JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
23 November 2004 *

In Case T-166/98,

Cantina sociale di Dolianova Soc. coop. rl, established at Dolianova (Italy),

Cantina Trexenta Soc. coop. rl, established at Senorbì (Italy),

Cantina sociale Marmilla — Unione viticoltori associati Soc. coop. rl, established at Sanluri (Italy),

Cantina sociale S. Maria La Palma Soc. coop. rl, established at Santa Maria La Palma (Italy),

Cantina sociale del Vermentino Soc. coop. rl Monti-Sassari, established at Monti (Italy),

represented by C. Dore and G. Dore, lawyers, with an address for service in Luxembourg,

applicants,

* Language of the case: Italian.

Commission of the European Communities, represented initially by F. Ruggeri Laderchi and A. Alves Vieira, and subsequently by A. Alves Vieira and L. Visaggio, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment under Articles 173 and/or 175 of the EC Treaty (now, following amendment as appropriate, Articles 230 EC and 232 EC) of the Commission's letter of 31 July 1998 containing a refusal to pay direct to the applicants aid for preventive distillation in respect of the 1982/83 wine year and for a declaration establishing that the Commission unlawfully failed to act, or, in the alternative, under Article 178 of the EC Treaty (now Article 235 EC), for compensation for the damage allegedly sustained by the applicants due to the conduct of the Commission,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Second Chamber),

composed of: J. Pirrung, President, A.W.H. Meij and N.J. Forwood, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearings on 14 September 2000 and 10 February 2004,

gives the following

Judgment

Legal background

1 Article 11(1) of Council Regulation (EEC) No 337/79 of 5 February 1979 on the common organisation of the market in wine (OJ 1979 L 54, p. 1), as amended by Council Regulation (EEC) No 2144/82 of 27 July 1982 (OJ 1982 L 227, p. 1), provides that preventive distillation of table wines and wines suitable for yielding table wine may take place each wine year.

2 The sixth recital in the preamble to Regulation No 2144/82 states that with a view to improving incomes of the producers involved, it is appropriate to ensure that, under certain conditions, they receive a guaranteed minimum price for table wine and, to this end, the possibility should be provided for the producer to deliver table wine from his own production for distillation at the guaranteed minimum price or to make use of any other appropriate measure to be decided upon.

3 On 15 September 1982 the Commission adopted Regulation (EEC) No 2499/82 laying down provisions concerning preventive distillation for the 1982/83 wine year (OJ 1982 L 267, p. 16).

4 Article 1(1) of that regulation provides that producers wishing to have their wines distilled under Article 11 of Regulation No 337/79 must conclude supply contracts with an approved distiller and submit them to the national intervention agency. Article 1(3) of that regulation, as amended, states that those contracts are not valid under that regulation unless they were approved by the intervention agency of the Member State in which the wine was held when the contract is concluded not later than 20 March 1983.

5 Article 21(1) of Regulation No 2499/82, as amended, required Member States to notify the Commission, not later than 15 April 1983, of the quantities of wine covered by approved distillation contracts.

6 Article 4 of Regulation No 2499/82 provides that the wine may not be distilled until the contract or declaration covering it has been approved.

7 Article 5(1) of the same regulation sets the minimum buying-in price for wines for distillation.

8 The eighth recital in the preamble to Regulation No 2499/82 states that that price normally renders it impossible to market the products of distillation at market prices. The regulation therefore laid down a compensation procedure whereby the intervention agency would pay aid, the amount of which is set out in the first and second paragraphs of Article 6 of that regulation.

9 The 11th recital in the preamble to that regulation states that provision should be made for the minimum price guaranteed to producers to be paid to them, as a general rule, within a period which would enable them to obtain a profit comparable to that which they would obtain from a commercial sale. In those circumstances, it is essential to pay the aid due for the distillation in question at the earliest opportunity, while guaranteeing that operations are correctly carried out by means of an appropriate system of securities. In order to allow the measure fully to achieve its purpose in the Member States, provision should be made for procedures for payment of aids and advances which are suited to the administrative systems of the different Member States.

10 Article 8 of Regulation No 2499/82 provides that for the payment of the minimum buying-in price for wines and for the payment of aid by the intervention agency, one or other of the procedures referred to in Articles 9 and 10 is to be applied, at the choice of the Member States. The Italian Republic decided to apply in its territory the procedure referred to in Article 9.

11 Article 9 of Regulation No 2499/82 provides:

'1. The minimum buying-in price referred to in the first subparagraph of Article 5(1) shall be paid by the distiller to the producer not later than 90 days after the entry into the distillery [of the total quantity of wine or, where appropriate, of each consignment of wine].

2. The intervention agency shall pay to the distiller the aid provided for in Article 6 ... within 90 days of submission of proof that the total quantity of wine specified in the contract has been distilled.

...

The distiller shall be required to supply the intervention agency with proof that he has paid the minimum buying-in price referred to in the first subparagraph of Article 5(1) within the period specified in paragraph 1 ... If such proof is not submitted within 120 days of the date of submission of the proof referred to in the first paragraph, the amounts paid shall be recovered by the intervention agency. ...'

12 Article 10 of that regulation states:

'1. Not later than 30 days after the entry into the distillery [of the total quantity of wine or, where appropriate, each consignment of wine], the distiller shall pay the producer at least the difference between the minimum buying-in price referred to in the first subparagraph of Article 5(1) and the aid referred to in Article 6(1).

2. Not later than 30 days after submission of the proof that the total quantity of wine covered by the contract has been distilled, the intervention agency shall pay the producer the aid referred to in Article 6 ...'

13 Article 11 of Regulation No 2499/82, as amended, provides:

'1. The distiller in the case referred to in Article 9 or the producer in the case referred to in Article 10 may ask for an amount equal to the aid referred to in the first paragraph of Article 6 to be paid to him by way of advance on condition that he has provided a security equal to 110% of the said amount in the name of the intervention agency.

2. The security shall be provided in the form of a guarantee by an establishment meeting the criteria laid down by the Member State to which the intervention agency is responsible.

3. The advance shall be paid not later than 90 days after proof is furnished that the security has been provided and in any case after the date of approval of the contract or declaration.

4. Subject to Article 13, the security referred to in paragraph 1 shall be released only if, not later than 29 February 1983, proof is furnished:

— that the total quantity of wine covered by the contract has been distilled,

— and, if the advance has been paid to the distiller, that the latter has paid the producer the minimum buying-in price referred to in the first subparagraph of Article 5(1).

However, if the proofs referred to in the first subparagraph are furnished after the date specified therein but before 1 June 1984, the amount to be released shall be 80% of the security, the difference being forfeit.

If such proofs are not furnished before 1 June 1984, the security shall be forfeit in its entirety.'

14 Article 13 of Regulation No 2499/82 provides that where, owing to chance circumstances or force majeure, all or some of the wine cannot be distilled, the distiller or the producer must immediately so inform the intervention agency. In such cases, the intervention agency must pay the aid laid down in Article 6 in respect of that quantity of wine which has actually been distilled.

15 Article 2(1) of Council Regulation (EEC) No 352/78 of 20 February 1978 on the crediting of securities, deposits and guarantees furnished under the common agricultural policy and subsequently forfeited (OJ 1978 L 50, p. 1) provides that any security which is forfeited is to be used in its entirety by the paying authorities or bodies in the Member States to reduce the expenditure of the European Agricultural Guidance and Guarantee Fund (EAGGF).

Facts

16 The applicants, which are wine cooperatives, are producers of wine in Sardinia (Italy). In the context of preventive distillation in respect of the 1982/83 marketing year, they entered into contracts with an approved distillery, Distilleria Agricola Industriale de Terralba ('DAI') to deliver wine. Those contracts were approved by the Azienda di Stato per gli Interventi nel Mercato Agricolo (the Italian intervention agency, 'AIMA'), in accordance with the provisions of Article 1 of Regulation No 2499/82.

17 Invoices produced by the applicants, expressly mentioning the 'AIMA premium' ('premio AIMA' or 'premio comunitario, a carico della AIMA') included in the minimum buying-in price laid down by Regulation No 2499/82 to be paid by DAI for wine delivered for preventive distillation in respect of the 1982/83 marketing year, show that the amount of Community aid was 169 328 945 Italian lire (ITL) for a minimum buying-in price of ITL 247 801 380, including value added tax (VAT), for wine delivered by Cantina sociale di Dolianova (invoice of 18 April 1983), ITL

102 145 631 for a minimum buying-in price of ITL 149 483 181, including VAT, for wine delivered by Cantina Trexenta (invoice of 30 April 1983), ITL 346 391 958 for a minimum buying-in price of ITL 506 921 061, including VAT, for wine delivered by Cantina sociale Marmilla (invoice of 28 February 1983), ITL 215 084 906 for a minimum buying-in price of ITL 316 505 762, including VAT, for wine delivered by Cantina sociale Santa Maria La Palma (invoices of 30 March 1983 and 20 April 1983) and ITL 33 908 702 for a minimum buying-in price of ITL 54 812 419, including VAT, for wine delivered by Cantina sociale del Vermentino (invoice of 10 May 1983).

18 According to information supplied by the applicants and not challenged by the Commission, the wine was delivered between the months of January and March 1983 and distillation took place within the time-limit laid down in Article 4 of Regulation No 2499/82. The time-limit laid down in Article 9(1) of that regulation for payment of the minimum buying-in price for wine by the distiller expired in June 1983, and the last deliveries of wine were made in March 1983.

19 On 22 June 1983 DAI asked AIMA to make an advance payment of Community aid, under Article 11 of Regulation No 2499/82, in respect of the wine which had been delivered, by the applicants in particular, and distilled. To that end, DAI provided the required security equal to 110% of the amount of the aid, in the form of a bond issued by Assicuratrice Edile SpA ('Assedile') for the benefit of AIMA. That security was ITL 1 169 040 262.

20 On 10 August 1983 AIMA paid ITL 1 062 763 876 to DAI, under Article 11 of Regulation No 2499/82, by way of an advance on the Community aid.

21 Due to financial difficulties, DAI failed to pay, either in full or in part, the producers, including the applicants, who had delivered wine for distillation.

22 On 17 October 1983 DAI applied for administration under Italian bankruptcy law. As the court to which the matter was subsequently referred, the Tribunale (District Court) d'Oristano (Italy), granted that application DAI suspended all its payments, including those owed to the producers who had delivered wine to it.

23 Although it had been informed that that procedure had been initiated, AIMA requested DAI for reimbursement of the Community aid, less the sums duly paid to the abovementioned producers, on the grounds that DAI had not supplied it within the time-limit laid down in Article 9(2) of Regulation No 2499/82 with proof that it had paid the other producers the minimum buying-in price for wine within the time-limit of 90 days after the entry into the distillery laid down in Article 9(1) of that regulation. As DAI did not reimburse that aid AIMA applied to Assedile for payment of the security.

24 At the request of DAI, on 26 July 1984 the Pretore (Magistrates' Court) de Terralba (Italy) made an interim order prohibiting Assedile from paying the security to AIMA. It gave DAI a time-limit of 60 days to bring an action on the merits of the case.

25 In September 1984 DAI brought such an action before the Tribunale civile (Civil District Court) Rome (Italy). It claimed inter alia that that court should declare that the producers were the intended ultimate recipients of the security, to the extent of the sums remaining to be paid to them, and, in the alternative, that AIMA's rights could at most be exercised in respect of the residual amount of the price which DAI had not yet paid to the producers. It argued that in that instance it had paid the producers approximately half of the advance which had been paid to it by AIMA, without however stating before the court — as the latter observes in its judgment of 27 January 1989 — that it had made those payments within the time-limit laid down in Regulation No 2499/82 (see paragraph 30 below). It proposed that questions concerning the interpretation of the Community regulations should be referred to the Court of Justice for a preliminary ruling. It could not be accused of non-

compliance, because it was not in a position to make all the payments. It maintained that the security was intended to guarantee payment of the minimum buying-in price to producers, in proportion to the amount of production delivered, in the event of the distiller failing to comply with its obligations. It pointed out that, under the relevant Community provisions, if aid was repaid to AIMA it would have to be refunded to the relevant Community body. The chances of producers who had an individual entitlement to aid would thus be undermined due to the action of a third party (that is to say a person other than DAI).

26 Assedile and AIMA were the defendants, and the producers concerned — namely the applicants, another wine cooperative and a consortium of wine cooperatives — were interveners in those proceedings.

27 The judgment of the Tribunale civile, Rome, of 27 January 1989 states that, according to AIMA, of the 12 contracts for buying in wine concluded by DAI and approved in accordance with the provisions of Article 1 of Regulation No 2499/82, DAI only supplied proof, under the terms set out in the Community regulations, of payment of the minimum buying-in price to three producers, for a total of ITL 111 602 075. AIMA pleaded that, with the exception of those three producers, DAI had not paid the minimum buying-in price to the producers, that it had not in any event proved that the payment had been made within the time-limit laid down in Article 9(1) of Regulation No 2499/82 and, lastly, that it had not supplied that proof within the time-limit laid down in Article 9(2) of that regulation. AIMA stated that, in that context, 'the security was forfeit in its entirety, under Article 11 of the abovementioned regulation, and therefore the unpaid producers could only assert their rights as against the distillery ...'. It therefore submitted a counterclaim seeking an order that Assedile should pay it ITL 1 047 084 185 from the security, plus interest.

28 The interveners in the proceedings before the Tribunale civile, Rome, supported DAI's case (see paragraph 25 above). They contended that the sums to which the security provided by Assedile related were due to them in proportion to the amount of wine delivered. They therefore sought a ruling from the Tribunale civile, Rome, that Assedile should pay them the amount of the unpaid debts owed to them by

DAI, plus the monetary revaluation and interest, and, in the alternative, that AIMA was required to pay them those sums. In particular, the applicants stated that the amount of their unpaid debts resulting from contracts approved in accordance with the provisions of Regulation No 2499/82 was ITL 106 571 589 in the case of Cantina sociale di Dolianova, ITL 79 483 181 in the case of Cantina Trexenta, ITL 506 921 061 in the case of Cantina sociale Marmilla, ITL 192 954 189 in the case of Cantina sociale Santa Maria La Palma and ITL 54 812 419 in the case of Cantina sociale del Vermentino.

29 Meanwhile, by judgment of 27 February 1986, the Tribunale d'Oristano declared DAI bankrupt.

30 In its judgment of 27 January 1989, the Tribunale civile, Rome, held as follows:

'In short, Regulation ... No 2499/82 confers entitlement to aid on condition that the strictly imposed time-limits and conditions are observed; failure to observe those time-limits and conditions entails recovery in whole or in part of the aid paid in advance.

The distillers are — according to the procedure adopted by [the Italian Republic] [the procedure provided for in Article 9 of Regulation No 2499/82] — the intended recipients of the aid whilst the wine and grape producers are the intended ultimate recipients.

It is clear from this that the regulation in question is easy to interpret and that it is not necessary to refer a question to the Court of Justice for a preliminary ruling.

...

As regards relations between Assedile and AIMA, Article 2 of the general conditions of insurance of [the security bond issued by Assedile] provides that Assedile guarantees AIMA, up to the value of the sum insured (which is ITL 1 169 040 262), reimbursement of any sums which may be owed to it by the contracting party [DAI] as a refund in whole or in part of the advance paid by AIMA in the event of it being found that there is no entitlement to exceptional aid for distillation for all or some of the quantities shown in the application for an advance or in the distillation contract.

Article 3 of the general conditions provides that AIMA must send DAI the request for repayment of the sum unduly paid; DAI is required to pay the sum sought within 15 days. If on expiry of this time-limit no action has been taken on that request AIMA may request the company [Assedile] to pay that sum; the company is required to make that payment within 15 days of receipt of that request and may raise no objection to so doing.

Under Article 4, the company [Assedile] is subrogated, to the extent of the amount paid, to all the rights, grounds and actions of AIMA against the contracting party and its successor in title.

The contractual clauses cited above are clear and easy to interpret: it is accepted in particular that the guarantee is given for the benefit of AIMA and not for the benefit of other persons such as the producers and that therefore the latter do not have any rights against Assedile in respect of the sum guaranteed.

It is also clear from the wording of Article 3, which requires the company [Assedile] to pay within 15 days of receiving the application for payment from the unpaid beneficiary, that the guarantor cannot raise any objections against the beneficiary.

Even if the view were to be taken that a finding that there is no entitlement (full or partial) to aid for distillation is a precondition for any reimbursement, there is no doubt that such entitlement is extinguished due to the failure by the defendant, DAI, to observe the time-limits and conditions laid down in the Community regulation.

It is established that the applicant distillery failed to meet its obligations on three different counts: (1) it did not pay (as is shown by the absence of any proof of payment among the documents before the Court) the minimum price to the producers, apart from ITL 110 795 870; (2) it did not pay the aid to the producers within 90 days of the entry of the wine into the distillery (a time-limit which expired in June 1983) and, whether it did or not, (3) it did not provide proof before 1 June 1984 that it had made the payments. The penalty for such failures is that the security is to be forfeited in its entirety.

Furthermore, the court cannot accept the points put forward in mitigation by the distillery in order to justify the failure to make the payments (that it was impossible for it to make the payments because it was in administration, and respect for the principle of equal treatment for creditors), since the expiry of the time-limits for making those payments (June 1983) and for repaying the aid (July 1983) was before the date on which the decision had been taken to apply for it to go into administration (October 1983).

...

AIMA should therefore be reimbursed, under the abovementioned Community provisions, up to 110% of the amount of aid paid by way of an advance, less the aid which it was proved had been actually paid, which is ITL 1 047 084 185 (the total amount of the contracts in respect of which no proof has been furnished that they were paid, plus 10% — ITL 1 046 277 980 — to which should be added the difference between the aid which it was proved had been paid and the aid paid in advance — ITL 806 205).

It should be pointed out that DAI has never disputed those amounts: although it has stated that it repaid producers approximately half of the aid obtained it has not claimed, let alone proved, that it paid that aid within the time-limits laid down in Regulation No 2499/82.

...

It may be appropriate to point out that the applicant distillery is in no position to complain that the cooperative wine-cellars which have delivered their production are having difficulty in obtaining payment of their debts since by its own action it has placed itself in a situation in which those debts cannot be paid, by filing for bankruptcy immediately after obtaining the Community aid that should in turn be paid to the producers.

The cooperative wine-cellars may — as may the guarantor if it decides to take the applicant's place — obtain satisfaction of their rights to receive payment in the course of the bankruptcy proceedings, together with all the other creditors and in accordance with the principle of equal treatment for creditors.'

31 On 27 September 1989 the four applicants, with the exception of Cantina sociale del Vermentino, appealed against that judgment before the Corte d'appello (Court of Appeal) in Rome. By judgment of 19 November 1991 that court held that the appeal was inadmissible on the grounds that the applicants had not correctly notified lodgement of the appeal to DAI's official receiver ('curatela fallimentare') but to DAI itself, which was then in bankruptcy, and that they had not subsequently properly made further notification within the time-limit imposed on them by the judge investigating the case ('consigliere istruttore').

32 In the meantime, on 16 January 1990, Assedile paid the sums owing to AIMA.

33 By judgment of 28 November 1994, the Italian Corte di Cassazione (Court of Cassation) dismissed the appeal lodged by the four applicants named above against the judgment of the Corte d'appello. In support of their appeal those applicants had claimed in particular that they had appealed against the abovementioned judgment of the Tribunale civile, Rome, in order to obtain a declaration that that judgment was incorrect not as regards DAI but solely as regards AIMA and Assedile.

34 The five applicants duly registered their claims among DAI's liabilities in the context of the bankruptcy proceedings that had been brought against it.

35 By letter of 22 January 1996 they requested AIMA to honour the debts owed to them by DAI, contending that AIMA had obtained unjust enrichment through payment of the security.

36 AIMA rejected that complaint, pointing out that it was entitled to the security and that the producers had no right to bring a direct action against it for payment of the debts owed to them by DAI.

37 On 16 February 1996 the applicants brought an action before the Tribunale civile, Cagliari (Italy), against AIMA for unjust enrichment.

38 On 13 November 1996 the applicants lodged a complaint with the Commission, in which they alleged that AIMA had infringed Community regulations, in particular Regulation No 2499/82, and in particular requested the Commission to call on AIMA and the Italian Republic to repay them the amounts which they had not received by way of Community aid for the 1982/83 wine year.

39 By letter of 25 June 1997 the Commission informed the applicants that Assedile had paid AIMA the amount of the security, plus interest, on 16 January 1990. It added that under Article 2(1) of Regulation No 352/78 any security which is forfeited is to be used by the intervention bodies to reduce the expenditure of the EAGGF, in other words it must be entered in the EAGGF accounts. It stated that its officials would make the necessary investigations, in particular at AIMA, in order to determine the actual recipient of the security retained by AIMA.

40 Following its investigations at AIMA the Commission informed the applicants by letter of 8 December 1997 that AIMA had notified it that on 21 February 1991 it had redeemed the bank draft ('il vaglia') amounting to ITL 1 047 084 185 issued in the name of Assedile on 16 January 1990 and that it had entered that amount in the EAGGF accounts in 1991 as 'probably corresponding to the security'.

41 By letter of 23 January 1998, which reached the Commission on 5 February 1998, the applicants requested that institution to pay them the sum corresponding to the amount of the debts owed to them by DAI, on the grounds that the security retained by AIMA had been refunded to the EAGGF. They argued that it was clear from the purpose of Regulation No 2499/82, which was to benefit wine producers, that the latter should be regarded as the actual and sole recipients of the aid provided for in that regulation. The choice afforded to the Member State concerned between the procedures provided for in Articles 9 and 10 respectively of that regulation for payment of the aid by the intervention agency could not undermine that purpose. In particular, in the procedure provided for in Article 9 of the abovementioned regulation, the security provided by the distiller was intended to ensure that the

preventive distillation operation as a whole was in order, in particular as regards actual payment of the aid to producers. Any other interpretation would amount to a breach of the principle of equal treatment laid down in Article 6 of the EC Treaty (now, after amendment, Article 12 EC). That view is confirmed by the successive Commission regulations laying down provisions relating to preventive distillation in respect of the following wine years, which expressly provide that where the distiller has not paid the producer the minimum buying-in price the producer may ask for the aid to be paid direct to the intervention agency.

42 By letter of 31 July 1998, signed by the Director-General of the Commission's Directorate-General for Agriculture, which reached the applicants on 14 August 1998 ('the contested letter'), the Commission rejected that request. It maintained that, under the procedure for payment of the aid to the distiller applicable in the present case, the aid was primarily for the benefit of the distiller in order to enable him to offset the high buying-in price of the wine. The security was made out for the benefit of AIMA, and the producers could not claim any rights to that security. The choice afforded to the Member State concerned between that procedure, provided for in Article 9 of Regulation No 2499/82, and the procedure for direct payment of the aid to the producer, provided for in Article 10 of that regulation, did not mean that those two provisions should be interpreted uniformly as meaning that the producers were always the recipients of the aid. Moreover, the Commission contended that the difference between the procedures did not infringe the principle of equal treatment since it was due to differing factual circumstances (administrative systems and numbers of producers which differed between Member States, and which in some Member States justified centralised payment of the aid to distillers). The Commission pointed out that, in its judgment of 27 January 1989, which had acquired the force of res judicata, the Tribunale civile, Rome, had decided not to concede that the applicants had a claim to the security. The Commission inferred from this that, as the applicants had no claim over the security retained by AIMA, there could likewise be no entitlement once that amount had been refunded to the Commission. In the alternative, the Commission observed that AIMA's approval of the contracts entered into between the applicants and DAI did not alter the private law nature of those contracts, so that the Commission's alleged obligations with regard to the applicants were of a non-contractual nature. Consequently, any action against the Community was henceforth barred, under Article 46 of the Statute of the Court of Justice, as the security was paid to AIMA on 16 January 1990 and refunded to the EAGGF during the 1991 financial year.

43 Moreover, according to the applicants' written replies to the questions from the Court of First Instance, the proceedings for unjust enrichment brought before the Tribunale civile, Cagliari, were suspended in order to enable the parties to reach amicable agreement on the apportionment of the costs, following the results of the Commission investigation mentioned in paragraph 40 above. As that investigation had revealed that AIMA had, contrary to what it claimed before and during the abovementioned proceedings, refunded the security to the EAGGF, in the applicants' view those proceedings were without purpose since it was by then apparent that AIMA could not have gained any unjust enrichment.

44 Lastly, in a written reply to a question from the Court of First Instance, the applicants stated that the bankruptcy proceedings had been concluded during 2000 and that they had taken part in the distribution as preferential creditors due to their status as an agricultural cooperative, under Article 2751a(5a) and Article 2776 of the Italian Civil Code. Under that distribution they received payment of 39% of the acknowledged debts owed by DAI. Following that distribution, the amounts of their outstanding debts were: ITL 72 797 022 in the case of Cantina sociale di Dolianova, ITL 54 412 685 in the case of Cantina Trexenta, ITL 350 554 208 in the case of Cantina sociale Marmilla, ITL 133 888 664 in the case of Cantina sociale Santa Maria La Palma and ITL 37 212 737 in the case of Cantina sociale del Vermentino.

Procedure and forms of order sought

45 By application lodged at the Registry of the Court of First Instance on 12 October 1998 the applicants brought the present action.

46 After the defence had been lodged the Court, by letter from the Registry of 25 February 1999, requested the applicants to focus their reply on the question of the admissibility of the application. The applicants complied with that request.

47 The applicants claim that the Court should:

— 'declare unlawful, under Articles 173 and/or 175 of the EC Treaty, the Commission decision of 31 July 1998 ... , and any measure that decision cites or which, at any event, provides a basis for it or is consolidated with it or related to it ...';

— 'declare that [the applicants] are entitled to receive the Community aid which was not paid to them at the appropriate time by DAI following the latter's bankruptcy and which was redeemed by AIMA ... and refunded to the EAGGF ... ';

— 'order the Commission, if appropriate also on the ground of unjust enrichment and/or by way of compensation for damage within the meaning of Article 178 of the EC Treaty, to pay the [applicants compensation equivalent to the amounts owed to them by DAI, as detailed in the application], together if appropriate with statutory interest from 1 January 1992, or at least from 23 January 1998, the date on which the request for payment was sent to the Commission ... ';

— 'order the defendant to pay the costs'.

48 The Commission contends that the Court should:

— declare the application inadmissible;

— in the alternative, declare the application unfounded;

— order the applicants to pay the costs.

49 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber) decided to open the oral procedure without any preparatory inquiry.

50 The parties presented oral argument and their replies to the questions from the Court at the hearing on 14 September 2000.

51 At that hearing the applicants withdrew their second head of claim.

52 At the end of the hearing on 14 September 2000 the President of the Second Chamber ended the oral procedure and stayed the proceedings for a period of three months so that the parties could reconsider the case.

53 By letter of 14 December 2000, the Commission stated that it had not been possible to arrive at an amicable settlement.

54 The Court of First Instance, by decision of 18 September 2001, re-opened the oral procedure in order to put a number of written questions to the parties by way of measures of organisation of procedure as provided for in Article 64 of the Rules of Procedure of the Court of First Instance. The Commission replied to those questions in a statement lodged at the Court Registry on 16 November 2001. The applicants submitted their observations on those replies in a statement lodged at the Court Registry on 27 June 2003.

55 Meanwhile, the composition of the Second Chamber of the Court of First Instance changed following the expiry of the term of office of a Member of the Court.

56 The Court of First Instance (Second Chamber) invited the parties to attend a second hearing and requested the applicants to reply in writing to further questions before the date of the hearing. The applicants complied with that request in a statement lodged at the Court Registry on 5 January 2004.

57 The parties presented oral argument and their replies to the questions from the Court at the hearing on 10 February 2004.

Law

A — *Admissibility of the actions for annulment and for failure to act*

Arguments of the parties

58 The Commission contends first of all that the application for annulment based on Article 173 of the EC Treaty (now, after amendment, Article 230 EC) is inadmissible

because the contested letter, dated 31 July 1998, was not a decision. In that letter the Commission did not refuse to pay the sums requested but merely stated that it did not have the power to act or to adopt a decision concerning the payment sought. That power lay with the national intervention agencies, which are responsible for paying the aid provided for in Regulation No 2499/82.

59 The only element of decision contained in the contested letter was the decision to take no further action in the matter. However, that is a purely internal administrative decision that does not adversely affect the applicants.

60 Secondly, the Commission asserts that the application based on Article 175 of the EC Treaty (now Article 232 EC) is also inadmissible because the applicants had not previously requested it to act. Even if the letter of 23 January 1998 could be construed as a request to act, which the Commission disputes, the present action for failure to act would be out of time. Contrary to the applicants' assertions, it is the request to act which provides the point at which procedural time-limits start to run.

61 The applicants contend first of all that their application for annulment is admissible. The content of the contested letter shows that it is a decision, since in it the Commission both rejected their request of 23 January 1998 and decided to take no further action in the matter. The applicants assert that the request of 23 January 1998 was clear and binding and contained a statement of reasons both in fact and in law. In addition, it was preceded by a long process of investigation. In the contested letter the Commission, following the investigation in question, rejected that request, giving its reasons in fact and in law.

62 Furthermore, even if, contrary to the applicants' view, the contested letter cannot be regarded as a genuine decision, the application for annulment is none the less

admissible, since it is directed not only against that letter but also against 'any measure [that letter] cites or which, at any event, provides a basis for it or is consolidated with it or related to it'. It should therefore be considered that that application relates to the 'detrimental measure complained of, consisting in the lack of a favourable decision regarding the request made at that time by the cooperatives on the same grounds'. It was submitted in accordance with the provisions of Article 44(1)(c) of the Rules of Procedure, which provides merely that the application must state the 'subject-matter of the proceedings and a summary of the pleas in law on which the application is based'.

63 Secondly, the applicants consider that their action based on Article 175 of the EC Treaty against the failure 'to adopt the positive measure requested of the Commission' is also admissible. They assert that the two-month time-limit for bringing an action for failure to adopt a position on the part of a Community institution which has previously been requested to act starts to run from the date on which the institution's inaction becomes evident. According to the applicants, the Commission's inaction became evident following the Commission's letter of 31 July 1998 rejecting the request made in the letter of 23 January 1998. Before that the situation was not clear. During telephone conversations with the applicants' lawyer during the months after the Commission received the abovementioned request, an official from the Directorate-General for Agriculture gave an assurance that the case was being considered by the Commission and that a decision would be taken before the end of summer 1998. The applicants have proposed that the Court of First Instance should, if appropriate, summon Mr Petrucci as a witness in order to verify the facts thus alleged.

Findings of the Court

Admissibility of the action for annulment

64 In order to assess first of all the admissibility of the application for annulment, it is necessary to consider the nature of the contested letter. It is not sufficient for a letter

to have been sent by a Community institution to its intended recipient in response to a request made by the latter for that letter to be regarded as a decision within the meaning of Article 173 of the Treaty (now, after amendment, Article 230 EC). It is settled case-law that acts or decisions against which an action for annulment may be brought under Article 173 of the Treaty are those which produce binding legal effects capable of affecting an applicant's interests and bringing about a distinct change in his legal position (Case C-257/90 *Italsolar* v *Commission* [1993] ECR I-9, paragraph 21; orders of the Court of First Instance of 4 October 1996 in Case T-5/96 *Sveriges Betodlares and Henrikson* v *Commission* [1996] ECR II-1299, paragraph 26, and 11 December 1998 in Case T-22/98 *Scottish Soft Fruit Growers* v *Commission* [1998] ECR II-4219, paragraph 34).

65 In the present case, it is necessary to ascertain first of all whether, in view of its legal context, the contested letter was capable of producing such effects, in so far as it contained a refusal to agree to the applicants' request, which was essentially that the Commission should pay direct to them the outstanding amount of Community aid provided for by Regulation No 2499/82 in respect of wine delivered for preventive distillation in the 1982/83 wine year (see paragraphs 41 and 42 above).

66 In that regard, it should be pointed out first of all that according to the principles which govern the relations between the Community and the Member States, it is for the Member States, in the absence of any contrary provision of Community law, to ensure that Community regulations, and in particular those concerning the common agricultural policy, are implemented within their territory. More specifically, the application of Community provisions on common organisations of markets is a matter for the national bodies appointed for this purpose. The Commission's services have no power to take decisions applying those provisions (order of the Court of First Instance of 21 October 1993 in Joined Cases T-492/93 and T-492/93 R *Nutral* v *Commission* [1993] ECR II-1023, paragraph 26, and judgment of the Court of First Instance in Case T-54/96 *Oleifici Italiani and Fratelli Rubino* v *Commission* [1998] ECR II-3377, paragraph 51).

67 In this case it is apparent from Regulation No 2499/82 that whilst the financial burden of the preventive distillation operation is ultimately to be borne by the Community it is for national intervention agencies (AIMA in this instance) to ensure that preventive distillation operations are carried out in their territory in accordance with the provisions of that regulation.

68 In particular, under Regulation No 2499/82, national agencies are responsible for

— checking and approving the contracts entered into between the wine producers and the distillers (Article 1(3) and Article 3 of the regulation),

— paying Community aid, or in certain circumstances paying an amount equal to that aid by way of an advance (Article 6, Article 9(2) and Article 11 of the regulation),

— recovering, where appropriate, amounts improperly paid by way of aid or an advance on aid (Article 9(2) and Article 11(3) of the regulation).

69 However, Regulation No 2499/82 did not confer any power on the Commission to intervene in the conduct of preventive distillation operations by national intervention agencies. It is clear from that regulation that the Commission could only take note of the operations carried out by the national agencies, in so far as Article 21 of the regulation required Member States to notify the Commission,

within the time-limits specified, of the quantities of wine covered by approved distillation contracts, the quantities of wine distilled, the quantities of products obtained, and the cases in which the distiller or the processor had failed to meet his obligations and the measures taken as a consequence.

70 Against that legal background, the Commission did not in any event have the power to grant a request such as the one that had been made to it in the present case by the applicants for payment by that institution of the aid allegedly owing to the wine producers under Regulation No 2499/82.

71 It follows that the rejection of that request in the contested letter and the decision it entailed to take no further action in the matter were not such that they brought about a change in the applicants' legal position. The letter thus has none of the characteristics of a decision and therefore does not constitute an actionable measure under Article 173 of the Treaty, in so far as it contains a refusal to pay the applicants the Community aid they are seeking.

72 It is also necessary to assess the admissibility of the application for annulment of the contested letter in so far as it might be construed as rejecting an implied request from the applicants that the provisions of Regulation No 2499/82 should be amended in order to bring them into conformity with the principle of equal treatment which they are relying on.

73 In that letter the Commission does not merely explain the application of the system for the payment of Community aid by AIMA, under the relevant provisions of Regulation No 2499/82, in particular with regard to redemption by the national intervention agency of the security lodged by the distiller in order to obtain payment of the aid by way of an advance, in the event of the distiller failing to comply with his obligations.

74 The contested letter also sets out the Commission's position on whether the system for the payment of aid introduced by Article 9 of Regulation No 2499/82 complies with the principle of equal treatment.

75 In that regard, the Court finds that even if, first, the applicants' letter of 23 January 1998 could be interpreted as containing a request that the Commission should retroactively amend Regulation No 2499/82 in order to ensure payment of the Community aid to the producers concerned — which is not stated expressly in the applicants' letter — and, secondly, the contested letter could therefore be construed as rejecting such a request, the application for annulment of that letter must none the less be declared inadmissible since the applicants have no legal standing.

76 According to settled case-law, an action brought by a natural or legal person against a Commission refusal retroactively to rectify a measure will be inadmissible if the rectification requested would have had to be adopted in the form of a generally applicable regulation (orders in *Sveriges Betodlares and Henrikson* v *Commission*, cited above, paragraph 28, and *Scottish Soft Fruit Growers* v *Commission*, cited above, paragraph 41).

77 In the present case, Regulation No 2499/82 is generally applicable because it concerns all wine producers and distillers within the Community and lays down in a general and abstract manner the provisions relating to preventive distillation for the wine year 1982/83. In those circumstances, rectification of that regulation would have had to be adopted in the form of a generally applicable regulation.

78 For all the above reasons, the application for annulment of the contested letter is inadmissible.

79 Although the forms of order sought by the applicants also include annulment of any measure that letter cites or which provides a basis for it or is consolidated with it or related to it, they lack adequate detail as to their subject-matter and are therefore also inadmissible under Article 44(1)(c) of the Rules of Procedure, as the Commission contends.

80 The application for annulment is therefore inadmissible in its entirety.

Admissibility of the action for failure to act

81 Secondly, as regards the unlawful failure to act allegedly constituted by the Commission's failure to adopt a decision regarding the grant of the Community aid concerned to the applicants, suffice it to say that the Commission did not have the power to adopt such a decision, as was stated in paragraph 70 above. The action for failure to act based on Article 175 of the EC Treaty (now Article 232 EC) is therefore inadmissible in so far as it seeks to penalise such failure to act, since the Commission cannot be criticised for failing to adopt in relation to the applicant any measure other than a recommendation or opinion of the kind referred to in the third paragraph of Article 175 of the Treaty (see for example *Italsolar* v *Commission*, cited above, paragraph 30). In addition, by accepting that the applicants' letter of 23 January 1998, which reached the Commission on 5 February 1998, contained a clear request for the adoption of a decision granting the aid concerned to the applicants, the present application, lodged on 12 October 1998, was at any event out of time, as the Commission points out. Under the second paragraph of Article 175 of the Treaty, the Commission should have adopted a position before 5 April 1998 and the action for failure to act should have been brought by 15 June 1998 at the latest, including extension of the time-limit on account of distance.

82 It should also be pointed out that, even if the present application could be interpreted as meaning that the alleged failure to act resides in the Commission's assumed refusal to adopt a regulation retroactively rectifying Regulation No 2499/82 in order to ensure the payment of Community aid to the producers concerned, that application must also be declared inadmissible. The applicants' letter of 23 January 1998 cannot in fact be interpreted as a request to act within the meaning of the second paragraph of Article 175 of the Treaty, since the applicants are not asking clearly for the Commission to amend Regulation No 2499/82 in order to make it comply with the principles they are relying on. In addition, individuals who have no standing to challenge the legality of a legislative measure likewise have no standing to bring an action before the Court for a declaration that a Community institution has failed to act after being called upon to adopt such a measure (Joined Cases 97/86, 99/86, 193/86 and 215/86 *Asteris and Others* v *Commission* [1988] ECR 2181, paragraph 17). Amendment of Regulation No 2499/82 required the adoption of a generally applicable measure, as was stated above (see paragraph 77 above).

83 The action for failure to act must therefore be declared inadmissible.

B — *The action for damages and the claim for reimbursement of unjust enrichment*

Admissibility of the claim for reimbursement of unjust enrichment

84 The alternative forms of order sought by the applicants, namely that the Commission should be ordered to pay them the Community aid in question by way of reimbursement of unjust enrichment, must be rejected at the outset as inadmissible, since the Treaty makes no provision among the remedies it puts in place for bringing an action for unjust enrichment. That does not however

determine the validity of the plea alleging infringement of the rule prohibiting unjust enrichment, since the abovementioned alternative forms of order can be interpreted as meaning that the applicants are relying in particular on this rule in support of their claim for compensation (see paragraphs 159 to 164 below).

Admissibility of the action for damages

Arguments of the parties

85 The Commission puts forward three grounds of inadmissibility of the present action for damages. First, in the management of the support measures provided for under the common agricultural policy, there is no direct relationship between the Community and economic operators. In the present case, there is no conduct attributable to the Commission, so that the conditions for referral of the matter to the Court under the second paragraph of Article 215 of the EC Treaty (now the second paragraph of Article 288 EC) are not met (Case 132/77 *Exportation des sucres* v *Commission* [1978] ECR 1061; Case 12/79 *Wagner Agrarhandel* v *Commission* [1979] ECR 3657 and Case 133/79 *Sucrimex and Westzucker* v *Commission* [1980] ECR 1299).

86 In that regard, the Commission has stated in reply to a written question from the Court of First Instance that the applicants did not contend that Regulation No 2499/82 was unlawful in order to support their claim for compensation. They merely challenged, before the national courts and then before the Court of First Instance, the interpretation of the relevant provisions of that regulation by the Italian authorities, and by the Commission in its letter of 31 July 1998.

87 Secondly, the applicants enjoy effective judicial protection before the national courts. In particular, they could have brought an action for payment against the intervention agency before a national court as in Case 281/82 *Unifrex* v *Commission and Council* [1984] ECR 1969, paragraph 11).

88 In their action for unjust enrichment in this case against AIMA pending before the Tribunale civile, Cagliari, the applicants might also suggest to the national court that it should refer a question for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) in order to enable the Court of Justice to consider the validity of the regulatory provisions concerned.

89 At the hearing on 10 February 2004, in reply to the questions put by the Court of First Instance, the Commission stated that the Italian legal system provided adequate means of redress that would enable the producers concerned to obtain an order requiring AIMA to pay the amount of the Community aid provided for in Regulation No 2499/82. The applicants' claims did not succeed before the Tribunale civile, Rome, because the proceedings concerned the security lodged by DAI for the benefit of AIMA and not, therefore, the individual right to Community aid claimed by the applicants. Moreover the applicants, given the background of their quasi-contractual relations with AIMA, should have brought an action for payment against that agency rather than an action for unjust enrichment such as the one brought before the Tribunale civile, Cagliari. An action for payment before a national court, possibly based on the alleged unlawfulness of Regulation No 2499/82, could have been instituted without waiting for the outcome of the bankruptcy proceedings. Lastly, the fact that the security was refunded to the Commission — a fact that is relied upon by the applicants in support of the admissibility of the present action for non-contractual liability — would not deprive an action for payment of its effectiveness. Indeed, it would not preclude the Italian court from ordering AIMA to pay the applicants the Community aid concerned, following a reference for a preliminary ruling for an assessment of the validity of the relevant provisions of Regulation No 2499/82, if the Court of First Instance were to find that some of those provisions were unlawful. The Commission quoted in that regard the order of the Court of First Instance of 25 April 2001 in Case T-244/00 *Coillte Teoranta* v *Commission* [2001] ECR II-1275.

90 Thirdly, the Commission considers that the claims for compensation are in any event inadmissible under Article 46 of the Statute of the Court of Justice, applicable to the proceedings before the Court of First Instance under Article 53 of that Statute, which provides that proceedings in matters arising from non-contractual liability are barred after a period of five years from the event giving rise thereto.

91 That limitation period began to run from the time the applicants became aware of the event giving rise to the damage. In the present case, whether that event was the incorrect application of the Community regulations or the unlawfulness of those regulations, the applicants became aware of it at the latest at the time of such application. Neither the judgment of the Tribunale civile, Rome, of 27 January 1989 nor the subsequent judgments of the Court of Appeal in Rome or the Italian Court of Cassation could have interrupted that limitation period.

92 In that regard, the defendant points out that the damage claimed by the applicants is the non-payment of the price of the wine sold to DAI, a price which should have been paid to them by June 1983 at the latest. The action for damages therefore relates to events that took place in 1983. Since the action was not brought until 12 October 1998 that action is time-barred.

93 If it were accepted — a point which the Commission disputes — that a period of limitation runs from the time it becomes apparent that actions before the national courts cannot succeed, it would be necessary to take the date on which the Tribunale civile, Rome delivered its judgment, 27 January 1989. This is the only substantive judgment concerning the applicants. The Court of Appeal in Rome 'dismissed' the appeal brought against that judgment because it had not been notified in accordance with the formal requirements, and the Italian Court of Cassation upheld that judgment. The Commission compares that procedural irregularity committed by the applicants during the appeal procedure with bringing an action late, after expiry of the time limit laid down. Any action for non-contractual liability therefore became time-barred in January 1994.

94 As regards the applicants' assertion that the event giving rise to the damage sustained was AIMA's entering of the security in the EAGGF accounts, the Commission contends that that security concerns the relationship between DAI and AIMA, not that between the applicants and DAI. Moreover, the accounting operation in respect of the security concerns the relationship between the EAGGF and AIMA, but has no significant effect as regards any rights the applicants may have against the Commission.

95 Even if it were necessary to accept that entering the security in the EAGGF accounts constituted an unlawful act on the part of the Commission, the claim for compensation would be time-barred. The applicants were aware at an earlier stage that the security had been entered in those accounts, since it is expressly provided for by Community legislation. In addition, the Commission pointed out at the hearing on 10 February 2004 that it was clear from the judgment of the Tribunale civile, Rome, of 27 January 1989 that DAI had observed that AIMA was required to refund the security to the competent Community authority.

96 The applicants consider for their part that the present action for non-contractual liability is not time-barred under Article 46 of the Statute.

97 They contend that the expiry of the limitation period cannot constitute a valid defence to a claim by a person who has suffered damage where that person only belatedly became aware of the event giving rise to it and thus could not have had a reasonable time in which to submit his application to the court before the expiry of the limitation period (Case 145/83 *Adams* v *Commission* [1985] ECR 3539, paragraph 50).

98 In the present case it was only after the Commission's letter of 31 July 1998 that the applicants became aware of the fact that AIMA had refunded at least part of the security to the Commission. They therefore requested the Commission to pay them the Community aid concerned by way of reimbursement for unjust enrichment or

compensation, under Articles 178 and 215 of the Treaty (now Articles 235 EC and 288 EC, respectively) for the damage they sustained.

99 Contrary to the Commission's assertions, the applicants were not in a position to know that the aid concerned had been entered in the EAGGF accounts. It was only after its investigation at AIMA, following the applicants' complaint, that the Commission itself was informed of the refund. Moreover, even if the obligation to refund the security to the Commission was laid down by Community legislation, which is not easy to interpret, it was by no means established that that obligation had been met in the present case, in the light of AIMA's conduct. In their written replies to the questions from the Court of First Instance and at the hearing on 10 February 2004 the applicants pointed out in that regard that AIMA had never stated that the security had been refunded to the Commission. It maintained on the contrary, before and during the proceedings before the Tribune civile, Cagliari, that it was entitled to keep the security.

100 At any event, even if it were considered that the event giving rise to the action for damages took place on 31 December 1991, the date on which AIMA refunded the security to the EAGGF, the period of five years was interrupted either by the letter of 22 January 1996, in which the applicants requested AIMA to pay them the amount corresponding to the aid in question, or by the letter of 13 November 1996 in which the applicants sent a complaint to the Commission in order to obtain that payment.

Findings of the Court

101 It is necessary to consider the three grounds for inadmissibility of the action for damages put forward by the Commission: first, the fact that the conduct in question

cannot be attributed to the Community, second, the existence of effective domestic remedies and, third, the time-bar on the action under Article 46 of the Statute of the Court of Justice.

1. The plea alleging that the conduct in question cannot be attributed to the Community

102 Since the present action for damages relates to the application of Community legislation the implementation of which falls to the competent national agencies, as already stated above (see paragraph 67 above), it is necessary to determine, in accordance with case-law, whether the unlawful conduct alleged by the applicants in support of that action emanates from a Community institution and cannot be considered to be attributable to a national agency (*Exportation des sucres* v *Commission*, cited above, paragraph 27; *Sucrimix and Westzucker* v *Commission*, cited above, paragraphs 16 and 22 to 25; and Case 175/84 *Krohn* v *Commission* [1986] ECR 753, paragraph 19).

103 To that end, it is appropriate first of all to identify precisely, within the legal and factual context of the present case, the conduct the applicants are criticising the Commission for and which has led them to bring the present action in the alternative under Article 178 of the EC Treaty.

104 Although, in the exceptional legal and factual context of the present case, a prudent and well-informed trader might legitimately have been unaware that there was no guarantee that the aid concerned would be paid to the producers in the event of the insolvency of the distiller (see paragraphs 136 to 145 below), study of the regulation reveals that, under the system of indirect payment of aid to wine producers through the intermediary of the distiller, introduced by Article 9 of the regulation, in the event of the distiller failing to pay the minimum buying-in price for wine delivered

and distilled in accordance with the provisions of the regulation, the producers did not have any entitlement to the security, which was lodged by the distiller solely in the name of the national intervention agency in order to obtain the aid by way of an advance.

105 Moreover, under the system introduced by Article 9 of Regulation No 2499/82, producers were not entitled to receive the Community aid concerned direct, as the Commission pointed out in essence in its letter of 31 July 1998. In that regard, the Commission also contended in that letter that the difference between the systems introduced by Articles 9 and 10 respectively of that regulation did not conflict with the principle of equal treatment.

106 However, it is common ground, first, that the applicants have complied with all their obligations under their contracts with DAI, approved by AIMA in accordance with the provisions of Regulation No 2499/82, and, secondly, that the quantities of wine delivered by the applicants were distilled within the time-limits laid down in that regulation. After experiencing financial difficulties, DAI did not pay the applicants the minimum buying-in price provided for in Regulation No 2499/82, including the Community aid, or did so only in part.

107 In that context, the applicants are claiming, in the alternative, compensation for the damage resulting from the total or partial absence of payment of the minimum buying-in price, due to lacunae in the system for the indirect payment of Community aid provided for in the relevant provisions of that regulation, as the Commission pointed out in its letter of 31 July 1998.

108 Although before the national court and in their correspondence with the Commission the applicants challenged AIMA's interpretation of the relevant provisions of Regulation No 2499/82 without expressly calling into question the lawfulness of the provisions themselves, they did not merely reiterate those

complaints before the Court of First Instance. In their application they also submitted, in the alternative, that if it were held that Regulation No 2499/82 had led to the creation of a difference in treatment between producers of different Member States — depending on the system for payment of Community aid chosen by the Member States, who under Article 8 of the abovementioned regulation had a choice between the two different systems provided for in Articles 9 and 10 of that regulation — it would have very seriously infringed the principle of equal treatment in particular.

109 The Court infers from the above that the conduct for which the Commission is criticised is in essence that, under the system for payment of aid provided for in Article 9 — which differs in this aspect from the system provided for in Article 10 — Regulation No 2499/82 did not guarantee, particularly in the event of the bankruptcy of the distiller, payment to the producers concerned of the aid included in the minimum buying-in price for wine delivered to that distiller and distilled in accordance with the provisions of that regulation.

110 The unlawfulness thus alleged is therefore attributable to the Commission as it is the author of Regulation No 2499/82.

111 In particular, the Commission's argument that application of the system provided for in Article 9 of Regulation No 2499/82 is the result of the choice made by the Italian Republic under Article 8 of that regulation does not alter this assessment, since the alleged unlawfulness affects the regulation itself and not the conduct of the Member State concerned, which merely correctly applied that regulation.

112 More precisely, the applicants are not challenging the lawfulness of the system introduced in Article 9 of Regulation No 2499/82 in so far as it provided for the indirect payment of aid to producers through the intermediary of the distiller. Rather, they are criticising the procedure for implementing that system, which is laid

down in the relevant provisions of the abovementioned regulation, since that procedure did not make it possible to ensure payment of the aid to producers in the event of the insolvency of the distiller. Where a Member State had opted for the system of indirect payment of aid, the actual principle of which is not challenged in the present case, the competent national authorities did not have any discretion as to the measures to adopt, under Regulation No 2499/82, if the distiller did not pay the aid concerned to the producers. In the present case, the alleged unlawfulness is therefore the direct result of an alleged lacuna in the regulation and not of the choice made by the Italian Republic to use the system of indirect payment of aid.

113 The plea alleging that the conduct in question cannot be attributed to the Community, in the present case to the Commission, must therefore be rejected.

2. The plea alleging the existence of effective domestic remedies

114 In this regard it should be pointed out first of all that in their claim for damages the applicants are seeking payment of compensation equivalent to the unpaid debts owed to them by DAI, as detailed in the application, plus default interest. It is therefore appropriate to check that the present action for damages does not constitute an abuse of process both in relation to remedies before the national courts and in relation to other Community remedies.

115 It is settled case-law that an action for damages under Article 178 and the second paragraph of Article 215 of the Treaty must be appraised with regard to the entire system for the judicial protection of the individual established by the Treaty, from which it follows that where an individual considers that he has been harmed by the lawful application of Community legislation which he considers to be unlawful and the event giving rise to the alleged damage is therefore attributable exclusively to the Community, the admissibility of such an action for damages may nevertheless, in some cases, be subject to the prior exhaustion of national remedies. It is none the

less a necessary precondition that those national remedies give effective protection to the individuals concerned and that they are capable of leading to compensation for the damage alleged (see to that effect Joined Cases 197/80 to 200/80, 243/80, 245/80 and 247/80 *Ludwigshafener Walzmühle and Others* v *Council and Commission* [1981] ECR 3211, paragraphs 8 and 9; *Krohn* v *Commisssion*, cited above, paragraphs 27 and 28; Case 81/86 *De Boer Buizen* v *Council and Commission* [1987] ECR 3677, paragraph 9, and Case T-195/00 *Travelex Global and Financial Services and Interpayment Services* v *Commission* [2003] ECR II-1677, paragraph 87).

116 In particular, the admissibility of an action for damages based on Article 178 and the second paragraph of Article 215 of the Treaty cannot be subject to the prior exhaustion of national remedies where, even if the disputed Community rules were declared invalid by a preliminary ruling of the Court of Justice, to which the matter has been referred under Article 177 of the EC Treaty, the national courts could not allow an action for payment — or any other appropriate action — without the prior intervention of the Community legislature, owing to the lack of a Community provision authorising the competent national agencies to pay the amounts sought. That view has been confirmed, implicitly or expressly, by case-law (see to that effect Case 5/71 *Zuckerfabrik Schoeppenstedt* v *Council* [1971] ECR 975; Case 74/74 *CNTA* v *Commission* [1975] ECR 533; Joined Cases 64/76 and 113/76, 167/78 and 239/78, 27/79, 28/79 and 45/79 *Dumortier and Others* v *Council* [1979] ECR 3091, paragraph 6; Joined Cases 261/78 and 262/78 *Interquell Stärke-Chemie* v *Council and Commission* [1979] ECR 3045, paragraph 6; *Unifrex* v *Commission*, cited above, paragraph 12, and *De Boer* v *Council and Commission*, cited above, paragraph 10).

117 In the circumstance just described, the exercise of rights by individuals who consider they have been harmed is rendered excessively difficult before the national courts. It would therefore not be in keeping with either the proper administration of justice and the requirements of procedural efficiency or the condition relating to the absence of an effective domestic remedy (see paragraph 115 above) to compel the individuals concerned to exhaust national legal remedies and to wait until a final decision is made on their claim, after the Community institutions concerned have, if necessary, amended or supplemented the relevant Community provisions in compliance with a preliminary ruling of the Court of Justice that those provisions are invalid (see, to that effect, Case 43/72 *Merkur Aussenhandels* v *Commission*

[1973] ECR 1055, paragraph 6; Joined Cases 117/76 and 16/77 *Ruckdeschel and Others* [1977] ECR 1753, paragraph 13, and, by analogy, Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727, paragraph 106).

118 In the present case, it must be stated that, contrary to what the Commission asserts, the applicants do not enjoy any effective judicial protection before the national courts. Without prejudice to the possible merits of the applicants' claims, it should be pointed out that in the legal context of the present case a national court is not in any event authorised to order AIMA to pay the applicants the Community aid in question unless Regulation No 2499/82 is rectified retrospectively, which, if it were to be done, would require the Commission to adopt a regulation, as has already been held (see paragraph 77 above). Even in the event that the Court were to find, if appropriate, in a preliminary ruling that some of the provisions of the above-mentioned regulation were invalid, only intervention by the Community legislature would make it possible to adopt a legal basis authorising such payment, as the Commission pointed out in the defence.

119 In that regard, the Commission's line of argument based on the order in *Coillte Teoranta* v *Commission*, cited above, delivered in respect of an action for annulment and not an action for damages as in the present case, is irrelevant.

120 The plea alleging that effective domestic remedies exist must therefore be rejected.

121 Moreover, following the same reasoning based on distinguishing between legal remedies, it should be pointed out that, as the applicants confirmed in their reply,

the action for damages is by way of an alternative to actions for annulment and for failure to act, which the applicants had also brought in order to obtain payment of those sums and which the Court of First Instance had held to be inadmissible (see paragraphs 80 and 83 above).

122 In that regard, it should be recalled that, according to well-established case-law, the action for compensation provided for by Article 178 and the second paragraph of Article 215 of the Treaty was introduced as an autonomous legal remedy with a particular purpose to fulfil within the system of remedies and subject to conditions on its use dictated by its specific nature. Its purpose is to redress, solely with regard to the applicant, the damage caused by a Community institution, and not to set aside a specific measure or to establish that the institution concerned has failed to act. It would therefore be contrary to the autonomy of that action, and the effectiveness of the system of remedies established by the Treaty, to consider that an action for damages is inadmissible on the ground that it might lead, at least for the applicants, to a result comparable to the results of an action for annulment or an action for failure to act. It is only where an action for damages is actually aimed at securing withdrawal of an individual decision addressed to the applicants which has become definitive — so that it has the same purpose and the same effect as an action for annulment — that the action for damages could be considered to be an abuse of process (see to that effect Case 4/69 *Lütticke* v *Commission* [1971] ECR 325, paragraph 6; *Zuckerfabrik Schoeppenstedt* v *Council*, cited above, paragraphs 3 to 5; *Krohn* v *Commission*, cited above, paragraphs 26, 32 and 33; *Interquell Stärke-Chemie* v *Council and Commission*, cited above, paragraph 7, and Case T-491/93 *Richco* v *Commission* [1996] ECR II-1131, paragraphs 64 to 66; see also to this effect *SA Dangeville v. France*, judgment of 16 April 2002, no. 26677/97, *Reports* 2002-III, §§ 47 and 61).

123 That is not so in the present case, however, since the Commission does not have any power to adopt an individual decision regarding the aid concerned, as the above considerations make clear (paragraphs 70 and 71 above).

124 For all the above reasons, the present action for damages cannot be regarded as an abuse of process.

3. The plea alleging that the action for damages is time-barred

— Preliminary observations

125 Under Article 46 of the Statute of the Court of Justice, proceedings against the Community in matters arising from non-contractual liability are barred after a period of five years from the occurrence of the event giving rise to it. That period of limitation is interrupted if proceedings are instituted before the Community courts or if prior to such proceedings an application is made by the aggrieved party to the relevant institution of the Community, subject to the proviso that in the latter event the proceedings are barred only if the application is followed by an action brought within the time-limits laid down in the articles to which Article 46 of the Statute of the Court refers, that is, within the period of two months provided for in Article 173 of the EC Treaty or the period of four months provided for in Article 175 of the EC Treaty (Case T-167/94 *Nölle* v *Council and Commission* [1995] ECR II-2589, paragraph 30, and Case T-76/94 *Jansma* v *Council and Commission* [2001] ECR II-243, paragraph 81).

126 In the present case, before even determining the starting point of the period of limitation, it should be pointed out straight away that at any event, and contrary to the applicants' assertions, that period was not interrupted either by their letter to AIMA of 22 January 1996 or by their letter to the Commission of 13 November 1996. On the one hand, it is quite clear that neither of those letters constituted a claim to the Commission for compensation. In particular, the letter of 13 November 1996 contained a complaint regarding AIMA's allegedly unlawful interpretation of Regulation No 2499/82. It did not call into question the lawfulness of that regulation or, more generally, the conduct of the Commission itself (see paragraph 38 above).

127 On the other hand, the applicants cannot in any case, in order to interrupt the limitation period provided for in Article 46 of the Statute, rely on the abovementioned letters, since neither of those letters was followed by the institution of an action before the Court of First Instance within the time-limits laid down in that article (see paragraph 125 above).

128 After those preliminary comments, it is necessary to determine the starting point of the limitation period for the present action for damages.

— The existence of certain damage

129 The limitation period laid down by Article 46 of the Statute of the Court of Justice cannot begin to run before all the requirements governing the obligation to make good the damage are satisfied. Those conditions relate to the existence of unlawful conduct on the part of the Community institutions, of the damage alleged and of a causal link between that conduct and the loss claimed (Joined Cases 256/80, 257/80, 265/80, 267/80 and 5/81 *Birra Wührer and Others* v *Council and Commission* [1982] ECR 85, paragraph 10; Case T-20/94 *Hartmann* v *Council and Commission* [1997] ECR II-595, paragraph 107, and *Jansma* v *Council and Commission*, cited above, paragraph 76). The abovementioned requirement relating to the existence of certain damage is met where the damage is imminent and foreseeable with sufficient certainty, even if the damage cannot yet be precisely assessed (Case 281/84 *Zuckerfabrik Bedburg* v *Council and Commission* [1987] ECR 49, paragraph 14).

130 In that regard, it should be pointed out that in cases in which the Community's liability stems from a legislative measure, as in this instance, the limitation period cannot begin to run before all the injurious effects of the measure have been produced and hence before the time when the persons concerned have suffered certain damage (*Birra Wührer and Others* v *Council and Commission*, cited above, paragraph 10).

131 In the present case the Court therefore finds that the period of limitation began to run when the damage resulting from the total or partial absence of payment of Community aid was suffered for certain by the applicants.

132 It is not contested by the applicants that, according to the scheme of Regulation No 2499/82, DAI should have paid them the minimum buying-in price for wine not later than the end of June 1983, under Article 9(1) of that regulation, as the Commission has pointed out. Under that provision, the minimum buying-in price was required to be paid by the distiller to the producer not later than 90 days after the entry of the wine into the distillery. In the present case, it is settled that the last deliveries of wine took place in March 1983 (see paragraph 18 above).

133 However, in the specific circumstances of the present case, the damage suffered by the applicants at the end of June 1983 due to the total or partial absence of payment of the minimum buying-in price within the time-limit laid down cannot be considered as being certain, that is to say imminent and foreseeable, from that date on.

134 On 22 June 1983 DAI asked AIMA for payment of an advance on the Community aid concerned and in that connection lodged a security in the name of that agency, in accordance with Article 11 of Regulation No 2499/82. It is not denied by the parties that DAI, having received the advance on 10 August 1983, paid part of that amount to some of the producers concerned, including some of the applicants, as is clear from the information the latter supplied in reply to questions from the Court, and as DAI stated moreover before the Tribunale civile, Rome (see paragraphs 16, 19, 20, 25, 26 and 43 above).

135 In September 1984 DAI also instituted proceedings before the Tribunale civile, Rome, in order in particular to obtain a ruling that the security was intended to guarantee payment of the minimum buying-in price to the producers in the event of the distiller failing to comply with his obligations. The producers concerned, including the applicants, intervened in support of DAI's claims. Those claims were dismissed by the judgment of the Tribunale civile, Rome, of 27 January 1989 (see paragraphs 25, 26, 28 and 30 above). The appeal lodged against the judgment by four of the five applicants was dismissed by the judgment of the Corte d'appello in Rome of 19 November 1991, upheld by the judgment of the Italian Corte di cassazione of 28 November 1994.

136 In order to assess whether damage is certain it is necessary to take into consideration those proceedings, concerning specifically the fate of the security. Despite the ineffectiveness of the national remedies, as the Court has established (see paragraph 118 above), it must be acknowledged that in the exceptional circumstances of the present case it was extremely difficult for a prudent and well-informed economic operator to be aware that he could not obtain payment of the aid concerned before a national court.

137 In the present case, the exchange of correspondence between the applicants and AIMA on the one hand and the Commission on the other, and the proceedings brought before the Italian courts, show that the applicants clearly initially attributed AIMA's refusal to pay them the aid concerned to the incorrect application of Regulation No 2499/82 (see paragraphs 28, 35 to 38, 41 and 42 above).

138 In that regard, it should be noted that AIMA's refusal, mentioned above, was not based on the express provisions of Regulation No 2499/82, but on a lacuna in that regulation, in so far as it made no provision, under the system it established in Article 9, for a procedure to ensure payment of aid to the producers concerned in the event of the insolvency of the distiller. Moreover, Article 11 of the abovementioned regulation made payment of the aid to the distiller by way of an advance subject to the latter providing a security equal to 110% of the said amount

in the name of the intervention agency. In those circumstances it was reasonable for the parties concerned to be unaware that the origin of the damage they suffered in fact lay in a lacuna in Regulation No 2499/82, so that they could not obtain redress for that damage before a national court, since there was no legal basis authorising the payment of the aid to the producers, as has already been established (see paragraph 118 above).

139 Furthermore, it is clear that in the context of their quasi-contractual relations with AIMA the applicants could legitimately expect that that agency would be ordered by the national court to pay them the amount of Community aid included in the minimum buying-in price that had not been paid to them by DAI, as the Commission pointed out at the hearing (see paragraph 89 above).

140 It is common ground that all the contracts entered into between the applicants and DAI, and approved by AIMA, made express reference to the amount of the EAGGF subsidy that was included in the minimum buying-in price laid down by Regulation No 2499/82 and stipulated in the contract, as is clear from the documents before the Court.

141 Furthermore, it is not disputed that the applicants complied with all their obligations and that preventive distillation was carried out within the time-limits laid down by the abovementioned regulation.

142 The absence of a procedure guaranteeing, under the system introduced by Article 9 of the regulation, payment of the Community aid to the producers concerned, in particular in the event of the bankruptcy of the distiller, is also incompatible with one of the essential purposes of preventive distillation. Preventive distillation is intended not only to prevent the marketing of poor quality wines, but also, as is clear from the sixth recital in the preamble to Regulation No 2144/82, to improve incomes of the producers, by ensuring that, under certain conditions, they receive a 'guaranteed minimum price' for table wine. In addition, under the 11th recital in the

preamble to Regulation No 2499/82, provision needed to be made for the minimum price guaranteed to producers to be paid to them, as a general rule, within a period which would enable them to obtain a profit comparable to that which they would have obtained from a commercial sale; in those circumstances, according to that recital, it was essential to pay the aid due to them at the earliest opportunity, while guaranteeing by means of an appropriate system of securities that operations were correctly carried out.

143 In those circumstances, a prudent and well-informed trader could reasonably expect to obtain payment of the aid concerned. In particular, as a security had been lodged by the distiller, under Article 11 of Regulation No 2499/82, in order to guarantee that operations were correctly carried out, the risk of insolvency on the part of the distiller would legitimately appear to be covered, as regards the amount of the aid paid earlier to the distiller by way of an advance, where the producers had fulfilled all their obligations and the wine had been distilled in accordance with the provisions of that regulation.

144 The exceptional nature of the situation resulting from the abovementioned lacuna in Regulation No 2499/82 in the area of the preventive distillation of table wine is moreover confirmed by the fact that, under the system introduced by Council Regulation (EEC) No 1931/76 of 20 July 1976 laying down general rules governing the distillation of wines provided for in Articles 6b, 6c, 24a and 24b of Regulation (EEC) No 816/70 (OJ 1976 L 211, p. 5), Community aid was paid direct to the producers concerned by the national intervention agency. Although Council Regulation (EEC) No 343/79 of 5 February 1979 laying down general rules governing certain distillation operations in the wine sector (OJ 1979 L 54, p. 64), replacing Regulation No 1931/76 from 2 April 1979, allowed Member States to provide for the payment of part of the aid to producers either by the intervention agency or by the distiller (the intervention agency in the second case repaying the aid to the distiller when proof was supplied that the total quantity of wine in the contract had been distilled), it did not introduce a system comparable to that provided for in Article 9 of Regulation No 2499/82, which applies in this case. Article 4(3) of Regulation No 343/79 stated that where the abovementioned proof was supplied, the intervention agency would pay the producer the difference between the aid due and the amount

referred to in paragraph 2. Unlike the system provided for in Article 9 of Regulation No 2499/82, the granting of Community aid was not therefore, in short, condional upon proof of payment of the aid by the distiller to the producer within a specified time-limit.

145 For all those reasons, given the complexity of the system introduced by Regulation No 2499/82 and the exceptional circumstances described above, it was only after the proceedings relating to the security were brought before the Italian courts that the applicants became aware that they would not obtain payment of the aid in question from the security.

146 In the present case, although the security was redeemed by AIMA in February 1991 in accordance with the judgment of the Tribunale civile, Rome, and entered in the EAGGF accounts for that year (see paragraph 40 above), the beneficiary of that security under the provisions of Regulation No 2499/82 was not finally decided by the Italian court until after the judgment of the Italian Corte di Cassazione of 28 November 1994, cited above. In that regard, the fact, relied on by the Commission, that the Corte d'appello in Rome declared the appeal proceedings time-barred due to the incorrect notification of the appeal to DAI does not imply that the intended beneficiaries of the security had finally been decided by the abovementioned judgment of the Tribunale civile, Rome, since the appeal had been lodged by four of the applicants within the time-limit laid down and properly notified to AIMA and to Assedile, and those four applicants subsequently duly lodged an appeal in cassation against the judgment of the Corte d'appello (see paragraphs 31 and 33 above and, by analogy, the Opinions of Advocate General Darmon in Case C-55/90 *Cato* v *Commission* [1992] ECR I-2533, I-2545, points 25 to 27, and I-2559, point 19). Therefore, the damage suffered by the applicants could not have been certain until 28 November 1994.

147 In those circumstances, the five-year period of limitation provided for in Article 46 of the Statute of the Court of Justice could not have begun to run before that date, so that the present action for damages, brought in 1998, cannot be considered to be out of time.

148 The plea alleging that the action is time-barred must therefore be rejected.

149 Moreover, it should be noted that the damage suffered by the applicants could, by contrast, be regarded as certain following the judgment of the Italian Corte di Cassazione of 28 November 1994, since it then appeared to be imminent and foreseeable although the extent of it could not yet be accurately determined (see paragraphs 129 and 130 above). Since the applicants, being agricultural cooperatives, enjoyed the status of preferential creditors, as appears from the applicants' replies to the written questions from the Court of First Instance, which have not been challenged by the Commission, it was possible that they might recover some of the unpaid debts owed to them by DAI at the end of the bankruptcy proceedings, which did not take place until 2000, according to those replies.

150 It is clear from all the above considerations that the claim for compensation is admissible.

Merits of the claim for compensation

Arguments of the parties

151 The applicants plead in support of their claim for compensation that Regulation No 2499/82 is unlawful in that the lacuna they allege to exist leads in the first place to inequality of treatment between producers on grounds of nationality. The regulation seriously infringes the principle of non-discrimination laid down in Article 6 and the second subparagraph of Article 40(3) of the EC Treaty (now, where relevant after amendment, Article 12 EC and the second subparagraph of Article 34(2) EC), since, in circumstances such as those of this case, only producers subject to the system

provided for in Article 9 of that regulation are excluded from entitlement to Community aid. Moreover, as a result of that system, the same aid is intended either for the producer, if the Member State concerned has opted for the procedure provided for in Article 10 of the regulation, or for the distiller, if it has opted for the procedure provided for in Article 9 of the regulation, which also manifestly conflicts with the objectives pursued by that regulation. Secondly, the applicants contend that the lack of a guarantee that the aid concerned will be paid to producers has in this case led to unjust enrichment of the Community.

152 Furthermore, as regards assessment of the damage suffered, the applicants have set out in the application the amounts of the unpaid debts owed to them by DAI, which they have already claimed before the Tribunale civile, Rome, (see paragraph 28 above) and which have not been contested by the Commission. At the hearing on 10 February 2004 they stated in response to a question from the Court of First Instance that, following the distribution carried out under the bankruptcy proceedings in respect of DAI in 2000, the damage they are claiming is only the share represented as a proportion by the Community aid in the amount of the unpaid debts owed to them by DAI, following that distribution (see paragraph 44 above). That share should therefore be calculated as a proportion of the share represented by the aid — as referred to in the contracts approved by AIMA — in the minimum buying-in price laid down.

153 The Commission for its part contends that under the system for payment of Community aid provided for in Article 9 of Regulation No 2499/82 the distillers were the direct recipients of that aid. Under the system provided for in Article 10 of that regulation, however, the recipients of it were the producers. That distinction, far from constituting discrimination, meets the need to take into account, as regards payment of advances and aid, the different administrative systems of the Member States, as stated in the 11th recital in the preamble to that regulation.

Findings of the Court

154 The Community's non-contractual liability for damage caused by the institutions, as provided for in the second paragraph of Article 215 of the EC Treaty, is not incurred unless a set of conditions relating to the illegality of the conduct complained of, the occurrence of actual damage and the existence of a causal link between the unlawful conduct and the harm alleged are all fulfilled (*Ludwigshafener Walzmühle and Others* v *Council and Commission*, cited above, paragraph 18, and Joined Cases T-195/94 and T-202/94 *Quiller and Heusmann* v *Council and Commission* [1997] ECR II-2247, paragraph 48).

155 As to the first of those conditions, case-law requires that it be established that there has been a sufficiently serious breach of a rule of law intended to confer rights on individuals (Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraph 42). The decisive test for finding that a breach of Community law is sufficiently serious is whether the Community institution concerned manifestly and seriously disregarded the limits on its discretion. Where that institution has only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach (Case C-312/00 P *Commission* v *Camar and Tico* [2002] ECR I-11355, paragraph 54, and Joined Cases T-198/95, T-171/96, T-230/97, T-174/98 and T-225/99 *Comafrica and Dole Fresh Fruit Europe* v *Commission* [2001] ECR II-1975, paragraph 134).

156 In this case, the applicants contend in essence that the difference between the systems of aid payment provided for in Articles 9 and 10 respectively of Regulation No 2499/82 is discriminatory, owing to the absence of a guarantee in respect of payment of the aid to the producers concerned under the system provided for in Article 9. Moreover, the total or partial absence of payment of the aid concerned to the applicants has led to unjust enrichment of the Community (see paragraph 84 above).

157 As regards first of all the plea alleging breach of the principle of unjust enrichment, it should be pointed out that the applicants complied with all their obligations and that preventive distillation of the wine they delivered to DAI was carried out within the time-limits laid down by Regulation No 2499/82, as was established above (see paragraph 141 above). The objectives pursued by that regulation as regards preventive distillation were thus fully attained.

158 None the less, following the insolvency of DAI, the applicants did not obtain consideration for what they provided under their quasi-contractual relationship with AIMA, in the form of payment — through DAI — of the amount of EAGGF aid stated in the contracts entered into with DAI and approved by AIMA.

159 In those circumstances, the Community obtained unjust enrichment as a result of the absence of full payment of the aid concerned to the applicants, whilst the security, provided by DAI — in order to guarantee that preventive distillation was carried out lawfully and to obtain payment of that aid by way of an advance — and redeemed by AIMA, had been entered by the latter in the EAGGF accounts in 1991.

160 The prohibition on unjust enrichment is a general principle of Community law (Case C-259/87 *Greece* v *Commission* [1990] ECR I-2845, summary publication, paragraph 26, Case T-171/99 *Corus UK* v *Commission* [2001] ECR II-2967, paragraph 55, and Joined Cases T-44/01, T-119/01 and T-126/01 *Vieira and Vieira Argentina* v *Commission* [2003] ECR II-1209, paragraph 86).

161 The conclusion that must be drawn is that the system of indirect payment of aid introduced by Article 9 of Regulation No 2499/82 manifestly infringes the general principle prohibiting unjust enrichment, since that system was not accompanied by

any procedure to ensure payment of Community aid to producers, in the event of the insolvency of the distiller, where all the conditions for granting aid were none the less met.

162 Regulation No 2499/82 is therefore vitiated by a sufficiently serious breach of the principle prohibiting unjust enrichment, the purpose of which is to confer rights on individuals.

163 As regards, secondly, the plea alleging breach of the principle of non-discrimination, the Court finds, first of all, that the choice provided for in Article 8 of Regulation No 2499/82 between, on the one hand, payment of the aid to producers through the intermediary of the distiller (Article 9) and, on the other hand, payment of the aid direct to the producers by the intervention agency (Article 10) was justified in principle by the need to ensure full effectiveness of preventive distillation for the 1982/83 wine year throughout the Community, taking into account the differences in the administrative systems in the different Member States, as stated in the 11th recital in the preamble to the regulation. The lawfulness of a system of indirect payment of aid to producers is not, in any case, contested in principle by the applicants.

164 In this case it is appropriate to consider whether or not the procedures under the system of indirect payment of aid as set out in the regulations in question give rise to discrimination between Community producers, which is prohibited by Article 40(3) of the Treaty, if their effect has been to impose on producers established in a Member State which opted for the system of indirect payment provided for in Article 9 of Regulation No 2499/82 a risk with regard to the payment of Community aid that has not been incurred by producers established in a Member State that opted for the system provided for in Article 10 of that regulation.

165 The Court has consistently held that the prohibition of discrimination laid down in Article 40(3) of the Treaty is merely a specific enunciation of the general principle of equality, which is one of the fundamental principles of Community law. By virtue of that principle, similar situations must not be treated differently unless different treatment is objectively justified (Joined Cases C-267/88 to C-285/88 *Wuidart and Others* [1990] ECR I-435, paragraph 13).

166 As regards judicial review of the conditions for the implementation of that prohibition, it should be pointed out, however, that the Community legislature has a wide discretion in respect of the common agricultural policy which corresponds to the political responsibilities imposed on it by Articles 40 and 43 of the Treaty (now Articles 34 EC and 37 EC respectively) (*Wuidart and Others*, cited above, paragraph 14).

167 In this case, it is clear from the purpose of the abovementioned regulation that whichever system for payment of aid was chosen the aid was indeed intended for producers (see paragraph 142 above). Although it is true that under Article 9(2) of Regulation No 2499/82 the intervention agency was to pay the aid to the distiller, none the less such payment was conditional upon payment, within the time-limit laid down in Article 9(1), by the distiller to the producer, of the minimum buying-in price, including the amount of the aid. Under that system, the distiller was in fact acting as an intermediary as regards payment of the Community aid, which was included in the guaranteed minimum buying-in price.

168 In those circumstances, the Court considers that the absence of a guarantee of payment of Community aid to the producers concerned, under the system provided for in Article 9 of Regulation No 2499/82 in particular in the event of the bankruptcy of the distiller, is not one of the normal commercial risks inherent in the performance of delivery contracts such as those entered into in this case between the distillers and the producers, and in particular the risk of failure to comply with the obligation to pay the agreed price in the event of the insolvency of the purchaser.

169 In that regard, it should be pointed out that, in the light of the regulations under which they were adopted, the contracts between the distillers and the producers, referred to in Articles 1, 3 and 4 of Regulation No 2499/82, should not be regarded as ordinary commercial contracts, since the price stipulated in them included the Community aid. By providing for the grant of aid from the Guarantee Section of the EAGGF for a particular category of economic operators, under specific conditions which it laid down, Regulation No 2499/82 excluded in principle any economic or commercial uncertainty in respect of payment of the aid, once those conditions for granting the aid were met.

170 In that context, the express reference to the Community aid included in the minimum buying-in price stipulated in contracts between producers and distillers, approved by the intervention agency, confirms the absence in principle of any risk of non-performance concerning payment of the price up to the amount of the aid. However, it should be pointed out that the share of the minimum buying-in price not covered by the Community aid remained subject to the risks inherent in any commercial contract.

171 In practice, however, owing to the absence of a system guaranteeing payment of the aid to the producers under the system provided for in Article 9 of the regulation, in particular in the event of bankruptcy of the distiller, actual payment of the Community aid to the producers also remained subject to uncertainties of a purely commercial nature liable to distort the conditions under which it was granted.

172 The fact that the system of aid for distillation was arranged in such a way that the Community financial resources provided for that purpose were liable to go astray in the intervening business stages before reaching their intended recipient is manifestly contrary to the purpose of the system and its public law nature. Although the security, which was provided for in the event of aid being paid by way of an advance, was likely to protect, where necessary, the financial interests of the Community, the fact remains that in circumstances such as those in the present case, the system flagrantly failed to fulfil one of its objectives, namely to improve incomes of the producers concerned. In that regard, it should be pointed out that the Commission's

argument that it is normal in the context of the common agricultural policy for the legal recipient of aid to be placed after the economic recipient represented by the agricultural producer does not affect this assessment, since the choice between the procedures laid down in Articles 9 and 10 of the regulation was by no means provided in order to enable Member States to select the recipient of the aid at their own discretion, but solely in order to help to adjust the procedures for implementing that system to their own administrative systems (11th recital in the preamble to Regulation No 2499/82).

173 It must therefore be held that that lacuna in Regulation No 2499/82 led to different treatment, depending on the Member State concerned, as regards the guarantee of payment of Community aid to the producers concerned, although that aid was in principle due to them under the relevant Community regulations.

174 Such a difference is compatible with the principle of non-discrimination only if it is objectively justified by differences between the situations concerned. That is not so in the present case. In particular, since the difference in treatment in question does not relate to the conditions for granting the aid for preventive distillation but only to the administrative procedures for granting the aid, it cannot be attributed to differences concerning the situation of the wine producers or, more generally, the situation of the wine sectors in the various Member States.

175 Moreover, contrary to the Commission's assertions, that difference in treatment is not justified either by practical considerations connected to the need to take into account the different administrative systems in the various Member States. The system of paying aid to the producers concerned through the intermediary of the distillers provided for in Article 9 of Regulation No 2499/82 could easily have been accompanied by a procedure to ensure payment of the aid to the producers in the event of the insolvency of the distiller, without any adverse effect on the effectiveness of that system. It was therefore incumbent upon the Commission to adopt in good time whatever measures it considered most appropriate in order to rectify the lacuna

in the abovementioned regulation. In that regard, the Commission's argument that the difference in treatment in question was justified by the fact that the system of payment of aid introduced by Article 10 of Regulation No 2499/82 imposed more administrative constraints on the producers concerned than the system provided for in Article 9 of that regulation is neither substantiated nor proven. The applicants' complaints do not relate to the actual principle of payment of aid to producers through the intermediary of the distiller, but to the fact that there is a lacuna in the system since it does not guarantee payment of the aid to its intended recipients in the event of the insolvency of the distiller. That absence of a guarantee was such that it deprived the producers concerned, for non-essential reasons, of the aid they were entitled to claim and therefore has nothing in common with the mere conditions of proof to which Article 10 of Regulation No 2499/82 subjected direct payment of aid to producers by the intervention agency. As for the argument the Commission put forward in its replies to the written questions from the Court that, under the system provided for in Article 10 of Regulation No 2499/82, the producers concerned were also subject to the risk that they would not receive Community aid if the distiller failed to comply with his obligation to carry out distillation of the wine within the time- limit laid down, it should be pointed out, first, that such a risk hung over all producers, whichever option was chosen by the Member States concerned, and, second, it has no connection with the risk linked to the insolvency of the distiller, which is the only risk at issue in this case, since it is common ground that the wine delivered by the applicants was distilled within the time-limits laid down.

176 In those circumstances, by failing, within the structure of Regulation No 2499/82, to add to the system for payment of aid provided for in Article 9 of that regulation a procedure guaranteeing payment of aid to the producers concerned in the event of the insolvency of the distiller, the Commission manifestly and seriously disregarded the limits on its discretion. Regulation No 2499/82 is also therefore vitiated by a sufficiently serious breach of the principle of non-discrimination, the purpose of which is to confer rights on individuals (*Dumortier and Others* v *Council*, cited above, paragraph 11).

177 Moreover, the Commission's view that the applicants did not establish the existence of a causal link between the damage resulting from the total or partial absence of payment of the aid to the applicants and the conduct of that institution, on the

ground that they did not establish a causal link between the absence of payment of the aid by DAI — which according to the Commission constitutes the damaging event — and the conduct of that institution must be rejected. In that regard, suffice it to say that the applicants are right to argue that the damage they suffered, which is not disputed by the Commission, was caused by the failure of that institution to include a procedure guaranteeing payment of the aid to the producers concerned in the event of the insolvency of the distiller, as part of the system provided for in Article 9 of Regulation No 2499/82 (see paragraphs 111 and 112 above). The total or partial absence of payment of the aid concerned to the applicants following DAI's bankruptcy is the direct result of that lacuna in Regulation No 2499/82. The existence of a causal link between that damage and the conduct in question of the Commission is thus clearly established.

178 It must be concluded in the light of the above that the conditions are met for the Community to incur liability as regards the unlawfulness of the conduct complained of, the existence of the damage and the causal link between that conduct and the damage pleaded.

179 Since the amount of damage suffered by the applicants cannot be determined at the current stage of the proceedings, in the light of the arguments adduced by the parties it is appropriate to establish by an interlocutory ruling that the Commission is required to compensate the applicants for the damage which has resulted for them from the total or partial absence of payment of the share represented by the Community aid — which they were entitled to claim under Regulation No 2499/82 — forming part of the unpaid debts owed to them by DAI.

180 The Court therefore calls upon the parties to seek agreement in the light of this judgment on the amount of compensation for the damage suffered, within four months of the delivery of this judgment. Failing agreement, the parties shall submit to the Court, within that time-limit, the figures they propose.

Costs

181 In the light of the preceding paragraph, the decision as to costs is reserved.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

Hereby:

1. **Declares that the Commission is required to make good the damage sustained by the applicants following the bankruptcy of Distilleria Agricola Industriale de Terralba, as a result of the absence of a procedure that would guarantee, under the system introduced by Article 9 of Regulation (EEC) No 2499/82 laying down provisions concerning preventive distillation for the 1982/83 wine year, payment to the producers concerned of the Community aid provided for in that regulation;**

2. **Orders the parties to transmit to the Court, within four months of delivery of the present judgment, the figures for the compensation drawn up by common consent;**

3. **Orders that, failing agreement, the parties shall submit to the Court within that time-limit the figures they propose.**

Pirrung Meij Forwood

Delivered in open court in Luxembourg on 23 November 2004.

H. Jung

Registrar

J. Pirrung

President

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