument on the basis of the facts of the case, which were established in the conciliation report and were not disputed, and the course of the proceedings, which, in the opinion of the Commission, directly contradict these accusations.

2. Assessment

86. The Belgian Government provides only vague grounds to back up its accusation that the Commission infringed the principle of genuine cooperation with regard to the Commission's cooperation in the conciliation procedure, stating that the Commission involved itself 'merely formally' in that procedure and did not make a genuine effort to achieve a conciliation.

87. As laid down in Commission Decision 94/442/EC of 1 July 1994 setting up a conciliation procedure in the context of the clearance of the accounts of the European Agricultural Guidance and Guarantee Fund (EAGGF) Guarantee Section,[35] under Article 1(1)(b) the conciliation body tries in the conciliation procedure to reconcile the divergent positions of the Commission and the Member State concerned. In doing this, under Article 2(4) of the same decision, it bases itself 'on the evidence in the dossier' and 'on a fair hearing of the Commission staff and national authorities concerned'.

88. Point 5 of the conciliation report shows that both parties involved in the conciliation procedure, that is, including the Commission, used the opportunity to set out their points of view before the conciliation committee, and these are summarised in points 3 and 4 of the report.

89. As there is no further evidence in the conciliation report that the Commission's

35 — OJ 1994 L 182, p. 45.

cooperation may have been defective, it may be concluded that the Commission cooperated in the conciliation procedure in the manner intended.

90. Furthermore, the Belgian Government cannot use the fact that, in its view, the Commission never met the representatives of the Kingdom of Belgium and did not state the 'real reasons' for the contested decisions (which were adopted later) as the basis for an accusation that the Commission did not seriously participate in the conciliation procedure, since such obligations are not provided for in that conciliation procedure.

91. The Commission therefore did not infringe the principle of genuine cooperation with regard to the conciliation procedure.

92. With regard to the general course of the dispute on the interpretation of the regulation in question, the file further shows that the Commission and the Belgian authorities also exchanged a great deal of information outside the conciliation procedure.

93. Thus, both in 1991 — on the occasion of the export of TAIB to France — and in the course of 1995 — in connection with the amendment of Regulation No 570/88 by Regulation No 455/95 — there was correspondence between Commission officials and the Belgian authorities, and in the course of this correspondence questions relating to the application of the regulation in question with regard to TAIB were dealt with. The Commission can therefore also not be accused of a breach of the duty of genuine cooperation with regard to the dispute on the interpretation of Regulation No 570/88, in so far as this took place outside the conciliation procedure.

94. It follows that the Commission did not infringe the principle of genuine cooperation.

D — *Fourth plea in law: infringement of the principle of protection of legitimate expectations*

1. Submissions of the parties

95. In the opinion of the Belgian Government, its interpretation of Article 1 of Regulation No 570/88 was justified in the light of the principle of protection of legitimate expectations. In contrast, and in breach of this principle, the Commission, in taking its decision as to correction, relied above all on a passage from a judgment of the Court of First Instance of 30 January 1997[36] and thus on a decision which was taken only three months after the events in

36 — *Corman* judgment, cited above in footnote 16.

question and did not relate to Regulation No 570/88.

96. The Commission, for its part, expresses astonishment at this accusation. It submits that, on the contrary, the Belgian Government, in classifying TAIB as 'beurre marque de contrôle' suddenly departed from its original position, in which it had accepted that TAIB was not eligible for aid under Article 1 of the regulation. In addition, in its decisions the Commission did not 'predominantly' rely on that judgment of the Court of First Instance: that judgment merely confirmed the consistent view of the Commission.

2. Assessment

97. Reliance may be placed on the principle of protection of legitimate expectations in regard to Community law only to the extent to which the Community itself first creates a situation which is capable of creating a legitimate expectation. [37]

98. In the present case, however, the Commission from the outset, that is, for the first time in its letter of 10 June 1991, expressed to the Belgian authorities doubts as to the eligibility of TAIB for aid, in any event with regard to the applicability of Article 1 of Regulation No 570/88: in a letter of 3 July 1991 to the French customs authorities, of which the Belgian Ministry of Agriculture was informed, the Commission pointed out that 'the product is not regarded as butter and can in no circumstances be classified as butter within the meaning of Article 1(3)(b) of Regulation (EEC) No 985/68'. In a letter of 22 August 1991, the Belgian Ministry of Agriculture confirmed that it shared this opinion of the Commission: 'But it [TAIB] cannot be classified in one of the categories of Article 1(3)(b) of Regulation (EEC) No 985/68, that is, for Belgium: "beurre marque de contrôle"...' Notwithstanding this opinion, it is a known fact that on 28 February 1994 the Belgian authorities classified TAIB, which to that date had received aid under Article 9a of Regulation No 570/88 as an intermediate product, as 'beurre marque de contrôle' and from then on granted aid under Article 1 of that regulation.

99. In those circumstances, the Kingdom of Belgium had no legitimate expectation than the Commission would take over aid as chargeable to the EAGGF where such aid was paid by the Kingdom of Belgium for TAIB under the new classification on the basis of Article 1. In the procedure for clearing EAGGF accounts which preceded the contested decisions, the Commission clearly also referred to the *Corman* judgment, [38] but this does not alter the situation with regard to the protection of a legitimate interest, since the Commission, as has just been explained, constantly expressed reser-

37 — See for example Case C-177/90 *Kühn* [1992] ECR I-35, paragraph 14.

38 — See point 3 of the conciliation report.

vations as to the eligibility of TAIB for aid under Article 1 of the regulation in question.

100. The allegation that the Commission infringed legitimate expectations is therefore also mistaken.

VI — Conclusion

101. In the light of the foregoing, I propose that the Court:

(1) dismiss the application as being unfounded;

(2) order that the costs of the proceedings be borne by the Kingdom of Belgium.