OPINION OF ADVOCATE GENERAL MISCHO

delivered on 15 January 2002 [1]

1. Among the numerous forms of aid financed by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) is aid for the processing of skimmed milk into casein and caseinates where the conditions laid down by Commission Regulation (EEC) No 2921/90 of 10 October 1990 on aid for the production of casein and caseinates from skimmed milk [2] are met.

2. It was specifically because it considered that those conditions had not been complied with in relation to aid received by a Netherlands undertaking, DMV Campina, that the Commission, in its decision of 3 February 1999 on the clearance of the accounts presented by the Member States in respect of the expenditure for 1995 of the Guarantee Section of the EAGGF, excluded from financing expenditure declared by the Kingdom of the Netherlands in respect of that aid, in the sum of NLG 39 182 606.

3. On 17 April 1994 the Kingdom of the Netherlands brought an action for annulment of the decision, registered under No C-133/99, whose merits must be examined.

4. The Netherlands Government sets out its challenge to the lawfulness of the contested decision on two levels. In its first plea, it argues that it did not commit any breach of Regulation No 2921/90 when granting the aid. In the other three pleas, it submits that the Commission decision, irrespective of substantive lawfulness, was adopted in unlawful circumstances in that the Commission failed to comply with the rules governing the clearance of EAGGF accounts laid down by Council Regulation (EEC) No 729/70 of 21 April 1970 on the financing of the common agricultural policy, [3] the principle of legal certainty, and the requirement to state reasons that is laid down by Article 190 of the EC Treaty (now Article 253 EC).

The first plea

5. The correction challenged by the Netherlands Government that the Commis-

1 — Original language: French.

2 — OJ 1990 L 279, p. 22.

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

sion made in its decision on the clearance of accounts for the Guarantee Section of the EAGGF for 1995 is based on considerations which are very clearly set out in the summary report on the results of inspections concerning the clearance of the EAGGF Guarantee Section accounts for 1995. The report states at paragraph 4.3.1:

'Production aid for casein and caseinates — Netherlands — Budget item 2024

In October 1995 UCLAF carried out an inspection visit in the Netherlands in conjunction with the AID at the premises of an operator to check the payments made in respect of production aid for casein and caseinates.

Two problems were detected. The first problem concerned the use of the additive aluminium ammonium sulphate (E523), referred to below as AAS, in the manufacture of edible caseinate sold on the Community market. The second concerned production of "EMST", whereby waste powders are regenerated into casein.

After careful consideration, the Commission concluded that the use of AAS could not be permitted because Council Directive 83/417/EEC,[4] which explicitly excludes its use, must be unconditionally applied. Furthermore, the production of EMST was considered not to be in conformity with the provisions of Article 1(1) and (3) of Regulation (EEC) No 2921/90.

Consequently, corrections must be applied for both elements starting with the financial year which at the time of the original audit had not yet been cleared, i.e. 1992, and for the financial years up to and including 1995 (EMST) and 1996 (the use of AAS). It can be noted here that, on receipt of UCLAF's preliminary observation letters, the Dutch authorities stopped the operator in question from carrying out its incorrect practices. From 10 December 1995 the manufacturing process for EMST was adapted to bring it into line with the Commission's interpretation of the rules, while the practice of aiding caseinate containing AAS ceased with effect from 22 March 1996.

By letter dated 21 January 1998 (Ref. VI/03854), the Dutch authorities were informed of the Commission's intention to propose a total correction of NLG 32 746 529 for the use of AAS for the years 1992–95 and NLG 6 436 077 for the production of EMST for the years 1992–95. The correction for the use of

4 — Council Directive of 25 July 1983 on the approximation of the laws of the Member States relating to certain lactoproteins (caseins and caseinates) intended for human consumption (OJ 1983 L 237, p. 25).

AAS for the period 15 October 1995–22 March 1996 must still be fixed and will be dealt with in a later ad hoc decision. It can be noted here that the correction for the use of AAS is only in respect of casein which was sold as edible for use in the EU.

Correction:

Use of AAS — NLG 32 746 529

EMST — NLG 6 436 077

Total correction:
Budget heading 2024— NLG 39 182 606'

6. As set out in the summary report, the Commission alleges that the Netherlands authorities have committed two irregularities, one relating to the presence of aluminium ammonium sulphate in caseinates intended for human consumption, and the other relating to the manufacturing process for caseinates called 'EMST'. [5]

7. Those irregularities are clearly distinct, both because the provisions under which the Commission considers that it has identified them are different and because one relates to the composition of certain caseinates while the other relates to the permissibility of a manufacturing process. I must therefore distinguish them in my analysis.

8. I will begin by considering the observations submitted on the problem of the presence of AAS in certain caseinates marketed in the Community as intended for human consumption.

9. The presence of AAS, which is not disputed at all by the Netherlands Government, is not expressly prohibited by Regulation No 2921/90, whether one refers to its various articles or to Annexes I, II and III on the composition requirements for caseins and caseinates eligible for aid.

10. None the less, when the Commission adopted its decision it considered that there was indeed such a prohibition because it was impossible to grant aid in respect of caseinates marketed for human consumption if they did not comply with the requirements laid down by Directive 83/417. Article 2 of that directive provides:

'The Member States shall take all the necessary steps to ensure that:

5 — The Netherlands Government stated at the hearing that EMST means 'Emulgator Stoff Kast' which can be translated as 'emulsifier-powder box'.

— the products defined in the Annexes may be marketed only if they conform to the definitions and rules laid down in this Directive and the Annexes thereto, and

— products which do not satisfy the criteria laid down in the Annexes are named and labelled in such a way that the buyer is not misled as to their nature, quality or use.'

11. Section II of Annex II to the directive sets out the standards applicable to edible caseinates, which relate to:

(a) essential factors of composition;

(b) contaminants;

(c) impurities;

(d) technological adjuvants of edible quality;

(e) characteristics.

12. AAS is not included among the technological adjuvants listed under (d), which, according to the Commission, means that it cannot be present in caseinates intended for human consumption, whether that presence results from the use of AAS in the manufacturing process for the caseinate or from its being added later.

13. In its application, the Netherlands Government, supported by the French Government, disputes that the grant of aid is subject to compliance with the rules laid down in Directive 83/417 and submits in the alternative that the presence of AAS in caseinates does not prohibit the caseinates from being marketed for human consumption.

14. Under its main submission, the Netherlands Government puts forward two arguments. It states, first, that the legal basis and the purpose of Regulation No 2921/90 are different from those of Directive 83/417.

15. Regulation No 2921/90 forms part of the common organisation of the market in milk and milk products and is intended to achieve objectives of the common agricultural policy, since the aid provided for by the regulation is aimed at stabilising production prices for lactoproteins.

16. Directive 83/417 is unrelated to the common agricultural policy, it was adopted on the basis of Article 100 of the EC Treaty (now Article 94 EC) and its object is to remove barriers to trade through the approximation of the laws of the Member States on the marketing of caseins and caseinates.

17. If the Community legislature had intended, when adopting the directive, to achieve an objective falling within the common agricultural policy, it should have used Article 43 of the EC Treaty (now, after amendment, Article 37 EC) as a legal basis.

18. However, it did not do so, which, according to the Netherlands Government, precludes Directive 83/417 from restricting the scope of Regulation No 2921/90.

19. To illustrate its point, the Netherlands Government refers to the step taken in relation to the protection of animals during transport.

20. In order that compliance with the rules laid down in Directive 91/628/EEC [6] on that subject be a condition for the grant of export refunds for cattle, the Council, in Regulation (EC) No 2634/97, [7] amended the basic regulation on the common organisation of the market in that sector, being aware that, as is apparent on reading the preamble to Regulation No 2634/97, without that amendment the provisions of Directive 91/628 on animal welfare during transport could not have applied as a condition for payment of export refunds.

21. As regards Regulation No 2921/90 and aid for caseinates, no reference is made in the regulation to Directive 83/417.

22. Secondly, the Netherlands Government seeks to rely on the fact that in 1997 the Commission proposed an amendment to Regulation No 2921/90, intended to harmonise the provisions of the regulation with those of Directive 83/417, in order that the award of production aid for caseinates be expressly subject to compliance with the marketing conditions laid down in Directive 83/417.

23. According to the Netherlands Government, the existence of that proposal amounts to an acknowledgement by the Commission that the necessary link between the regulation and the directive is missing.

6 — Council Directive of 19 November 1991 on the protection of animals during transport and amending Directives 91/425/EEC and 91/496/EEC (OJ 1991 L 340, p. 17).

7 — Council Regulation of 18 December 1997 amending Regulation (EEC) No 805/68 on the common organisation of the market in beef and veal (OJ 1997 L 356, p. 13).

24. In order to be persuaded of this, it is, in the Netherlands Government's submission, sufficient to refer to the preamble to the proposal, which states:

'experience has shown there to be a risk that caseins and caseinates qualifying for aid but not complying with the provisions of the directive may none the less be marketed in the Community for human consumption; ... in order to avoid that risk without having to introduce a cumbersome and restrictive system of control, it is appropriate to adapt the requirements laid down under the aid regime to those of [Directive 83/417]'.

25. Since that proposal was not well received, it was withdrawn and replaced by a proposal to the opposite effect, that is to say, explicitly excluding any link between the grant of aid and compliance with the conditions laid down in Directive 83/417.

26. In the Netherlands Government's submission, this second proposal cannot be interpreted as reflecting the existence of a link between the regulation and the directive which is to be removed. In the preamble to that proposal, according to which 'making checks on the destination of products for which aid is granted would unnecessarily complicate the aid payment procedure; ... as a result, specific provision should be made not to make the grant of aid subject to compliance with the requirements of those Directives', the Commission explained what the consequences would be, in terms of control procedures, if, in order for aid to be granted, the requirements of the directive were to be met and if the destination of caseinates therefore had to be checked, so as to exclude from the grant of aid caseinates marketed for human consumption not meeting the requirements of the directive as regards their composition.

27. The Commission disputes those arguments point by point. In its submission, it is totally irrelevant that the legal basis and objective of Regulation No 2921/90 differ from those of Directive 83/417.

28. The problem posed in the present case is the interpretation to be given to Regulation No 2921/90. According to the Commission, its interpretation has to take account of other provisions of Community law which may prove relevant. That is clearly the case with Directive 83/417, as an interpretation leading to an absurd result cannot be supported, that is so say to the grant of aid to manufacturers, in order to help them to face up to competition from manufacturers in non-member countries who can acquire the raw material at a lower price, in respect of products whose sale on the Community market is prohibited under Directive 83/417.

29. The Commission states that Community law cannot be divided into strictly separate compartments, between which, in the absence of express provision, there is no communication.

30. In the Commission's submission, the unity of Community law must be laid down as a principle, each of the rules of Community law having to be interpreted, in the absence of an express provision to the contrary, in the light of the others.

31. The fact that the aid in question falls within the framework of pursuit of the objectives of the common agricultural policy cannot lead to the grant of aid for a product whose sale on the Community market is prohibited by a directive that falls within the policy of approximation of laws.

32. The common agricultural policy has not been accorded any pre-eminence *vis-à-vis* the other objectives of the Treaty and must therefore be applied having regard to those objectives.

33. Furthermore, Article 38(2) of the EC Treaty (now, after amendment, Article 32(2) EC) expressly provides that, save as otherwise provided in Articles 39 to 46, the rules laid down for the establishment of the common market are to apply to agricultural products, and there are no grounds for considering that Regulation No 2921/90 should be regarded as specific legislation derogating from a general provision relating to the functioning of the common market.

34. In the Commission's submission, the argument which the Netherlands Government seeks to derive from the provisions adopted in order to make payment of export refunds for cattle subject to compliance with the rules on the protection of animals during transport is entirely without merit because, concerning intra-Community transport, Directive 91/628 had no intrinsic link at all with the grant of refunds, which is dependent on the actual arrival of the animals in a non-member country, so that, if it were sought to require compliance with its provisions when animals were transported for export, that had to be done by amending the provisions on the grant of refunds.

35. That is not the case in relation to Regulation No 2921/90 and Directive 83/417, the link between which is undeniable, since the former concerns the grant of aid intended to support the competitive position on the market of a product for which the latter sets out the conditions to be met in order for it to be marketed.

36. As regards the two proposals for amendment of Regulation No 2921/90, upon which the Netherlands Government seeks to rely in support of its view, the

Commission explains that the first proposal was not intended to amend the existing legislation, but only to clarify it, as is apparent from its preamble, and the second attests in two respects the obligation to comply with the conditions of the directive in order to qualify for the aid provided for by the regulation.

37. First, the second proposal would never have been drawn up if the first had been submitted in the belief that its adoption was necessary in order to create a link between the regulation and the directive, and secondly, its preamble refers to the fact that caseinates must 'also meet the requirements laid down in the directives on foodstuffs and that, for supervision reasons, specific provision should be made not to make the grant of aid subject to compliance with the requirements of those Directives'.

38. The Commission also observes that the Netherlands Government has still not produced any express statement on its part indicating that the grant of aid under Regulation No 2921/90 is not subject to compliance with the conditions under Directive 83/417.

39. What are the merits of the various arguments exchanged by the parties?

Assessment

Infringement of Regulation No 2921/90

40. It should be stated at the outset that the Commission appears to put forward a weighty argument when it refers to the necessary unity of Community law. In the Community legal system as elsewhere, it is not desirable for the left hand not to know what the right hand is doing, and the Commission is right to note that, as Article 38(2) of the Treaty states, 'save as otherwise provided in Articles 39 to 46, the rules laid down for the establishment of the common market shall apply to agricultural products'.

41. However, to go from there to maintaining, as the Commission does, that the fact that the regulation and the directive were adopted on two different legal bases, Articles 43 of the Treaty for one and Article 100 of the Treaty for the other, is irrelevant entails taking a step before which I hesitate in the present case.

42. As the Netherlands Government observes, the Court has held[8] that 'Article 43 of the Treaty is the appropriate legal basis for any legislation concerning

8 — Case 68/86 *United Kingdom* v *Council* [1988] ECR 855, paragraph 14, and Case 131/86 *United Kingdom* v *Council* [1988] ECR 905, paragraph 19.

the production and marketing of agricultural products listed in Annex II to the Treaty which contributes to the achievement of one or more of the objectives of the common agricultural policy set out in Article 39 of the Treaty. There is no need to have recourse to Article 100 of the Treaty where such legislation involves the harmonisation of provisions of national law in that field'.

43. Even if it does not contend that the directive could have amended the regulation, the Commission asks us to take the view that, by virtue of the unity of Community law, the directive dictates the interpretation of the regulation, which in concrete terms amounts to accepting that the directive added, to the conditions already set out in the regulation for the grant of aid, a supplementary condition set out in the directive alone.

44. But does adding a condition not, in fact, amount to amending the regulation, since it will lead to a refusal of aid for caseinates which, under the regulation alone, could have qualified for aid?

45. In light of the case-law cited above it appears hardly practicable to accord a directive based on Article 100 of the Treaty such an effect in relation to a regulation based on Article 43 of the Treaty.

46. It is true that, if the regulation had provided for aid for caseinates intended for human consumption, without specifying in any way what should thereby be understood, it would not, in my view, have been unlawful to look for the definition of caseinates in a provision other than one based on Article 43 of the Treaty, in reliance on the consideration that Community law forms a whole governed by the principle of unity.

47. However, as we have just seen, that is not the situation in the present case. Regulation No 2921/90 defines very precisely in its annexes the conditions which have to be met in order for a product to confer entitlement, as a caseinate, to aid and any addition of a supplementary condition would require amendment of the regulation by a measure founded on the same legal basis.

48. Consequently, it is my view that, even if the presence of AAS in caseinates intended for human consumption is prohibited by Directive 83/417, a matter which I will have to elucidate below when examining the submission put forward in the alternative by the Netherlands Government, that prohibition does not justify the refusal of aid laid down by Regulation No 2921/90 for caseinates sold for human consumption which meet the conditions prescribed by the regulation.

49. Even if Regulation No 2921/90 must, as the Commission submits, be interpreted in the light of Directive 83/417, that would still not, in my view, justify the contested decision.

50. Careful reading of the directive, in particular of Articles 2 and 3, reveals that the standards laid down by it apply only to products for which the designation 'edible caseinates' is claimed.

51. Article 2 reads as follows:

'The Member States shall take all the necessary steps to ensure that:

— the products defined in the Annexes may be marketed only if they conform to the definitions and rules laid down in this Directive and the Annexes thereto, and

— products which do not satisfy the criteria laid down in the Annexes are named and labelled in such a way that the buyer is not misled as to their nature, quality or use.'

52. Article 3 provides:

'The names referred to in the Annexes shall be reserved for the products defined and must be used commercially to designate those products.'

53. The second indent in Article 2 leaves clearly open the possibility of marketing products which fall within the category of caseinates but are not capable of claiming the designation 'edible caseinates', provided that their labelling does not, expressly or by implication, use that designation.

54. Those products could include products that meet the conditions laid down by Regulation No 2921/90 and have received aid on that basis, but do not satisfy the standards laid down by the directive because a product has been added to them which the directive prohibits in products marketed as edible caseinates.

55. One would search in vain in Directive 83/417 for a general and absolute prohibition on the marketing of caseinates for the food industry which are not capable of claiming the designation 'edible caseinates'. The answer to the question whether such caseinates can lawfully be used by the food

industry must be found in the rules applicable to the various products made by that industry. The French Government has indeed observed in this regard that, on the Commission's own admission, caseinates marketed under the designation 'high viscosity milk proteins' containing AAS may, even today, be used in the food industry.

56. It is accordingly difficult to see how, assuming that a link must be established between the regulation and the directive, the final use of the caseinate could affect the grant of aid. Aid is payable for all caseinates meeting the requirements of the regulation, but it is for the producer, when marketing them, to comply with the rules for the use of the designation 'edible caseinates' laid down by the directive.

57. The sale under that designation of caseinates containing a product unauthorised by the directive clearly constitutes an infringement of Community law, which every Member State is duty bound to make unlawful. If it does not do so, the Commission is certainly justified, as the French Government most rightly observes, in asking the Court of Justice to find that there has been a failure to fulfil obligations. What it cannot do on the other hand, in my view, is to penalise that wrongful use of a designation by refusing to grant aid, given that aid is not limited to caseinates capable of claiming the designation 'edible caseinates'. The regulation sets out the products for which aid is given, the directive sets out the conditions which certain of those products must meet in order to be marketed under a certain designation, and the fact that a caseinate is marketed under an improper designation does not affect its eligibility for aid.

58. It remains to consider, briefly, the parties' arguments on the two proposals to amend the regulation submitted in turn by the Commission.

59. Even though it appears to me to be difficult to draw definitive conclusions regarding the correct interpretation of Regulation No 2921/90 from texts which never got past the stage of Commission drafts and which were not presented until 1997, that is to say after the period to which the Commission's contested decision relates, I consider that those drafts — essentially their preambles — support the Netherlands Government's case. It may be recalled that in the preamble to the first proposal, dated 3 October 1997, the Commission stated that 'experience has shown there to be a risk that caseins and caseinates qualifying for aid but not complying with the provisions of the directive may nonetheless be marketed in the Community for human consumption; ... in order to avoid that risk without having to introduce a cumbersome and restrictive system of control, it is appropriate to adapt the requirements laid down under the aid regime to those of the directive'.

60. It follows, first of all, from this preamble that the Commission considers that caseinates not complying with the directive's conditions and which therefore should not be marketed in the Community under the designation 'edible caseinates' should not receive aid either. That admittedly confirms the Commission's position, but it does not prove the existence of a link between the regulation and the directive. In addition, the continuation of the recital shows that, in the eyes of the Commission itself, the existence of such a link is not obvious and that it is therefore at the very least appropriate to lay it down clearly. The Commission thus recognises by implication that a provision whose effect is to limit the scope of an aid regime must normally be found in the very legislation establishing that regime.

61. If that proposal had been adopted, it would also have introduced a fundamental change since, irrespective of their subsequent destination — export, animal feed, foodstuffs for human consumption, or some other use — all caseinates would have had to comply with conditions which are laid down by Directive 83/417 only for caseinates claiming the designation 'edible caseinates'. The Commission proposed to insert the following sentence in Annex III to the regulation: 'Caseinates must comply with the standards set out in Annex II to Directive 83/417/EEC'.

62. In any event, the first proposal does not in any way state that the marketing in the Community, for human consumption, of caseinates which have been granted aid but do not comply with the directive has to be viewed as a breach of Regulation No 2921/90.

63. Less than two months later, that is to say on 24 November 1997, the Commission presented to national experts a proposal for a regulation also intended to amend Regulation No 2921/90, but in the opposite way from the first proposal.

64. The first recital in the preamble of that proposal is worded as follows:

'... Article 1(1) of ... Regulation (EEC) No 2921/90 ... lays down the requirements to be met by casein and caseinates to be eligible for Community aid; ... casein and caseinates sold on the Community market and intended for human consumption must *also* [9] meet the requirements laid down in the Directives on foodstuffs'.

65. This wording merely confirms that two sets of conditions are to be complied with,

9 — Emphasis added.

but does not establish that aid could be granted only to caseinates intended for human consumption that comply with the requirements of the directives. In the second recital, it is stated, on the contrary, 'that Member States are required to ensure that the Directives are complied with *by means of appropriate measures*'.[10] That corresponds to the French Government's line of argument, which I set out and approved of above.

66. The second recital then states: 'making checks on the destination of products for which aid is granted would unnecessarily complicate the aid payment procedure; ... as a result, specific provision should be made not to make the grant of aid subject [il convient de dissocier *explicitement*[11] l'octroi de l'aide ...] to compliance with the requirements of those Directives'.

67. In other words, that separation was already implicit, but should now be made explicit.

68. Consequently, the Commission proposed adding the following subparagraph to Article 1(1) of the regulation:

'For the purposes of this Regulation, fulfilment of the conditions laid down in the Directives on foodstuffs applying to casein and caseinates shall not be a requirement for the grant of aid.'

69. Translated into familiar language, the text effectively states: if anyone could have thought that the aid provided for by this regulation could be granted only for caseins and caseinates complying with the conditions laid down by the directives on foodstuffs, they are hereby informed that this is not the case! Put differently again: there is not, and never has been, a link between Regulation No 2921/90 and Directive 83/417.

70. Although I have thus reached the conclusion that the contested decision is unlawful in so far as it deducts NLG 32 746 529 from sums due to the Netherlands because of the purportedly unlawful payment of aid for caseinates containing AAS, it is none the less necessary, for the sake of completeness, to consider the submission put forward by the Netherlands Government in the alternative, that Directive 83/417 does not prohibit the presence of AAS in edible caseinates.

Prohibition of the use of AAS

71. According to the Netherlands Government, Annex II to Directive 83/417 does

10 — Emphasis added.
11 — Emphasis added.

not list all the substances which may be present in caseinates marketed in the Community for human consumption; it lays down standards only for substances which characterise caseinates.

72. As AAS does not play any role in the manufacture of caseinates, it cannot be classified as a technological adjuvant. In relation to caseinates, it should be classified as an additive.

73. The Netherlands Government acknowledges that the labelling used by the undertaking alleged to have wrongly received aid states 'edible caseïnate with processing aid aluminium ammonium sulphate', but that merely provides the information that AAS is a technological adjuvant for the purchaser's use of the caseinate.

74. The presence of AAS in caseinates endows them with technical properties that prove useful in the manufacture of certain foodstuffs. Adding AAS after the end of the caseinate's manufacturing cycle is not as useful, since it is not possible to obtain a good level of homogeneity of the product.

75. Finally, the Netherlands Government argues that caseinate with AAS added was, in the relevant financial years, authorised as an additive in foodstuffs by Article 9 of Council Directive 74/329/EEC of 18 June 1974 on the approximation of the laws of the Member States relating to emulsifiers, stabilisers, thickeners and gelling agents for use in foodstuffs. [12]

76. The Commission puts forward an entirely opposing view. In its submission, the list of authorised substances in caseinates set out in Annex II to Directive 83/417 is exhaustive. A caseinate containing a substance not included in the list, whatever the role played by that substance, does not comply with the directive's requirements. The Commission recalls that in 1989 it had planned, at the request of French manufacturers, to authorise use of aluminium derivatives, in particular aluminium sulphate, but that, following a meeting on the subject — at which a representative of the Netherlands undertaking in question indeed participated — it decided, following the strong opposition which it had encountered, to abandon that proposal.

77. As regards labelling, the Commission considers that the labelling used in the present case cannot remedy the fact that caseinates containing AAS cannot claim the

12 — OJ 1974 L 189, p. 1.

designation 'edible caseinates' and observes that the relevant provisions are silent about possible additives.

78. As regards Directive 74/329, the Commission doubts that Article 9 concerns the addition of AAS. Above all, however, one cannot lose sight of the fact that the precise rules on the composition and labelling of caseinates laid down in Directive 83/417 were adopted to protect public health.

79. The point is to prevent caseinates used in foodstuffs for human consumption from presenting a risk to public health. That is why caseinates can contain only substances recognised as being harmless, which is specifically not the case with regard to AAS.

80. Finally, the Commission raises the question whether AAS does in fact play no role in the manufacture of caseinates produced by the undertaking in question, inasmuch as it alters the degree of acidity of the product, and therefore affects its final properties, and observes that this question arises from the fact that the presence of AAS is not necessarily desirable for all intended uses of caseinates produced by that undertaking.

81. In any event, according to the Commission, a narrow construction of technological adjuvants should not be adopted when interpreting Annex II to Directive 83/417.

82. At the time when that directive was drawn up, a clear distinction was not drawn between a technological adjuvant or processing aid and an additive, as is shown by the fact that the substances authorised by Annex I to the directive as technological adjuvants include substances which are clearly additives. The distinction between an additive and a technological adjuvant or processing aid was introduced only by Council Directive 89/107/EEC of 21 December 1988 on the approximation of the laws of the Member States concerning food additives authorised for use in foodstuffs intended for human consumption. [13] In that directive, food additive means 'any substance not normally consumed as a food in itself and not normally used as a characteristic ingredient of food whether or not it has nutritive value, the intentional addition of which to food for a technological purpose in the manufacture, processing, preparation, treatment, packaging, transport or storage of such food results, or may be reasonably expected to result, in it or its by-products becoming directly or indirectly a component of such foods'. A processing aid is defined as 'any substance not consumed as a food ingredient by itself, intentionally used in the processing of raw materials, foods or their ingredients, to fulfil a certain technological

13 — OJ 1989 L 40, p. 27.

purpose during treatment or processing and which may result in the unintentional but technically unavoidable presence of residues of the substance or its derivatives in the final product, provided that these residues do not present any health risk and do not have any technological effect on the finished product'.

83. It is not easy to decide between these opposing claims. The Netherlands Government's argument that, since AAS is an additive, there was no reason to include it in the list of technological adjuvants of edible quality in Section II(d) of Annex II to Directive 83/417, so that, in the absence of a prohibition on the use of that substance in the Community legislation on additives, its inclusion in edible caseinates within the meaning of Directive 83/417 has to be allowed, appears to me to have a certain logic.

84. However, the Commission's argument is not to be immediately dismissed.

85. On the one hand, if AAS were, in all circumstances, only an additive, one might be tempted to agree with the Netherlands Government when it states that, as an additive, it cannot be prohibited in caseinates by Section II(d) of Annex II which regulates only the use of technological adjuvants, in so far, of course, as that term is construed narrowly. On the other hand, if the list in Section II(d) included both technological adjuvants and products which can only be additives, one ought to accept, as the Commission does, that the fact that AAS is an additive does not mean that it may be present in edible caseinates.

86. But the reality is in fact less clear-cut. While the Netherlands Government itself presents AAS contained in a caseinate as an additive, it also states that AAS plays a role as a technological adjuvant in the manufacture of products containing caseinates. The Commission acknowledged at the hearing that certain products listed in Section II(d) which are known as additives can play a role as technological adjuvants in certain subsequent manufacturing processes. This rather weakens its submission that that list has to be viewed as completely exhaustive, since it combines recognised additives with technological adjuvants.

87. Faced with that uncertainty, a lawyer who is not privileged to be also a specialist in the food industry is confronted with a formidable problem.

88. Is the view to be taken that, in the absence of a prohibition, AAS must, by virtue of its quality as an additive for caseinates, be regarded as authorised or, on the contrary, that, given its dual nature, it has to be prohibited, since it is not included in the list of authorised technological adjuvants construed in a broad sense?

89. To solve the problem, it appears to me that it is legitimate to turn to the labelling requirements laid down in the directive. If additives were authorised by Directive 83/417 without being included in the list in Annex II concerning technological adjuvants, the directive would certainly, in its provisions on labelling, have required their presence to be mentioned.

90. As the Commission points out, no requirement of that kind is laid down by Article 4 for products claiming the designation 'edible caseinates'.

91. The fact none the less remains that Article 4 only sets out labelling rules for caseinates 'without prejudice to Directive 79/112/EEC and without prejudice to the provisions *to be adopted*[14] by the Community concerning the labelling of foodstuffs not intended for the ultimate consumer'.

92. However, I consider that the absence from the directive of any requirement that labelling mention additives in caseinates can reasonably be interpreted as meaning that any substance not listed in Annex II is precluded.

93. Finally, I also consider that this view is confirmed by the discussions which took place in 1989 on the possibility of adding aluminium sulphate to the list of substances whose use would be authorised in the manufacture of caseinates (see point 76 above). It follows from a document put before the Court by the Commission that, apart from the French undertakings in the relevant sector, the undertakings in the other Member States and the Member States themselves expressed their opposition to that suggestion. It follows from the positions taken that the general view was that the use of that substance was not allowed by the version in force of Annex II to Directive 83/417, which has remained unchanged since the directive was adopted.

14 — Emphasis added.

94. I thus come to the conclusion that, as regards the submission put forward in the alternative, the Netherlands Government is wrong, that is to say that the designation 'edible caseinate', as governed by Directive 83/417, may not be claimed for caseinates containing AAS.

95. However, as I have already stated above, I consider that the primary submission put forward by the Netherlands Government is convincing and therefore that the presence of AAS in a caseinate used, after it has been marketed by the manufacturing undertaking, for human consumption does not make it unlawful to grant in respect of that caseinate the aid provided for in Regulation No 2921/90.

Aid granted for EMST

96. I thus come to the second correction made by the Commission in respect of sums payable by the EAGGF to the Netherlands, which relates to the product called EMST. This product is manufactured, according to the Netherlands Government, from residues of semi-finished products that arise during the manufacture of caseinates. The residues are collected and, once there is a certain quantity of them, they undergo final processing into caseinates before being packed into bags. The collection takes place over several days, or even a week.

97. The Commission bases its refusal to take on the cost on the fact that EMST is not a product meeting the requirements of Article 1 of Regulation No 2921/90, more specifically those laid down in Article 1(1) and (3) which provide:

'1. Aid shall be granted to producers of casein and caseinates only if these products

— have been produced from skimmed milk of Community origin or raw casein extracted from milk of Community origin,

— meet the composition requirements of Annex I, II or III,

— are packaged as stipulated in Article 3.

...

3. For the purposes of this Regulation a production batch must consist of products of identical quality made on the same day. However, where the total production of casein and caseinates of the establishment concerned during the previous calendar year did not exceed 1 000 tonnes, the production batch may consist of products made during the same calendar week.'

98. The Commission submits that EMST is a product made from caseinates and in batches which do not correspond to the production of a single day. The Netherlands Government challenges that analysis, arguing, first, that EMST is made from residues of semi-finished products which, by definition, are not yet caseinates at the time of their collection given that this takes place before the end of the drying process and, second, that 'made' in Article 1(3) of the regulation must be understood as 'prepared' and EMST does not pose any problem from the point of view of the requirement laid down in that provision since batches of EMST products contain only caseinates whose production process, ending with the products' being packed into bags, is carried out in a day. The Netherlands Government also refers to exchanges of correspondence between itself and the Commission, showing that the Commission, duly informed of how EMST is produced, found no reason why that product should not be eligible for the aid provided for by the regulation.

99. The Commission responds to these arguments by stating first of all that it is incorrect to claim that the residues recovered are only semi-finished products which, since the drying cycle has not been completed, are not caseinates. They are well and truly caseinates, lost during the final stage of the production process, which are then reintroduced into the production process — and not just in order to be dried to the desired degree since the material recovered contains impurities, which presuppose genuine reprocessing. This analysis of the EMST production process also allows the Commission to dispute that batches of EMST are made in a day. In its submission, these are batches made up of products made on different dates, which are collected in order to be processed into products eligible, from the point of view of their quality, for aid, an operation which Article 1(3) of Regulation No 2921/90 prohibits.

100. This method is impermissible as it lends itself to speculation, because batches can be prepared at the time when the amount of aid is highest. As regards the absence of objections on its part when the Netherlands Government raised with it the question of the interpretation of the qualifying conditions for aid under the regulation, the Commission categorically disputes that its responses to ambiguous questions may, in good faith, be interpreted as expressing any approval of the production methods for EMST.

101. In its defence, the Commission also observes that the existence of residues, and therefore of losses, during the production process was taken into account in calculating the amount of aid. In its rejoinder, the Commission provides details on this matter, in response to the Netherlands Government which challenged the argument. It explains that the rate of loss taken into account is 5%, which is very generous given that, in modern plants, such as those of the Netherlands business in question, the true percentage is much lower since it does not exceed 2%.

102. The Commission's explanation appears to me to be convincing overall, without its being necessary to enter into the discussion regarding the precise meaning of the word 'made', or regarding the significance to be attached to the correspondence exchanged on the subject of EMST, which the Netherlands Government wishes me to address.

103. Two factors at least convince me. First, I cannot support the Netherlands Government in its contention that residues which are reused in order to make EMST are not caseinates, as it appears to me that, in arguing this, it is playing with words. It is true that those residues are not caseinates with the characteristics required for the grant of aid. However, where Article 1(1) prohibits the production of caseinates eligible for aid from caseinates, it is clearly not directed at caseinates which already display all the characteristics required for the grant of aid, as it really is not evident what purpose there would be in an operation consisting of reprocessing caseinates eligible for aid. What it seeks to prohibit is the use of products which, in themselves, may be considered to be caseinates irrespective of whether they in any way comply with the criteria governing the grant of aid, in order to produce caseinates in respect of which aid is applied for. None the less, that is indeed what happens in the production process for EMST. The reprocessed residues are already caseinates when they are recovered, even if the caseinates do not yet meet the quality standards set out in the regulation because they have not been sufficiently dried.

104. Secondly, it appears to me to be impermissible, once the method for calculating the amount of aid has taken into account the losses rightly considered to be inevitable in the production process, that an undertaking, instead of reducing its losses as far as possible, which it is entirely entitled to do, should be able to do something entirely different, namely recover lost material in order to reintroduce it into the production process in such a way as to avoid any losses. This method of achieving maximum profit goes beyond mere rationalisation of the production process. It infringes the rules set out in the regulation.

105. I therefore conclude that the Netherlands Government is wrong in its challenge to the Commission's decision to reject the expenditure incurred in granting aid for EMST products.

106. Having thus completed the examination of the lawfulness of the Commission's decision as to the substance, that is to say as regards its compliance with the rules governing the grant of aid for caseinates, I am in a position to address the criticisms made by the Netherlands Government concerning the circumstances in which that decision was adopted.

107. Those criticisms are the subject of the second, third and fourth pleas.

The second, third and fourth pleas

Breach of Regulation No 729/70 and of certain general principles

108. The Netherlands Government's second plea alleges infringement of Article 5(2)(c) of Regulation No 729/70, as amended by Council Regulation (EC) No 1287/95 of 22 May 1995 amending Regulation No 729/70 on the financing of the common agricultural policy, [15] and breach of the principle of cooperation in good faith, the principle of consultation and the preventive approach.

109. As the Netherlands Government states, the amendments made to Regulation No 729/70 by Regulation No 1287/95 apply, by virtue of the second subparagraph of Article 2(1) of the latter, only from the financial year commencing on 16 October 1995 and cannot therefore apply to the procedure for the clearance of accounts in the course of which the contested decision was adopted. I will therefore limit myself to examining the conditions under which the contested decision was adopted in the light of the

15 — OJ 1995 L 125, p. 1.

three principles to which the Netherlands Government, maintaining that Regulation No 1287/95 has merely given them concrete expression, makes reference.

110. I observe at the outset that those principles, which are not contested by the Commission, are only a guide for the conduct which the Commission and the Member States must adopt during the procedure for the clearance of accounts and that, before it can be found that they have been breached, a thorough examination must be carried out of the circumstances of the case.

111. As regards cooperation in good faith and consultation, the Netherlands Government alleges, essentially, that the Commission did not alter its position after the conciliation body submitted its report, which was, however, extremely critical of the Commission since it stated that the Commission's line of argument was not entirely clear, that the Commission had not shown that the Member States had to be familiar with its interpretation of Regulation No 2921/90, and that the Commission's position on EMST appeared difficult to understand.

112. The Netherlands Government even ventures to assert that the Commission never took seriously into account that report or the arguments that it had made during the previous exchange of correspondence.

113. In its rejoinder, the Commission expresses its surprise and indignation at that assertion, and I fully understand the Commission. I can only agree with the Commission when it states that it was not in any way required to act on the comments made by the conciliation body. It is one thing to agree to conciliation, that is to say to participate in a process intended to reconcile points of view and to seek a friendly solution which both the Member State and the Commission could endorse, but it is another to give up one's own decision-making power. Accordingly, one cannot infer an offhand attitude to the conciliation process from the fact that the Commission adhered to its initial position.

114. The various exchanges of correspondence indeed contradict the Netherlands Government's claims. The Commission took into account both the Netherlands Government's arguments and the report by the conciliation body, but simply was not persuaded that it should alter its point of view.

115. As regards the preventive approach, the Netherlands Government submits that the Commission did not apply it in that it did not disclose to the Netherlands Government clearly, before or at the very least

during the relevant financial years, the interpretation of Regulation No 2921/90 on which it relies in the contested decision in order to refuse certain expenditure.

116. The Commission replies that the present case did not fall within the scope of that approach and that, in any event, it is wrong to claim that it relied on an interpretation of the regulation of which the Netherlands Government was unaware.

117. So far as concerns AAS, it had, according to the Commission, been clear since the meeting in 1989 referred to above at which a representative of the undertaking in question was present that the Commission interpreted Directive 83/417 as prohibiting the presence of AAS in edible caseinates. So far as concerns EMST, a letter sent to the Netherlands Government in 1992, relating to findings made during an inspection, already mentioned that the reprocessing of caseinate residues collected over several days was improper under Article 1 of Regulation No 2921/90.

118. As regards AAS, the Commission's defence is not absolutely convincing, as it leaves unresolved the question whether the Netherlands Government could not but be aware that products granted aid under Regulation No 2921/90 had to comply with the requirements of Directive 83/417 if they were intended for human consumption. As regards EMST, the Commission's defence is entirely convincing.

119. First, the irregularity penalised in the contested decision is the very irregularity which the Commission observed in 1992, but did not penalise since the undertaking in question at that time, which was not DMV Campina, produced fewer than 1 000 tonnes per year and therefore qualified for the exemption expressly provided for in Article 1(3) of Regulation No 2921/90.

120. Second, it cannot be inferred from the exchange of correspondence that the Netherlands Government produced in Annexes XI, XII and XIII to its application that the Commission gave its unqualified approval to the manufacturing process for EMST.

121. It is true that the Netherlands authorities asked the Commission whether it is possible to reprocess defective products in so far as they have not yet given rise to a refusal to grant aid, but they did not expressly ask whether it is permissible to recover residues, which are inevitable in the manufacturing process, in order to reintroduce them into that process, so they can hardly seek today to interpret the Commission's response as approving that practice.

It should also be noted that the Commission, in its responses, has always stressed the need to observe strictly the conditions laid down by the regulation, in particular as regards the composition of batches in respect of which aid is applied for.

The plea alleging breach of the principle of legal certainty

122. Given what I have set out above, I will deal quickly with the implications of the plea alleging breach of the principle of legal certainty so far as concerns AAS and the link between the regulation and the directive, simply noting that not only can one not claim that the interpretation advocated by the Commission was the most obvious one — in my opinion it was incorrect — but also that the two conflicting proposals to amend Regulation No 2921/90 which the Commission presented and then withdrew in turn did nothing to clarify the situation.

123. As regards EMST, I consider that, contrary to the assertions of the Netherlands Government, the Commission's position has never changed and it is not possible to find that it has committed any breach of the principle of legal certainty. Regulation No 2921/90 is clear, as I believe I have shown above, and nowhere in its letters to the Netherlands Government did the Commission, having regard to the questions to which it replied, provide assurances to the Netherlands Government as regards a right to aid for that type of product.

124. In particular, the Commission never went back on the finding of irregularities which it made in 1992, and while that finding did not lead to a refusal to meet expenditure, it is to be remembered that, as explained in the rejoinder, that was only because the low production tonnage of the undertaking inspected at the time meant that that undertaking qualified for an exemption.

Breach of the duty to state reasons

125. As regards the plea alleging a failure to state reasons, I will begin by recalling the judgment in Case C-28/94, [16] which merely confirms settled case-law, stating:

'82 In the particular context of the preparation of decisions relating to the clearance of accounts, the statement of reasons for a decision must be regarded as sufficient if the Member

16 — *Netherlands* v *Commission* [1999] ECR I-1973.

State to which the decision was addressed was closely involved in the process by which it came about and was aware of the reasons for which the Commission took the view that it should not charge the sum in dispute to the EAGGF (see, *inter alia*, Case C-27/94 *Netherlands* v *Commission* [1998] ECR I-5581, paragraph 36).

83 In the present case, in addition to the explanations in the Summary Report, it is common ground that the Netherlands Government was involved in the process of preparing the contested decision and was thus aware of the reason for which the Commission considered that it should not charge the sum in dispute to the EAGGF. The Netherlands Government itself states that it exchanged voluminous correspondence with the Commission between 1989 and 1993.'

126. The contested decision meets the requirements of Article 190 of the Treaty, as defined more precisely by that judgment amongst others. The Netherlands authorities were closely involved in the preparation of the contested decision. The reasons for which the decision was adopted were set out both in correspondence sent to them by the Commission and in the summary report and were explained to the Netherlands Government in the conciliation procedure. The Commission also explained the data on which it relied in calculating the amount of the correction made, that is to say the figures notified by the Netherlands authorities and by DMV Campina for the financial years 1993 to 1995 and, in the absence of notification, an estimate of EMST production for the financial year 1992.

127. It is true that those reasons did not convince the Netherlands authorities, and have not convinced me in relation to caseinates containing AAS, but that has nothing to do with the existence of a statement of reasons, which is unquestionable in the present case, if, as is legitimate, the decision is placed in the context of its adoption. This last plea must therefore, in my view, be rejected.

128. Bringing together the various conclusions which I have reached on the various pleas submitted by the Netherlands Government, annulment of the contested decision is justified only in so far as it rejects expenditure, in the sum of NLG 32 746 529, corresponding to the aid granted for caseinates containing AAS.

129. That leads me to consider with regard to costs that, since each of the parties has been partly unsuccessful, the Kingdom of the Netherlands and the Commission should each be ordered to bear their own costs, while the French Republic, as intervener, must in any event bear its own costs.

Conclusion

130. Consequently, I propose that the Court should:

— annul the Commission decision of 3 February 1999, notified on 12 February 1999, 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 in so far as it excludes the sum of NLG 32 746 529, concerning caseinates containing AAS, from the financing of expenditure declared by the Kingdom of the Netherlands in respect of aid for the processing of skimmed milk into casein and caseinates;

— dismiss the remainder of the application;

— order the Kingdom of the Netherlands, the Commission and the French Republic each to bear their own costs.