2. Neither Regulations Nos 1282/72, 1717/72 and 2315/76 on the sale of butter by intervention agencies at a reduced price, nor any legislation governing the milk sector generally, define the event by virtue of which the amount involved in this type of transaction becomes due; consequently, for the purpose of determining that event, which dictates the exchange rate to be used for the conversion into national currency of the sale price expressed in units of account, Articles 4 and 6 of Regulation No 1134/68 require reference to be made to the relevant national law.

3. If, during the clearance of the EAGGF accounts for any given financial year, the Commission inserts a reservation as to the manner in which a particular question is to be resolved, it may not thereafter rely on its own interpretation of that reservation unless it was possible for the Member State to construe it in the same way; this could not apply in the case of an ambiguous reservation.

Thus, having reserved itself the right to review a question over which there had been disagreement with a Member State, the Commission could not refuse to review it on the ground that the evidence was produced outside the time-limits prescribed by Community legislation.

OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 23 October 1985

My Lords,

Council Regulation No 729/70 of 21 April 1970 on the financing of the common agricultural policy (Official Journal, English Special Edition 1970 (I), p. 218) provides:

(a) in Article 1 for the Guarantee Section of the European Agricultural Guidance and Guarantee Fund ('EAGGF') to finance refunds on exports to non-Member countries and intervention intended to stabilize the agricultural markets; and

(b) in Article 3 that the Guarantee Section shall finance intervention intended to stabilize the agricultural markets, 'undertaken according to Community rules within the framework of the common organization of agricultural markets'. By Articles 4 and 5 the Commission must make the necessary funds available to designated national authorities and bodies and must clear the accounts submitted by those authorities and bodies.

Detailed rules for the application of Articles 4 and 5 of that Regulation were adopted in Commission Regulation No 1723/72 of 26 July 1972 on making up accounts for the EAGGF, Guarantee Section (Official Journal, English Special Edition, Second Series III, p. 109). Under Article 8 thereof the Commission's decision to clear the

accounts is to cover, *inter alia*, the determination of the amount of expenditure incurred in each Member State during the year in question recognized as chargeable to the EAGGF, Guarantee Section.

Commission Decision 84/202/EEC of 8 February 1984 on the clearance of the accounts presented by the Italian Republic in respect of the EAGGF, Guarantee Section, expenditure for 1978 (Official Journal 1984, L 110, p. 13) *inter alia* disallowed three items:

(1) LIT 12 374 446 850 relating to payments to four Italian fruit and vegetable producers' associations,

(2) LIT 305 825 498 for expenditure in financing the sale of intervention butter at reduced prices on the basis that the wrong dates had been taken for converting into national currency the price in ECUs of such butter, and

(3) LIT 227 433 782 relating back to 1976 and LIT 570 058 890 relating back to 1977 in respect of payments for milk lost or deemed to be lost in the processing of skimmed milk powder into animal feeding stuffs.

By Commission Decision 84/203/EEC of 8 February 1984 on the clearance of the accounts presented by Italy in respect of the EAGGF, Guarantee Section, expenditure for 1979 (Official Journal 1984, L 110, p. 15) the Commission disallowed, *inter alia*, LIT 1 621 239 160 relating to payments to four Italian fruit and vegetable producers' associations.

The disallowance in both cases was made after Italy had been given an opportunity to state its views and for the reasons which are given in the Summary Report for 1978/1979 made by the Commission.

In Case 129/84 and in Case 130/84 Italy asks the Court to annul respectively Decision 84/202 and 84/203 in so far as the Commission refused to accept these particular items as chargeable to the EAGGF, Guarantee Section, and in the alternative to replace the expenditure disallowed by any lesser sum considered appropriate, and to order the Commission to pay the costs. Italy alleges in respect of each of these matters that the Commission has erred. It also alleges excess of power, inadequate statement of reasons and infringement of Articles 1, 3 and 5 of Regulation No 729/70 and Article 8 of Regulation No 1723/72. The Commission takes the point that the grounds other than the specific matters relied on should be ruled inadmissible because they consist of a mere assertion unsupported by argument and consequently do not fulfil the requirements of an application laid down in Article 38 (1) of the Rules of Procedure.

It seems to me that the Italian Government is perfectly entitled to link to its allegations in respect of the detailed items a claim that the Articles of the two Regulations have also been infringed. Those Articles lay down the procedure to be followed by the Guarantee Section and by the Commission. Moreover, the claims that there has been an excess of power and an inadequate statement of reasons are so closely linked to the detailed claims which are made that there has been an error by the Commission that the two should be allowed to stand together.

It seems to me that no valid reason has been shown why the claims made by the Republic of Italy are inadmissible.

I turn then to the questions of substance which are raised.

1. Payments to Fruit and Vegetable Producers' Associations

Council Regulation No 1035/72 of 18 May 1972 on the common organization of the market in fruit and vegetables (Official Journal, English Special Edition 1972 (II), p. 437), provides, *inter alia*:

'13. For the purposes of this Regulation, "producers' organization" means any organization of fruit and vegetable producers which is established on the producers' own initiative for the purpose, in particular:

(i) of promoting the concentration of supply and the regularisation of prices at the producer stage in respect of one or more of the products referred to in Article 1;

(ii) of making suitable technical means available to producer members for presenting and marketing the relevant products;

which requires it(s members):

(iii) to sell their total output of the product or products by reason of which they have become members through the organization; the organization may, however, waive this requirement in respect of certain quantities;

(iv) to apply, with regard to production and marketing, rules which have been adopted by the producers' organization with a view to improving product quality and adapting the volume of supply to market requirements.'

Under Article 14 (1), Member States may grant aid to producers' organizations up to a specified amount, during the three years following the date following which they are established, to encourage their formation and to facilitate their operation, provided that the organizations furnish adequate guarantees as regards the duration and effectiveness of their activities.

Article 15 provides for the producers' associations to take measures for the purpose of withdrawing their members' products from the market, and requires them to set up an intervention fund to finance such measures. By Article 18 (1) Member States are to grant financial compensation to producers' organizations which intervene pursuant to the provisions of Article 15, subject to the limits provided. Article 18 (2) provides that the value of the financial compensation paid by the Member States shall be equal to the indemnities paid by the producers' organizations, less net receipts from products withdrawn from the market.

Thus Articles 15 and 18 provide for the financing of market intervention by producers' associations, whereas Article 14 provides for start-up aid to such organizations.

Italian law No 622 of 27 July 1967 as amended and its implementing regulation of 1968 as amended, make provision for producers' organizations to be recognized by the Italian Minister of Agriculture and Forestry and put on a national list.

Pursuant to these provisions, the Associazione di zona fra produttori ortofrutticoli delle provincie di Matera e Potenza ('Assozona-Matera'), the Associazione di

zona fra produttori di agrumi delle provincie di Catanzaro, Cosenza e Reggio Calabria ('Assozona-Cosenza'), the Associazione interprovinciale produttori agrumicoli ed ortofrutticoli 'AIPAO' based in Catania ('AIPAO-Catania') and the Associazione Consorzio provinciale cooperative agricole 'ETNA' based in Catania ('ETNA-Catania'), were respectively put on the national list by Ministerial Decrees dated 21 July 1970, 18 March 1972, 2 December 1974 and 12 January 1977.

From 30 January to 6 February 1978 a number of Commission officials went on an information visit to Italy in order to examine the operation of some of the Italian fruit and vegetable producers' organizations. That visit gave the Commission the impression that the Community rules relating to those organizations were not always correctly applied in Italy, and by a letter of 3 July 1978 the Commission requested the Italian Government, pursuant to Article 9 (2) of Regulation No 729/70, to carry out an inspection of the operation of all fruit and vegetable producers' organizations recognized under law No 622 and to send it a report of its findings on each of the organizations included on the national list. The Commission listed the specific points on which it wanted the inspection to concentrate, and invited the Italian authorities, after carrying out the inspections requested, to draw up a list of the producers' organizations which did not comply with the Community rules and whose recognition was to be withdrawn. The Commission concluded its letter with the statement: 'Moreover, the Commission wishes to remind you that any start-up aid or financial compensation for withdrawals granted to a producers' organization which does not fulfil the above conditions is contrary to Community law'.

It appears that in 1979 Commission officials, accompanied by Italian officials, inspected amongst other associations two of the four associations in issue here. These inspections revealed, for Assozona-Matera, that there was almost no operation or administrative organization, that there was no concentration of supply and that only a small proportion of the produce was sold through the association. For AIPAO-Catania, they revealed that concentration of supply had just begun, and that most members marketed their produce for themselves.

By a letter of 27 May 1980, the Italian Ministry of Agriculture and Forestry sent the Commission the results of its inspections. It found that the majority of the associations had defects regarding the basic criteria on rationalization of marketing activities, but it expressed the view that most of the associations had begun to comply with the aims of the Community rules and could be expected within a short time to achieve full compliance with those rules. However, it said, doubts existed as to the possibility for five of the associations to adapt themselves to the Community rules. Those five included the four associations just mentioned and the Associazione di produttori ortofrutticoli-Brindisi. 'For these associations', said the letter, 'there were malfunctions due to functional shortcomings as regards rationalization of marketing; in particular, it should be pointed out that the organizations in question are not capable of showing that they control all the production marketed by their members'. The Italian Government proposed not to withdraw recognition from these associations straight away, but to keep them under inspection pending a definitive decision. On 29 May 1980 the Minister wrote to each of the four associations to which the present cases

relate inviting them to regularise their functioning in accordance with the rules in force. Those letters, it appears, were never replied to.

By a letter of 15 September 1980 the Italian Ministry of Agriculture sent the Commission its final report on its enquiry into the operation of fruit and vegetable producers' organizations in Italy. On the basis of that letter and that report, along with information acquired by its own officials on visits to Italy, the Commission by a letter of 11 November 1980 classified the 82 producers' organizations on the national list in three categories, and stipulated the measures to be taken for each category: 59 were considered to comply with the Community rules; 16 presented structural and operational shortcomings capable of being eliminated within a short time; this category was to be subjected to a period of observation up to 31 December 1981 at the latest.

Finally, seven organizations were considered not to comply with Community legislation. They included the four organizations in issue in the present cases. In relation to this category, the Commission considered that 'the national authorities must take all the measures which flow from these organizations' failure to comply with the provisions of Regulation (EEC) No 1035/72. In particular, no start-up aid or financial compensation may be paid under the aforementioned Regulation. The finanancial compensation paid from 1973 and the start-up aid paid from 1976 are not chargeable to the EAGGF'. Nevertheless the last paragraph of the letter stated that these measures could be reexamined by the Commission in the light of subsequent information which the Italian authorities would deem necessary to supply to the Commission.

On 16 June 1981 the Italian Ministry of Agriculture sent the Commission a telex informing it of the Italian Government's decision to withdraw the recognition of the associations ETNA-Catania, Assozona-Matera and Assozona-Cosenza. 'Consequently', added the telex, 'the appropriate procedures have been undertaken'. The telex went on: 'As regards AIPAO-Catania, inspections carried out have shown operation in accordance with the Community rules. Therefore we think that subsequent, joint, on-the-spot inspection would be opportune'. It is to be noted that by this telex Italy simply informed the Commission that recognition was to be withdrawn from the first three organizations: it did not ask for any further examination of their situation. It was only in relation to AIPAO-Catania that Italy requested further inspection. At the hearing, the agent for the Commission said that the Commission responded by telex on 29 June 1981 stating that since the position of the AIPAO was well known there was no need to go and look at it on the spot again. In other words the Commission's services reaffirmed their negative judgment in relation to AIPAO.

By a letter of 22 July 1981 (which made no reference to this exchange of telexes) the Commission informed the Italian authorities that it had arrived at the following conclusions: out of the 82 fruit and vegetable producers' organizations, 61 were operating in accordance with the Community rules and their expenses therefore qualified for Community financing

as provided by the Community legislation; 17 organizations would be subjected to particular supervision by the Italian authorities up to 31 December 1981, when a definitive decision would be taken as to whether they complied with Community rules; and the operation of four producers' organizations was not in accordance with the Community provisions and therefore the sums paid in their favour could not be taken into consideration for Community financing.

By a Ministerial Decree of 25 July 1981 the Italian Minister of Agriculture and Forestry struck ETNA-Catania off the list of recognized producers' organizations. By Ministerial Decrees of 10 September 1982 the Minister struck off that list the other three producers' associations in issue here.

The final position is summed up in the Commission's Summary Report for 1978-79, in the following terms:

'When the 1973 to 1977 accounts were cleared, the Commission expressed reservations as to the eligibility of certain types of expenditure incurred in connection with the withdrawal of fruit and vegetables in France and Italy, pending the outcome of an enquiry in hand covering the operation of the producers' organizations in the two Member States and their compatibility with Regulation No 1035/72. The examination of the results of the enquiry carried out in Italy has now been completed ...

It is recalled that financial compensation for withdrawals from the market — financed by the EAGGF Guarantee Section — can, under Article 18, be paid only to organizations operating under Articles 13 *et seq.* and on condition that the withdrawals are carried out in accordance with the arrangements established by the Regulation.

...

It has been concluded that in Italy, of the 82 producers' organizations covered by the enquiry, four organizations were not operating in accordance with Community regulations and the Italian authorities decided to withdraw recognition from them. The financial compensation paid to these four organizations can therefore not be charged to the EAGGF.

For expenditure incurred over the 1973 to 1978 period, the amount is LIT 12 374 446 850 which is to be disallowed for Community financing under the 1978 clearance (at issue in Case 129/84).

For expenditure incurred in 1979, the amount is LIT 1 621 239 160 which is to be disallowed for Community financing under the 1979 clearance (at issue in Case 130/84).

The amounts paid after 1979 to these four organizations will be disallowed under the clearances of the years during which the financial compensation is paid.

The Italian authorities take the view that until such time as it had been finally established that the four organizations were not operating properly (i.e. July 1981), it may be presumed that they were empowered to carry out their official duties pending the final decision to withdraw recognition.

The Italian authorities argue that neither the legality of the operations nor the charging to the EAGGF of the expenditure relating to financial compensation provided for in Regulation No 1035/72 can be challenged *ex post.*

The Commission's staff disagree: the Member States have an obligation, whenever a Community aid is paid, to verify beforehand that the beneficiary has fulfilled the conditions required for payment. The enquiry has shown that the four organizations have never been entitled to the aid.'

The dispute in this case is not concerned with start-up aid but with whether the four associations referred to complied with Article 13 of Regulation No 1035/72 so as to be eligible to receive payments under Article 18 in respect of withdrawals made.

Italy maintains that this expenditure incurred by the four associations should be charged to the EAGGF for the period from 1973 to the time when their recognition was withdrawn or at least up to the Commission's final statement on 22 July 1981. It makes three main submissions to that effect.

First of all Italy submits that the four associations at issue did satisfy the requirements of Article 13 of Regulation No 1035/72.

This must largely be a question of fact for the Commission unless it can be shown that one of the grounds referred to in Article 173 of the EEC Treaty is established.

The Italian Government argues that the Commission's first findings were based on the subsequently abandoned presumption that the associations should have concentrated supply of their members' products and marketed those products in their own name and on their own account. Once the Italian view is accepted that sale may be carried out by producers according to conditions laid down by the association, even the four associations in issue should have been considered as complying with Article 13, like all the others. The Commission contends that this misrepresents its position: it has always considered that the concentration of supply by the associations was only one element enabling an assessment to be made of whether the associations were controlling the production of their members; its allegation that the activity of the four associations in issue was unlawful is based on much broader grounds.

I accept the Commission's account of its position and do not consider that there was any misdirection on this matter.

Italy relies on a report dated 16 December 1980 made by the Italian Ministry of Agriculture and Forestry. It is important to bear in mind that this was not shown to the Commission at the time, nor referred to in the Ministry's letter to the Commission dated 27 December 1980, nor indeed produced until it was annexed to the Reply in the present proceedings. It cannot, therefore, be relied on as being material which the Commission should have taken into account in its Decision and which it wrongly failed to do so.

In any event it seems to me that the conclusion of the report ('we would say that all four associations in question are operating in full compliance with the Community rules and an inspection by the officials of the EEC should therefore enable all the reservations formulated up to now to

be put aside') hardly seems to be borne out by the contents.

Both ETNA-Catania and AIPAO-Catania were said to have large numbers of members (including for ETNA 376 and for AIPAO 4 200 natural persons). The Commission's letter of 3 July 1978 had already stressed that a large number of individual members spread over extensive regions made it likely that the organization to which they belonged would not be able to comply with Article 13 of Regulation No 1035/72. Even at the date of the report in December 1980, ETNA-Catania was only planning to reduce its membership radically and AIPAO was merely planning to do so by half. They had not yet done so.

According to the report, ETNA-Catania admitted its administrative and organizational shortcomings but said that its governing board had discussed restructuring the organization in order to bring it into line with national and Community legislation. A first step had been taken by electing a new president but nothing else had been done.

The report states that AIPAO-Catania had been most active in relation to the production phase in the form of technical advice and aid for the purchase of fertilizer and plant-care products at reduced prices, and had organized and participated in exhibitions in order to promote the products of its members. The association sold produce both directly and through its members, though the report does not state in what proportions. In relation to sales through the members of AIPAO, the association, whilst continuing to give instructions for sale first orally then in writing, acquired and registered the sales invoices of the members and checked that they complied with the instructions given. It continues: 'Only at the end of the marketing year will it be possible to verify whether all the production has been treated or not; however, after observing the activities of the association in operation, it may be concluded that any shortcomings can only concern the documentary part and certainly not the activity itself which appears fully in compliance with the rules.' The report does not deal with the question as to whether, with a membership exceeding 4 000, oral instructions to the members as to how they should dispose of their produce was capable of providing an adequate degree of control.

Assozona-Matera and Assozona-Cosenza, were dealt with together in the report. They were still mainly using the marketing system of sale 'through the intermediary', that is to say sale by the members themselves. To control those sales, instructions were given orally and no written trace of those instructions was kept. The officials of the associations checked whether the instructions had been complied with by inspecting the sales invoices at the members' place of business. The report goes on to state that a system was being prepared which would provide a written record of the date when the sales instructions were given and which would allow copies of the sales invoices to be obtained and registered.

So much of what is relied on in the report is provisional even at this time and it is to be borne in mind that the two sets of accounts were for 1978 and 1979.

It does not seem to me that there was other contemporaneous evidence before the Commission which any reasonable body must have regarded as showing that the four

associations did satisfy Article 13 in respect of those years. On the contrary there was ample evidence from which the Commission could conclude that they did not do so. Thus the inspection in 1979 showed that the concentration of supply was either non-existent or only just beginning. The Italian Government's report on 27 May 1980 singled out these four associations and said that it was doubtful whether they could adapt to satisfy Community rules. They worked badly because of functional shortcomings and the organizations appeared incapable of controlling the produce marketed by their members. The letter which the associations received from the Italian authorities of 29 May 1980 received no reply which is surprising if steps had been taken. The Italian Government's telex of 16 June 1981 does not claim that the three associations other than AIPAO-Catania fulfilled the requirements of Community law. It merely says that their recognition was to be withdrawn. The telex does on the other hand assert that AIPAO-Catania was operating in accordance with the Community rules though it gives no evidence of changes made, even those referred to in the report of 16 December 1980, which was not of course sent to the Commission.

I am not satisfied that there is any valid reason why the Commission should have looked again at the three associations other than AIPAO-Catania in the light of the earlier evidence. The fact that time was given to others who were considered to be capable of putting their house in order does not require such a course in respect of organizations which appeared wholly incapable of doing so.

In respect of AIPAO-Catania there is the additional fact that Italy expressed the view, in the telex, that this association was in 1981 in compliance. If this association had from the beginning been a borderline case I would have considered that the Commission should have investigated it again. It was not, however, such a case — all the earlier evidence suggested that it was not complying and would not be able to comply with Article 13 of the Regulation and the Commission had at all times made it plain that no monies would be paid to an association which did not qualify. In my view, although it would have been better if the Commission had asked Italy for details of the bare assertion in the telex of 16 June 1981, the real initiative to give evidence of compliance with Article 13 rested with the association and with the Italian authorities. If further evidence had been sent, I have do doubt that the Commission would have considered it. However, in the light all the circumstances, and in particular the history of events which had taken place, I do not consider that the Commission acted unreasonably or unlawfully in proceeding on the basis that it had not been shown by AIPAO or Italy that AIPAO Catania complied with Article 13, and in not itself asking for further evidence. The risk which existed if it was not shown that AIPAO-Catania complied with Article 13 was well known and it seems to me that if further evidence existed it was the task of Italy to collect it and put it forward.

I therefore reject the contention that the Commission erred in law or procedurally in disallowing the payments to the four producers' associations in respect of the years in question.

The Italian Government's second main submission is that the withdrawal of recognition from a producers' association operates only for the future and not retro-

spectively. It submits that as long as the recognition of an association remains in force and the association carries out transactions complying with Community objectives, the association cannot be refused payment of the sums corresponding to those transactions. The Commission replies that the Community cannot be bound by a Member State's decision to recognize a non-qualifying association; it must only pay what lawfully is due unless the Community institutions themselves have been responsible for an incorrect application of Community law (Case 11/76 *Netherlands* v *Commission* [1979] ECR 245).

Under Articles 15 and 18 of Regulation No 1035/72, financial compensation for withdrawal transactions has to paid only to producers' organizations as defined in Article 13 of the same Regulation. If the Commission was entitled to conclude, as I think that it was, that the four associations in question never fulfilled the requirements of Article 13, then their recognition was void from the outset. It was a mistake of the Member State concerned, which therefore has to bear the financial consequences: Article 3 of Regulation No 729/70 and the third sub-paragraph of paragraph 8 of the judgment of the Court in Case 11/76 *Netherlands* v *Commission* at p. 279.

Thirdly, the Italian Government submits that in any event the deductions cannot go back to 1973, as the Commission proposes, but only:

(1) to the time when the four associations' failure to fulfil the conditions was definitively established (by the Commission's letter of 22 July 1981);

or

(2) was provisionally established (by the Commission's letter of 11 November 1980);

or

(3) in the further alternative, to the period prior to the beginning of the inspections (initiated by the Commission's letter of 3 July 1978).

Again, if the Commission was entitled to conclude that the four associations in question never fulfilled the requirements of a producers' organization under Article 13 of Regulation No 1035/72, there was at no time any legal basis on which their expenditure could legitimately be charged to the EAGGF: Article 3 of Regulation No 729/70 and the third sub-paragraph of paragraph 8 of the judgment in Case 11/76, cited above. This position is not affected by the occurrence of the three events contended for by the Italian Government. I therefore reject its third submission.

It follows in my view that the application in Case 130/84 must be rejected in its entirety, and that the application in Case 129/84 must be rejected in so far as it concerns the payments to the four fruit and vegetable producers' associations concerned.

2. Date for the Conversion into National Currency of the Price of Intervention Butter

Commission Regulation No 1282/72 of 21 June 1972 on the sale of butter at a reduced price to the army and similar forces (Official Journal, English Special Edition 1972 (II), p. 575) provides for butter taken into intervention storage to be sold at a reduced price to the armies and similar forces of the Member States. The Regulation makes no requirement for a security to be lodged, but does require that the

butter shall be taken over within six months from the conclusion of the contract.

Commission Regulation No 1717/72 of 8 August 1972 on the sale of butter at a reduced price to non-profit-making institutions and organizations (Official Journal, English Special Edition 1972 (III), p. 849) provides for butter taken into intervention storage to be sold at a reduced price to non-profit-making institutions and organizations for consumption within the Community. Article 6 of the Regulation provides for a deposit to be lodged where the butter is bought by an intermediary, where the quantity bought exceeds five metric tons or where the institution or organization concerned is located in a Member State other than the seller Member State. There is no stipulation as to how soon after the contract date the butter must be taken over.

Commission Regulation No 2315/76 of 24 September 1976 on the sale of butter from public stocks (Official Journal 1976, L 261, p. 12) provides for butter which has been held in intervention store for six months or more to be sold at reduced prices to any person wishing to purchase. By Article 2 the butter is to be sold in quantities of not less than five metric tons and in all cases a security must be lodged on or before conclusion of the contract of sale; by Article 3 the purchaser is to take delivery of the butter within one month from the date of conclusion of the contract of sale, failing which the contract shall be terminated and the security forfeit. Article 3 also provides that before taking delivery of any quantity of butter the purchaser shall pay to the intervention agency the purchase price thereof.

All three Regulations express the price of the butter in units of account. None of them contains any express provision as to the date which is relevant for deciding the exchange rate to be used in converting the price of the butter from units of account into national currency.

In converting into its national currency the price in units of account of butter which it sold pursuant to the Regulations in the 1978 marketing year, Italy applied the rate in force at the date when the contract of sale was concluded. The Commission, however, took the view that the exchange rate used should have been that prevailing on the day when the buyer took over the butter. By reason of a variation in the exchange rate during 1978, application of the date chosen by the Italian authorities resulted in greater costs than the date favoured by the Commission. The Commission therefore refused to charge to the EAGGF the extra amount resulting from the application of the date used by the Italian authorities, namely LIT 305 825 498.

Articles 4 (2) and 6 of Council Regulation No 1134/68 of 30 July 1968 lay down rules for the implementation of Regulation No 653/68 on conditions for alterations to the value of the unit of account used for the common agricultural policy (Official Journal, English Special Edition 1968 (II), p. 396).

'4 (2) For transactions carried out pursuant to provisions on the common agricultural policy or special trade systems for goods processed from agricultural products, the sums owed to or by a Member State or a duly authorized body, expressed in national currency and representing amounts fixed in those provisions in units of account, shall be paid on the basis of the relationship between the unit of account and the national

currency which obtained at the time when the transaction or part transaction was carried out.

...

6 For the purposes of this Regulation, the time when a transaction is carried out shall be considered as being the date on which occurs the event, as defined by Community rules or, in the absence of and pending the adoption of such rules, by the rules of the Member State concerned, in which the amount involved in the transaction becomes due and payable.'

Thus the 'date on which occurs the event in which the amount involved in the transaction becomes due and payable' is defined by the rules of the Member State concerned unless and until Community rules are adopted to define it. The question therefore arises whether there are any such Community rules. The Commission appears to suggest that there are. It argues that Regulations Nos 1282/72, 1717/72 and 2315/76 set up an autonomous system for contracts for the sale of butter at reduced prices; under that system the buyer can repudiate the contract at any time until he has paid the price, without losing his security under Regulations Nos 1282/72 and 1717/72 or on pain of losing his security under Regulation No 2315/76. The Commission argues that, because the contract can be repudiated in this way, mere conclusion of the contract of sale cannot be regarded as the 'event in which the amount involved in the transaction becomes due and payable' for the purposes of Article 6 of Regulation No 1134/68. For the Commission, that event is the takeover of the butter by the purchaser, which in its turn presupposes the payment of the price, because it is only at that point that the sale becomes final.

To adopt the date when the butter is taken over provides an element of certainty. The first question, however, is whether Regulations Nos 1282/72, 1717/72 and 2315/76 contain any provisions stipulating which date should be used for the purpose of converting the price of butter from ECU's into national currency. I do not find that they contain any such provision, either expressly or by implication.

The Commission also points out that in March 1977, in the Management Committee for Milk Products, the Commission had stated its view that the relevant date in the case of intervention transactions was the date when the transaction achieved its economic objective, that is to say the date on which the product was taken over. This statement by the Commission was subsequently confirmed by letters or telexes to all Member States. The Commission maintains that from March 1977 onwards no uncertainty remained about this point. It may well be that the Member States were in no doubt as to what the Commission's opinion was, but the fact remains that it is only an opinion. In my view, the expression of an opinion by the Commission in a Management Committee does not amount to a 'Community rule' for the purposes of Article 6 of Regulation No 1134/68.

It seems to me, in the present state of Community legislation, that there are no 'Community rules' defining the relevant date for the purposes of Article 6. It follows that reference must be made to 'the rules of the Member State concerned' in order to define the relevant date for the purposes of that Article.

The Italian Government has stated in its pleadings that application of the exchange rate obtaining on the date of the conclusion of the contract is a practice which is in accordance with Italian law. The Commission has not denied its statement. It appears therefore that Italy has applied the

date defined by its national rules, as it is required to do in the present state of Community law by Article 6 of Regulation No 1134/68. It follows that its expenditure on reduced-price sales of butter in the 1978 marketing year was properly incurred, and that the Commission's decision must therefore be annulled to the extent to which it refuses to charge that expenditure to the EAGGF.

The Italian Government also argues that the application of the exchange rate prevailing at the date of conclusion of the contract corresponds to a general principle which finds specific expression in Article 8 of Commission Regulation No 2182/77 of 30 September 1977 laying down detailed rules for the sale of frozen beef from intervention stocks for processing in the Community and amending Regulation No 1687/76 (Official Journal 1977, L 251, p. 60), which provides: 'The date of the event within the meaning of Article 6 of Regulation No 1134/68, in which ... the selling price become(s) due and payable, shall be regarded as that on which the contract of sale is concluded'. The Commission argues that there is no reason to consider Article 8 of Regulation No 2182/77 as the expression of a general principle; and it points to a number of respects in which the rules for disposing of frozen beef from intervention stocks differ from the rules concerning the disposal of butter from intervention stocks. One of the differences is said to be that under Regulation No 2182/77 the operator must lodge a substantial security; but it may be noted that under Regulations Nos 1717/72 and 2315/76, concerning butter, security also has to be lodged.

However great or small the differences may be between the beef and butter sectors, the fact remains that they are different sectors. It is not necessary to decide whether Article 8 of Regulation No 2182/77 in the beef sector should be transposed to the butter sector. The salient fact is that no Community provision has yet been adopted in the butter sector, from which it follows, pursuant to Article 6 of Regulation No 1134/68 that reference must be made to the national rules of the Member State concerned, with the result outlined above, that Italy is entitled to succeed on this part of its claim.

3. Losses in processing skimmed milk powder into feeding-stuffs

Article 1 of Commission Regulation No 990/72 of 15 May 1972 on detailed rules for granting aid for skimmed milk processed into compound feeding-stuffs and for skimmed milk powder for use as feed (Official Journal, English Special Edition 1972 (II), p. 428) provides: 'Aid shall be granted for skimmed milk powder which has ... been used in the manufacture of compound feeding-stuffs' as defined in Article 4 of the Regulation.

The third recital to Regulation No 990/72 states that, 'it should be ensured that the skimmed milk and skimmed milk powder for which aid is granted are in fact used as feed'. Article 2 (5) of Council Regulation No 986/68 of 15 July 1968 laying down general rules for granting aid for skimmed milk and skimmed milk powder for use as feed (Official Journal, English Special Edition 1968 (I), p. 260), as amended by Council Regulation No 1038/72 (Official Journal, English Special Edition 1972 (II), p. 456) provides: 'Any product referred to in paragraph 1 in respect of which aid is granted may be used only as feed'. *Inter alia* in the light of these provisions, Article 1 of

Regulation No 990/72 must be read as meaning that only the skimmed milk powder actually converted into compound feeding-stuffs is eligible for Community aid; the excess, which although intended for such production and 'used' in the process of manufacture has disappeared, cannot be considered to have been converted (Mrs Advocate General Rozès in Case 61/82 and Case 62/82 *Italy* v *Commission* [1983] ECR at pp. 679 to 680; judgment at paragraphs 11 and 12 in Case 61/82 and paragraphs 4 and 5 in Case 62/82 (1983) ECR 655 at p. 671 and 687 at p. 703).

Thus losses of skimmed milk powder in the manufacture of feeding-stuffs do not qualify for Community aid. If a Member State pays out aid for such losses, it must bear that expenditure itself and cannot pass it on to the EAGGF. When the Commission examines the Member State's accounts, it must deduct any aid granted for such losses from amounts chargeable to the EAGGF.

For 1974 and 1975 the Italian intervention agency paid aid not only for skimmed milk powder actually used but also for skimmed milk powder lost in processing in so far as such losses did not exceed 2%, on the basis that such an increase had always been granted in Italy. In clearing the accounts, the Commission reduced the expenditure declared by Italy in respect of Regulation No 990/72 by an amount corresponding to 2%.

In Case 61/82 concerning 1974, and Case 62/82 concerning 1975, Italy contested that deduction, but the Court dismissed its claims. Processing losses are not chargeable to the EAGGF. In the alternative, the Italian Government claimed that the Commission could not reduce the expenditure in question by the maximum rate of 2% provided by the Italian rules but only by the amount corresponding to the average rate of actual waste in respect of which aid had been paid, which it estimated at 1%. The Court held (at paragraphs 14 and 15 of the decision in Case 61/82 and paragraphs 7 and 8 of the decision in Case 62/82):

'As evidence the Italian Government submitted to the Court a table which, however, related to only 25% of the total quantity of milk powder processed into animal feed in Italy during the years 1974 and 1975. In relation to that quantity the average loss amounted to 1.745% in 1974 and 1.464% in 1975.

In those circumstances it has not been established that of the total quantity which had been processed the percentage of actual waste differed to any appreciable degree from the maximum rate of 2% which was laid down by the Italian rules and which the Commission adopted as a basis at the time of clearance'.

As I read it, this passage means that where the Commission is deducting national aid granted for losses, the deduction should *prima facie* be the actual amount of aid granted by the national authorities for the losses, but that if this actual amount cannot be proved then the Commission is entitled to apply a flat-rate deduction corresponding to the maximum flat rate fixed by national law for granting the aid. For 1974 and 1975 the Court considered that there was no appreciable difference between the actual

figures proved in evidence and the flat rate and accordingly it upheld the Commission's decision to apply a flat rate of 2% in calculating the deduction which it made from the Italian expenditure chargeable to the EAGGF for 1974 and 1975.

Case 61/82 and Case 62/82 were still pending before the Court when the accounts for 1976 and 1977 were audited. By a telex of 10 September 1979 the Commission requested the Italian authorities to send evidence of actual losses in those years. The Italian authorities did not do so. Since the Italian authorities failed to provide evidence of the actual losses in those years, the Commission again made a flat-rate deduction of 2% from the expenditure in question for 1976 and 1977. However, according to the Summary Report for 1976 and 1977, 'the decision to deduct the above amounts in respect of Italy is provisional: the Commission will reconsider its position in the light of the judgment given by the Court of Justice'. This was reflected in the recitals to the Commission decisions on the clearance of accounts for 1976 and 1977 (Decision 83/37, Official Journal 1983, L 38, p. 30, and Decision 83/48, Official Journal 1983, L 40, p. 55), where these deductions were included with others 'on which no final decision can be taken in the course of this clearance operation because an additional investigation is first necessary; ... it may be possible to recognize this amount when the accounts for 1978 are cleared'.

Following the judgments of the Court in Case 61/82 and Case 62/82 on 15 March 1983, the Italian authorities sent the Commission on 26 April 1983, while the accounts for 1978 and 1979 were being audited, a detailed table showing the actual losses as being 1.53% for 1976, 1.15% for 1977, 0.58% for 1978 and 0.73% for 1979. The Commission accepted these percentages as applicable to the declared expenditure for 1978 and 1979, and based the reduction of declared expenditure in respect of aid for processing skimmed milk powder on the percentage of actual loss stated by the Italian Government.

For 1976 and 1977, however, the Commission maintained the deduction of expenditure at the flat rate of 2%. According to the Summary Report for 1978 and 1979, the Commission took the view that it could not do more than the Court ruling permitted and that it was unable to go back on its earlier decisions formally closing accounts. The Summary Report added that the right to reserve a possible reexamination, entered in the decisions for 1976 and 1977, had been made with a view to avoiding an additional appeal for those financial years and not to allow an additional period for presentation of evidence by Italy. To be recognized in the framework of the clearance of those financial years, such evidence should have been introduced before the clearance decision was taken by the Commission. Its presentation at the end of April 1983 was late and could not give rise to any modification of the decision taken by the Commission.

It is this decision which is contested by the Italian Government. The Government maintains that only the actual losses can be disallowed against the EAGGF. It points to the fact that the Commission accepted that view for 1978 and 1979. It interprets the Court's judgments of 15 March 1983 as supporting that view. It says that in the decisions on the clearance of the accounts for 1976 and 1977 the Commission reserved the whole question pending a decision by

the Court and contends that in those circumstances the Commission cannot maintain that the previous provisional decisions are final in the sense that they no longer permit the submission of evidence for those years.

The Commission remains of the view that after it has taken a decision closing the accounts for a particular year, it is too late for a Member State to put in evidence of losses in that year. Italy refused to prove its actual losses in time, therefore it can no longer claim them. The reservation which the Commission made on clearing the accounts for 1976 and 1977 only meant that it would reconsider its position if it lost the action; but since the Court upheld the Commission's approach, it was under no obligation to review its decisions in the light of fresh evidence of actual losses.

In principle, a Member State must supply evidence of its actual losses if it wants the Commission to take actual losses into account; otherwise, according to the Court's decisions in Case 61/82 and Case 62/82 as I read them, the Commission may be entitled to apply a flat rate. Italy should therefore have sent the Commission the evidence of its actual losses for 1976 and 1977 when the Commission requested it to do so, accompanied if it saw fit by an express reservation that it was without prejudice to the rights which Italy was claiming in Cases 61/82 and 62/82 then pending.

On the other hand, the legal position had not yet been clarified by the judgments in Cases 61/82 and 62/82. I read the reservation in the Summary Report for 1976 and 1977 along with the recitals in Decisions 83/37 and 83/48 on the clearance of the accounts for 1976 and 1977 in the sense that the accounts were not finally closed. It was open to the Commission to review the matter. In my opinion fairness required that this should have been done in the light of the Italian Government's evidence.

Accordingly, in my opinion, the definitive deduction in Decision 84/202 should be annulled to the extent of the difference between the flat-rate figure applied by the Commission and the percentages alleged to represent the actual losses for 1976 and 1977, that is a difference of LIT 227 433 782 for 1976 and LIT 570 058 890 for 1977. This would not mean that those amounts would thereupon become payable to Italy. The Commisison has so far neither accepted nor rejected Italy's figures: it has not yet considered them. Pursuant to Article 176 of the EEC Treaty, such a partial annulment would require the Commission to take a fresh decision on the deductions to be made.

Accordingly, I am of the opinion that in Case 129/84 the Court should annul Commission Decision 84/202 in so far as it refuses to recognize as chargeable to the EAGGF (1) LIT 305 825 498 in respect of sales of butter from intervention stocks at reduced prices in the 1978 marketing year and (2) LIT 227 433 782 relating to 1976 and LIT 570 058 890 relating to 1977 in respect of losses in processing skimmed milk powder into animal feeding-stuffs. For the rest, the

application should be dismissed. Each party having succeeded on some and failed on other heads, the parties should be ordered to bear their own costs pursuant to Article 69 (3) of the Rules of Procedure.

In Case 130/84 I am of the opinion, for the reasons given above, that the Court should dismiss the application in its entirety and hence should order the Italian Republic to pay the costs pursuant to Article 69 (2) of the Rules of Procedure.