OPINION OF ADVOCATE GENERAL ALBER

delivered on 19 October 2000 [1]

I — Introduction

1. In this action, the Netherlands is seeking the annulment of Commission Decision 98/358/EC of 6 May 1998 on the clearance of the accounts presented by the Member States in respect of the expenditure for 1994 of the Guarantee Section of the European Agricultural Guidance and Guarantee Fund ('the EAGGF'), [2] in so far as that decision excluded from Community funding, in respect of the applicant Member State, an amount of NLG 16 378 716.63 for expenditure on advance payments of export refunds.

2. The Commission claims that in the course of verifications made between February and May 1994 it found deficiencies in the control system [3] in the Netherlands. Thereupon it made financial corrections. Under those corrections, expenditure equal to the amount in dispute was not recognised for the Netherlands in connection with the prefinancing of export refunds [4] in the beef and veal sector and the cereals sector.

3. In summary, the Kingdom of the Netherlands makes the following six complaints against the Commission, in the following order:

(1) The Commission cannot base reductions for 1994 on verifications which related to the 1992 and 1993 financial years. Furthermore, the small number of checks and the small number of irregularities found in those checks do not justify the reductions made.

(2) It infringed the principle of good faith cooperation, since it failed to have regard to the arguments presented by the Netherlands.

1 — Original language: German.

2 — OJ 1998 L 163, p. 28.

3 — With regard to the requirements on the controls to be carried out under Community law see point 26 et seq. below.

4 — With regard to the prefinancing system see point 21 et seq. below.

(3) The Commission's final report is incorrect in so far as the control measures applied during the period under consideration had complied with Community law.

(4) By making the reductions the Commission infringed the principle of legal certainty, since it had undertaken to draw the consequences from the deficiencies found only from 1 July 1994.

(5) The reduction made is not consistent with the guidelines drawn up by the Commission and also infringes the principle of equal treatment.

(6) Lastly, there is also an infringement of the duty to state reasons.

II — Facts and forms of order sought

4. As part of the clearance of accounts for the 1992 and 1993 financial years, the Commission had carried out the following checks in 1994:

(a) in the cereals sector

— in February at the Central Board for Agricultural Products (Hoofdproduktschap Akkerbouwprodukten — 'the HPA') and

— in April again at the HPA, at Waalhaven customs office (Rotterdam) and at World Flour, at Zaandam customs office and at Wessanen Flour, and at Veendam customs office and at AVEBE B.A.

(b) in the beef and veal sector

— in February checks at the Cattle and Meat Board (Produktschap Vee en Vlees — 'the PVV') in The Hague and

— in May both at Winterswijk customs office and at NVC International BV, and at Nijmegen customs office and at Kühne und Heitz N.V.

The Commission had decided not to make the proposed checks on a third undertaking in this sector, since the Netherlands authorities were conducting their own investigations into that undertaking.

5. On 12 October 1994, the Commission informed the Netherlands authorities of its findings from those verifications. [5] The Netherlands Ministry of Agriculture replied by letter of 28 November 1994. [6]

6. On 7 July 1995 a meeting was held between the Commission and representatives of the Netherlands authorities in which the results of the verifications carried out by the Commission staff were discussed. Following that meeting, the Commission sent an official notification on 28 July 1995 concerning the outcome of that discussion and for the first time indicated the years 1993 and 1994 as the reference period. [7]

7. On 22 September 1995 the Commission submitted a Summary Report on the results of the investigations carried out for the clearance of the accounts of the EAGGF Guarantee Section for 1992. [8] In a passage of the section on physical checks on exports, which was subsequently amended several times, [9] the Commission declared that absolutely no corrections would be proposed for 1992 and that corrections would be reserved for the following years, in particular 1993, if further checks revealed that the Member States had failed to take the required measures. In a letter of 11 January 1994, the Commission had already announced with regard to those requirements that the Member States should implement the measures by 1 July 1994, since a further delay in implementation would have financial consequences. By letter of 13 April 1994, the Netherlands authorities gave notification of the relevant measures. [10]

8. On 28 June 1996 the Commission transmitted to the permanent representation of the Netherlands a further official notification on the final conclusions arising from the checks on the prefinancing procedure in the Netherlands. [11] That notification reiterated the Commission's criticisms, summarised the position of the Netherlands authorities and set out the corrections to the clearance of accounts for 1993 and 1994 which the Commission considered to be necessary and which amounted to more than NLG 16 million for each year.

9. Thereupon, by letter of 6 September 1996, [12] the Netherlands Government requested the conciliation procedure provided for under Article 2(1) of Decision

5 — Annex 6 to the application.
6 — Included only partially in Annex VIII to the defence.
7 — Annex 8 to the application and Annex IX to the defence.
8 — Doc. VI/6355/95, extracts in Annex 9 to the application.
9 — See Annexes 10 and 11 to the application.
10 — Annex 3 to the application.
11 — Annex 12 to the application and Annex VI to the defence.
12 — Annex 13 to the application.

94/442/EC. [13] The conciliation body submitted its report on 13 February 1997. [14]

10. The Commission had already produced the draft version of its Summary Report for 1993 [15] on 31 December 1996, which, as far as the subject-matter of the proceedings is concerned, was based largely on the arguments contained in the conclusions of 28 June 1996. It also already contained the proposal to correct the clearance of the accounts presented by the Netherlands for 1994 by approximately NLG 16 million. On 26 February 1997, the Commission submitted a first addendum to that report which *inter alia* reiterated the opinion of the conciliation body and in which it stated that, according to that opinion, no modification to the proposed measures was necessary. [16] A further addendum followed on 20 March 1997 in which the Commission referred *inter alia* to a statement made by the Netherlands. [17]

11. Following a further contact with the Netherlands authorities in July 1997, the Commission adopted the Summary Report for 1994 on 24 November 1997. [18] With reference to the Summary Report for 1993, that report reiterated the proposal to make another correction to the detriment of the Netherlands of approximately NLG 16 million for 1994.

12. On 6 May 1998 the Commission finally adopted the contested decision. For Belgium, Germany, France and the Netherlands, flat-rate reductions of 10% of declared expenditure in the cereals sector were decided. As regards prefinancing of export refunds for beef and veal, reductions of 5% were fixed for France, Germany, Italy and the Netherlands, and 10% for Belgium. This meant corrections of more than NLG 16 million for the Netherlands.

13. In the meantime, on the basis of the investigations in May 1996 which were intended to concern physical checks on exports in the 1994, 1995 and 1996 financial years, the Commission had expressed its satisfaction with the measures taken by the Netherlands authorities as a result of the criticism made by the Commission regarding physical checks in connection with prefinancing — in particular for the export of beef and veal. [19]

13 — Commission Decision 94/442/EC of 1 July 1994 setting up a conciliation procedure in the context of the clearance of the accounts of the European Agricultural Guidance and Guarantee Fund (EAGGF), Guarantee Section (OJ 1994 L 182, p. 45).

14 — Annex 14 to the application.

15 — Doc. VI/5210/96, extracts in Annex II to the defence and, from a later version, in Annex 15 to the application.

16 — Annex XI to the defence.

17 — Annex XII to the defence.

18 — Doc. VI/7421/97, extracts in Annex 17 to the application.

19 — Letter from the Commission of 18 December 1996, Annex 18 to the application.

14. In the view of the Netherlands Government, in adopting the contested decision, the Commission has

(1) infringed Article 5(2)(c) of Regulation (EEC) No 729/70 [20] in so far as it made corrections to the expenditure in the 1994 financial year on the basis of verifications relating to the 1992 and 1993 financial years. In view of the small number of checks carried out by the Commission in 1994 and the small number of irregularities found in those checks, the Commission cannot assume, on the basis of the verifications for 1994, that the Netherlands control system as a whole displayed material deficiencies which justified a flat-rate reduction of 10% for the cereals sector and 5% in the beef and veal sector;

(2) infringed Article 5(2)(c) of Regulation No 729/70, the principle of cooperation in good faith stemming from Article 5 of the EC Treaty (now Article 10 EC) and the principle of *audi alteram partem*, since it failed to conduct a dialogue in good faith with the Netherlands authorities concerning the procedure leading up to the clearance of accounts for 1994. The Commission did not allege that the Netherlands' arguments were incorrect or irrelevant, let alone state reasons for taking such a view, but merely ignored those arguments;

(3) infringed Regulation (EEC) No 565/80 and Regulation (EEC) No 3665/87, since, contrary to the view taken by the Commission, the Netherlands control system was in accordance with the Community rules in force at the time; there was no reason to apply Regulation (EC) No 2221/95 by anticipation;

(4) infringed the principle of legal certainty, since, contrary to its undertaking that financial consequences would follow from the deficiencies found only from 1 July 1994, it made corrections for the 1994 financial year and failed to take mitigating circumstances into account;

(5) infringed the principle of equal treatment, since it departed from its guidelines without stating the reasons for such a departure;

(6) infringed Article 190 of the EC Treaty (now Article 253 EC), since it failed properly to state reasons for its decision.

20 — Regulation (EEC) No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy (OJ, English Special Edition 1970 (I), p. 218), last amended by Council Regulation (EC) No 1287/95 of 22 May 1995 amending Regulation (EEC) No 729/70 on the financing of the common agricultural policy (OJ 1995 L 125, p. 1). For the content of Article 5 of Regulation No 729/70 see point 23.

15. The Kingdom of the Netherlands has therefore brought an action against the Commission and claims that the Court should:

(1) annul the Commission Decision of 6 May 1998 on the clearance of accounts presented by the Member States in respect of the expenditure for 1994 of the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF), in so far as a sum of NLG 16 378 716.63 concerning expenditure incurred by the Netherlands on advance payments of export refunds is excluded from Community financing (reference C(98) 1124 final);

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

16. The Commission claims that the Court should:

(1) dismiss the action brought by the Kingdom of the Netherlands;

(2) order the Kingdom of the Netherlands to pay the costs.

17. The Commission takes the view that the deficiencies that it found in the Netherlands control system justified a flat-rate reduction of 10% of declared expenditure in the cereals sector and of 5% in the beef and veal sector. Furthermore, it claims that the correction made is proportionate and does not constitute unjustified discrimination.

18. The parties' other arguments will be examined in my analysis.

III — Relevant legislation

19. The general provisions of Community law which are relevant to the present case will be set out together below. The specific provisions will — where necessary — be mentioned together with the individual pleas in law.

A — *Community financing*

20. The basic provisions concerning the financing of the common agricultural

policy can be found in Regulation No 729/70.[21] Thus, under Article 2(1), refunds on exports to third countries, granted in accordance with the Community rules within the framework of the common organisation of agricultural markets, are to be financed by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (the EAGGF).

B — *Advance payments for exports of beef and veal and cereals*

21. The basic provisions governing the common organisation of the market in beef and veal are contained in Regulation (EEC) No 805/68,[22] whilst those for the cereals sector are contained in Regulation (EEC) No 2727/75.[23] In principle, export refunds may be granted only where proof has been furnished that the products have been exported from the Community.

22. Exceptions to that principle are provided for in particular in Regulation (EEC) No 565/80.[24] That regulation lays down general rules for paying, in advance of export, an amount equal to the export refunds on beef and veal and cereals.[25]

23. Title II, Chapter 3 of Regulation (EEC) No 3665/87[26] lays down rules governing advances on refunds where goods are processed or stored prior to export and thus the application of Regulation No 565/80.

24. The advance payment may not result in the beneficiaries obtaining advantages compared with other exporters who receive refunds only when the goods are exported. It must therefore be ensured that the goods actually exist when the advance payment is made and are not used in any other way during the period covered by the advance payment.

25. Therefore, the different procedures for advance payments in principle require, under Article 25 of Regulation No 3665/87, the exporter to lodge a declaration of intent (payment declaration) with the customs authorities. That payment declaration must include all necessary particulars, including the precise quantity of

21 — Cited in footnote 20.

22 — Regulation (EEC) No 805/68 of the Council of 27 June 1968 on the common organisation of the market in beef and veal (OJ, English Special Edition 1968 (I), p. 187).

23 — Regulation (EEC) No 2727/75 of the Council of 29 October 1975 on the common organisation of the market in cereals (OJ 1975 L 281, p. 1).

24 — Council Regulation (EEC) No 565/80 of 4 March 1980 on the advance payment of export refunds in respect of agricultural products (OJ 1980 L 62, p. 5).

25 — For the details of the procedure for advance payment see the Opinion of 21 October 1999 in Case C-242/97 *Belgium* v *Commission* [1999] ECR I-3421, point 25 et seq.

26 — Commission Regulation (EEC) No 3665/87 of 27 November 1987 laying down common detailed rules for the application of the system of export refunds on agricultural products (OJ 1987 L 351, p. 1).

the goods to be exported. Under Article 26 of Regulation No 3665/87, the goods must be placed under customs control from the date of acceptance of the payment declaration until they leave the customs territory of the Community or until they have reached their destination.

— recover sums lost as a result of irregularities or negligence.

...'

C — *The checks*

26. With regard to the obligations of the Member States, Article 8(1) of the abovementioned Regulation No 729/70 provides:

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

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

— prevent and deal with irregularities;

27. The rules governing the checks carried out at the time of export of agricultural products for which refunds or other payments have been given were adopted in Regulation (EEC) No 386/90[27] and Regulation (EEC) No 2030/90.[28] Article 1(1) of Regulation (EEC) No 386/90 lays down '... procedures for monitoring whether operations conferring entitlement to the payment of refunds on and all other amounts in respect of export transactions have been actually carried out and executed correctly'.

28. Articles 2 and 3 of Regulation No 386/90 lay down the checks to be carried out by the Member States.

27 — Council Regulation (EEC) No 386/90 of 12 February 1990 on the monitoring carried out at the time of export of agricultural products receiving refunds or other amounts (OJ 1990 L 42, p. 6), last amended by Council Regulation (EC) No 163/94 of 24 January 1994 amending Regulation (EEC) No 386/90 on the monitoring carried out at the time of export of agricultural products receiving refunds or other amounts (OJ 1994 L 24, p. 2).

28 — Commission Regulation (EEC) No 2030/90 of 17 July 1990 laying down detailed rules for the application of Council Regulation (EEC) No 386/90 as regards physical checks carried out at the time of export of agricultural products attracting refunds or other amounts (OJ 1990 L 186, p. 6).

29. First, Article 2 states:

'Member States shall carry out:

(a) physical checks on goods in accordance with Article 3 and Article 3a, at the time the customs export formalities are completed and before authorisation is given for the goods in question to be exported, on the basis of documents submitted in support of the export declaration, and

(b) scrutiny of the documents in the payment application file in accordance with Article 4.'

30. This is followed by Article 3, under which

'1. Without prejudice to any specific provisions which require more extensive checks, the physical checks referred to in Article 2(a) must:

(a) take the form of spot checks conducted frequently and without prior warning;

(b) ...'.

31. The term 'Warenkontrollen' in the German version implies the direct inspection of the goods, which is expressed more clearly in the terms 'fysieke controles' in the Dutch and 'contrôles physiques' in the French version.

32. Under Article 5(1) of Regulation No 2030/90 the physical checks must be carried out during the period between the lodging of the export declaration and authorisation to export the goods.

D — *Corrections to the clearance of accounts*

33. Under Article 8(2) of the abovementioned Regulation No 729/70, the financial

consequences of irregularities or negligence attributable to administrative authorities or other bodies of the Member States are not borne by the Community. In practical terms, the Commission corrects the clearance of accounts presented by the Member States by the relevant amounts.

34. Article 5(2)(c) of that regulation, introduced by Regulation No 1287/95, [29] is the legal basis for a correction which applies at present. In particular, the provision governs the procedure under which the Commission decides on the corrections to the clearance of accounts ('the correction procedure'). Article 2 of Regulation No 1287/95, which governs the temporal application of that provision, is described in greater detail in the analysis. [30]

35. If the Commission detects actual amounts which have been paid out with loss to the EAGGF, it must make corrections equal to those amounts. However, it may also make flat-rate corrections if it can simply give evidence of a risk of loss.

36. The Commission's Belle Group Report, which the Member States have accepted, lays down the guidelines for the corrections. The Belle Group Report provides *inter alia* for the following three categories of flat-rate corrections:

'(a) 2% of expenditure, where the deficiency is limited to parts of the control system of lesser importance, or to the operation of controls which are not essential to the assurance of the regularity of the expenditure, such that it can reasonably be concluded that the risk of loss to the EAGGF was minor.

(b) 5% of expenditure, where the deficiency relates to important elements of the control system or to the operation of controls which play an important part in the assurance of the regularity of the expenditure, such that it can reasonably be concluded that the risk of loss to the EAGGF was significant.

(c) 10% of expenditure, where the deficiency relates to the whole of or fundamental elements of the control system or to the operation of controls essential to assuring the regularity of the expenditure, such that it can reasonably be concluded that there was a high risk of widespread loss to the EAGGF.'

37. The guidelines further provide that, where there is doubt as to the correction

29 — Cited in footnote 20.

30 — See below, point 83 et seq.

rate to be applied, the following points may be taken into account as mitigating factors:

'— whether the national authorities took effective steps to remedy the deficiencies as soon as they were brought to light;

— whether the deficiencies arose from difficulties in the interpretation of Community texts.'

38. Therefore, under the guidelines set out in that report, in assessing the rate at which flat-rate corrections are to be applied, the risk of loss to the EAGGF is first to be calculated on the basis of the deficiencies found. In that regard, consideration must be given to the effectiveness of the control system as a whole, individual elements of that system or the operation of those controls. Account must also be taken of the seriousness of the deficiencies and the measures taken to combat fraud.

IV — Observations regarding the clearance of accounts procedure — Principles derived from case-law

39. It should first be stated that the clearance of accounts procedure is intended to ensure that the funds made available to the Member States have been used in accordance with the Community rules applicable within the framework of the common organisation of the market.

40. The Court has held that Article 8(1) of Regulation No 729/70, [31] which expressly lays down in that specific area the obligations imposed on the Member States by Article 5 of the EC Treaty, defines the principles according to which the Community and the Member States are to ensure the implementation of Community decisions on agricultural intervention financed by the EAGGF and combat fraud and irregularities in relation to those operations. It imposes on the Member States the obligation to take the measures necessary to satisfy themselves that the transactions financed by the EAGGF are actually carried out and are executed correctly, even if the specific Community act does not expressly provide for the adoption of particular supervisory measures. [32]

31 — Cited in footnote 20; with regard to the content of the provision see above, point 26 et seq.

32 — See Case C-2/93 *Exportslachterijen van Oordegem* [1994] ECR I-2283, paragraphs 17 and 18, and Case C-235/97 *France* v *Commission* [1998] ECR I-7555, paragraph 45.

41. It is settled case-law that where the Commission refuses to charge expenditure to the EAGGF on the ground that it was incurred as a result of breaches of Community rules for which a Member State can be held responsible, it is required not to demonstrate exhaustively that the information transmitted by the Member States is inaccurate, but to adduce evidence of serious and reasonable doubt on its part regarding the figures notified by the national authorities. [33] Where, in refusing to bear certain expenditure, the Commission claims that there has been a breach of the rules on the common organisation of the agricultural markets, it is obliged to give reasons for its decision and indicate how the absence of, or defects in, inspection procedures operated by the Member State in question were found. [34] These considerations apply *mutatis mutandis* if the Commission makes a flat-rate correction to the expenditure on the basis of general deficiencies in the control system in a Member State. [35]

42. Consequently, it is for the Member State to show that the Commission's calculations and findings are incorrect and to adduce the most detailed and comprehensive evidence that its own information and figures are accurate. [36] As can be seen from the abovementioned judgment, the Member State in question cannot rebut the Commission's findings by mere assertions, but must indicate specific elements by which, for example, the existence of a reliable and operational supervisory system can be proven. (The reason for this mitigation of the burden of proof on the Commission is that it is the Member State which is best placed to collect and verify the data required for the clearance of EAGGF accounts.)

43. If the Member State is not able to show that they are inaccurate, the Commission's findings can give rise to serious doubts, which give sufficient grounds for a payment reduction, as to the existence of an adequate and effective series of supervisory measures and inspection procedures. [37]

44. In refusing to bear expenditure within the framework of the grant of funds through the EAGGF, the Commission is

33 — Case C-28/94 *Netherlands* v *Commission* [1999] ECR I-1973, paragraph 40, with further references.

34 — Case C-242/96 *Italy* v *Commission* [1998] ECR I-5863, paragraph 58, and Case C-8/88 *Germany* v *Commission* [1990] ECR I-2321, paragraph 23.

35 — See Case C-28/94 (cited in footnote 33, paragraph 38 et seq.).

36 — Case C-54/95 *Germany* v *Commission* [1999] ECR I-35, paragraph 35.

37 — Case C-242/96 *Italy* v *Commission* and Case C-8/88 *Germany* v *Commission* (both cited in footnote 34).

not required in principle to prove that actual loss has occurred. If such specific cases cannot be proven, proof of a risk of loss to the EAGGF is sufficient.

V — Analysis

A — *First plea: infringement of Regulation No 729/70*

45. The Netherlands divides this first plea into three parts. The first two allege infringement of Article 5(2)(c) of Regulation No 729/70, since, on the one hand, for various reasons which are explained in detail, the investigations conducted could not, by and large, justify the corrections and, on the other, the Commission has infringed the principles of cooperation in good faith and *audi alteram partem*. The third alleges infringement of Regulations No 565/80 and No 3665/87 in that the Commission found individual deficiencies when the Netherlands controls had complied with the applicable Community provisions in this regard. The third part of this plea should be examined first, because it concerns the individual deficiencies found in the controls, which are a condition for the contested corrections.

(1) The third part of the first plea: infringement of Regulations No 565/80 and No 3665/87 [38]

(a) Cereals sector

(i) No knowledge of the storage location

46. In the Summary Report for the 1993 financial year, to which the Summary Report for the 1994 financial year refers, the Commission stated that the Netherlands authorities had no knowledge of where Wessanen stored cereals for which advance payments were made.

47. The Netherlands claims that this was an isolated case. This practice had been changed by November 1993. It was not therefore possible to infer any general deficiencies from it.

48. The Commission submits that for years, rather than designating the precise storage location, Wessanen had referred only in general terms to its 10 warehouses which were scattered throughout the Netherlands. In 1992 this undertaking received export refunds amounting to NLG 30 million, including NLG 18 million as an

38 — With regard to those regulations see point 22 et seq. above.

advance payment. The Netherlands authorities had continued to tolerate this practice at least up to the beginning of the 1994 financial year.

49. In addition, at least one other undertaking that reaped the benefit of this practice received advance payments at least at the beginning of the 1994 financial year.

50. The facts established by the Commission and not disputed by the Netherlands undoubtedly indicate a deficiency in the Netherlands controls, since a spot check conducted without prior warning is not possible without knowledge of the precise storage location. The mere assertion that it was an isolated case is not sufficient, in accordance with the principles of case-law explained above, to call into question negative conclusions regarding the whole system of Netherlands controls, particularly since the Commission is able to cite similar deficiencies in the monitoring of another undertaking which was not even the subject of investigations.

(ii) Mixture of cereals from two undertakings

51. The Summary Report further complains that Wessanen and World Flour used the same warehouse and had not separated their stocks. The risk thus arose that both undertakings had received advance payments for the same consignments of cereals.

52. The Netherlands takes the view that, in this regard too, this is an unrepresentative exceptional case, since at the time both undertakings were undergoing a merger, which had already extended to warehouse facilities.

53. The Commission points out that together the undertakings had received 40% of the advance payments in 1992. Furthermore, both undertakings acted separately for the purpose of the advance payments.

54. Those circumstances must also be classified as deficiencies in the Netherlands control system. There is no clear reason to suggest that these circumstances were representative of similar deficiencies in the whole system of Netherlands controls, since the Commission itself concedes that it was attributable to special circumstances in connection with the storage of cereals in the port of Rotterdam. However, they are a further indication that the Netherlands system of controls in the cereals sectors did not enable the prefinanced quantities to be checked at any time.

(iii) Monitoring deficiencies in the port of Rotterdam

55. In the port of Rotterdam, the customs instructions required physical checks on goods in the course of the advance payment. However, cereal from different undertakings, which was not all subject to prefinancing arrangements, was stored there in 333 interconnected silos. It was therefore impossible to carry out a physical check on different consignments during storage. The Commission criticised the fact that, rather than using a different — equally effective — control method, the Netherlands had carried out checks only subsequently. This had given rise to further risk of abuse.

56. The Netherlands refers to its systematic controls. These had consisted of the following measures:

— an authorisation to place a consignment under customs control;

— a verification of the payment declaration to ascertain whether the quantity of cereal declared is being stored at the location declared and under the name of the undertaking making the declaration;

— spot checks on goods in accordance with Community law;

— verifications on the basis of stock management, whereby, in order to make more effective use of warehouse capacities in the cereals sector, it is permitted to store different consignments together, and

— a subsequent administrative control.

57. This complaint concerns the central problem, which has already been mentioned, of storage in the port of Rotterdam, which clearly makes a check on the prefinanced consignments of cereals more difficult. Since the Netherlands authorities permitted the cereals which were subject to customs control to be stored in this form, they should have ensured a form of control which was at least as effective as the physical checks prescribed by Community law. If in such a case the Commission complains of the absence of appropriate checks, it is for the Netherlands to demonstrate that such a control system exists. [39] The reference to the general system of controls does not satisfy these requirements to present evidence, since that system fails to take account of the special situation in

39 — See point 42 above.

the port of Rotterdam. For example, it provided for spot checks on goods which were, in fact, impossible there. Failure to take into account the special situation can also be seen in the fact that the control instructions to the customs office required a manifestly impossible physical check on goods. The Netherlands has not therefore refuted the Commission's complaint.

(iv) Checks at AVEBE

58. In the reply, the Netherlands claims that the Commission recognised that sufficient physical checks had been conducted at AVEBE.

59. That assertion is not correct. As the Commission explains, it is clear from the check report that physical checks were not conducted during the advance payment period, but only when the export declaration was made.

(b) The beef and veal sector

60. The Netherlands first argues that the criticism made by the Commission concerns only Winterswijk customs office. However, the Commission rightly refers to its investigation report[40] on Nijmegen customs office, which showed similar deficiencies including even the announcement of the check. According to the same report, checks were announced in the cereals sector at Rotterdam and Veendam customs offices.

(i) Checks 'without prior warning'

61. The Netherlands takes the view that the meaning of checks 'without prior warning' under Article 3(1)(a) of Regulation No 386/90 was not clarified until the adoption of Regulation (EC) No 2221/95,[41] which was not (yet) applicable to the 1994 financial year, indicating that even a short notice of the check to the warehouse manager was not permitted. Article 5(2) of Regulation No 2221/95 expressly stated for the first time that checks with prior warning are not to be regarded as physical checks within the meaning of Article 2(1) of Regulation No 386/90. It would not be compatible with the prohibition of retroactive effect to require such a narrow interpretation even for 1994. The Netherlands draws a conceptual distinction between 'onverwacht', which is used in Regulation No 386/90 and can be translated as 'unexpected', and 'onaangekondigd', which can best be translated by 'unannounced', but is not used in either of the regulations.

40 — Report of 24 October 1994, Annex IV to the defence.

41 — Commission Regulation (EC) No 2221/95 of 20 September 1995 laying down detailed rules for the application of Council Regulation (EEC) No 386/90 as regards physical checks carried out at the time of export of agricultural products qualifying for refunds (OJ 1995 L 224, p. 13).

62. It may be that the German version 'unangemeldet' or the English 'without prior warning' precludes any announcement more clearly than the Dutch 'onverwacht' and also the French 'inopiné'. Nevertheless, announcements of checks are incompatible with the aim of an effective check, which was clear even before the adoption of Regulation No 2221/95. Article 5(2) of that regulation contains only a clarification in this respect, but no restriction of the concept of checks in comparison with Regulation No 386/90. The Netherlands authorities should also have realised this. Retroactive effect is therefore entirely out of the question, particularly since the Commission had criticised the announcement of checks in a report published back in 1993. [42]

63. The Netherlands also claims that the announcements were made with such short notice that any abuse was ruled out. However, in the case of Rotterdam customs office, in the cereals sector, the abovementioned investigation report refers to a delay of between half an hour and one hour.

64. In the case of Winterswijk customs office, the announcement was made in practice in such a way that the warehouse manager informed the customs office by telephone when goods were delivered and in 5% of cases the customs office prohibited deposit of the goods in the warehouse until it had made a check. It is unclear how much time passed before each check. However, since any period of notice reduces the surprise nature of an investigation and allows scope for abuse, the Netherlands should have shown that its methods of announcement did not allow such scope for abuse and stated reasons why that was so. The mere assertion that there was no such risk is not sufficient, particularly in view of the other deficiencies in the control system.

(ii) The superficiality of the checks

65. The Summary Report accuses the Netherlands authorities of conducting superficial checks.

66. The Netherlands points out that, with regard to male cattle, the Voedselvoorzieningsinen verkoopbureau (Office for the Purchase and Sale of Food Supplies, 'the VIB') conducted a thorough check following slaughter. The customs offices were therefore able simply to carry out visual checks. In addition, the deficiencies were present only at Winterswijk and in June 1994 the Netherlands had improved its procedures once again.

67. The Commission argues, however, that the customs offices did not even carry out the necessary visual checks, but often relied exclusively on the VIB certificates without comparing the contents of the boxes with those certificates. Furthermore, the Commission points out that the VIB checks did

42 — Supplementary report of the application of Regulation (EEC) No 386/90 on the monitoring carried out at the time of export of agricultural products receiving refunds or other amounts (OJ 1993 C 218, p. 14, No 2.4).

not have the same aim as the checks during prefinancing which are at issue here, which are intended primarily to prevent an exchange of products during that period. The VIB checks could not have guaranteed this. This practice existed both at Winterswijk and at Nijmegen. The improvements recommended even before the investigations were not made until the last quarter of the 1994 financial year.

68. It is not disputed that the checks were not conducted in the required form during the prefinancing period. The Netherlands was not able to show that the VIB checks justified the restriction of the checks during the prefinancing period. Therefore, this complaint made by the Commission cannot be rejected either.

(iii) Fax-based checks

69. The Summary Report criticised the fact that the checks at Winterswijk had not been conducted on the basis of the original payment declaration, but only on the basis of a fax. That fax was sent to the customs office by the warehouse manager when the meat was deposited at the warehouse. The actual payment declaration was not submitted until 24 hours later.

70. The Netherlands emphasises that this method merely served to reduce the workload. The fax contained the same information as the payment declaration and enabled inaccuracies to be detected quickly and the formal declarations to be based on data which was verified by the customs offices.

71. The Commission points out, however, that this method allowed undertakings, in the event of a check, to correct inaccurate (i.e. excessive to the detriment of the Community) data in the formal declaration with impunity. If the check did not take place, the abovementioned control practice enabled the undertaking to receive excessive payments on the basis of the inaccurate data.

72. The very reasons for these methods given by the Netherlands show that it reduced the undertakings' risk of having penalties imposed when a check was made. This approach thus impaired the effect of checks. Furthermore, it is clear from Article 25 of Regulation No 3665/87 that the payment declaration alone forms the basis of the advance payment.[43] The advance payment procedure does not commence until the declaration is submitted. Consequently, this complaint made by the Commission cannot be rejected either.

43 — See point 25 above.

(iv) The inaccuracy of the check reports

73. The Summary Report complained that it could not be discerned from the check reports what had actually been checked and, in particular, whether a complete physical check had taken place.

74. In the view of the Netherlands, the obligation to produce detailed reports first applied under Regulation No 2221/95, which was not yet applicable in 1994.

75. In the reply the Netherlands argues for the first time that the Commission investigated the wrong set of files at Winterswijk customs office. These could not have contained the relevant information, since in these cases absolutely no physical checks had taken place, only administrative checks. The Commission had also been made aware of the fact, but it did not follow up this information. At Nijmegen customs office, on the other hand, the Commission had investigated the correct files and therefore reached a more positive conclusion. The Commission complains that this submission was not made in due time.

76. The Commission points out that the Member States are required to show the quality of their checks, an obligation which is also expressly laid down in Article 2(3) of Regulation No 2030/90.[44] The distinction between the different types of document does not have any basis in Community law, irrespective of whether or not this plea in support of the claim was submitted in due time.

77. In the reply, the Netherlands clearly abandoned the view, which is contrary to Community law, that detailed check reports had to be produced only after the entry into force of Regulation No 2221/95. Article 2(3) of Regulation No 2030/90 expressly requires sufficient documentation of checks.

78. It may be that the claim that the Commission investigated the wrong files was not submitted in due time. Article 42(2) of the Rules of Procedure prohibits in principle the introduction of new pleas during the proceedings unless they are based on matters of law or of fact which come to light after the commencement of the proceedings. The argument that two different sets of files were kept at Winterswijk customs office implies a factual assertion which had not been made before and which must have been known to the Netherlands authorities long before the commencement of proceedings. That submission was therefore not submitted in due time.[45]

44 — The provision states: 'Member States shall take the necessary measures so that it may be shown, where appropriate, that the customs offices have carried out the [minimum] physical checks referred to in Article 3(1) and (2) of Regulation (EEC) No 386/90.' [Tr: 'minimum' appears in the German version.]

45 — Case C-242/97 *Belgium* v *Commission* [2000] ECR I-3421, paragraph 115 et seq.

79. Furthermore, that assertion is in any case inconclusive in so far as the check reports in the files inspected should have made clear that they do not relate to physical checks. In addition, it would then be incomprehensible why the Netherlands took the view in the application that the check reports did not have to be so detailed at the time the checks were made.

80. If the Commission did actually erroneously investigate the wrong files, the duty of cooperation in good faith would have required the Netherlands authorities to shed light on that error. If the Netherlands had done so — as is claimed — this raises the question why it is not documented at any point in the procedure and was not submitted in due time.

81. The third part of the first plea must therefore be rejected.

(2) The first part of the first plea: unlawful corrections

82. The first part of the first plea is based on two different complaints which the Netherlands classifies as an infringement of the correction procedure under Article 5(2)(c) of Regulation No 729/70.[46] On the one hand, the Commission may not base corrections for 1994 on verifications which concern the 1992 and 1993 financial years, whilst on the other those verifications would not justify the corrections made. However, the Commission first raises the question whether the abovementioned provision is applicable at all.

(a) The applicability of Article 5(2)(c) of Regulation No 729/70, introduced by Regulation No 1287/95

83. The Commission takes the view that the correction procedure under Article 5(2)(c) of Regulation No 729/70 is not applicable in the present case. The provision contained in Regulation No 729/70 was introduced only by Regulation No 1287/95. It is applicable only from the 1995 financial year. In so far as the Commission has undertaken to observe relevant criteria, these are only political undertakings, failure to fulfil which does not give grounds to annul a Commission decision.

84. The Netherlands claims that the correction procedure merely specifies that in the procedure to determine the clearance of accounts the duty of cooperation in good faith which always exists between the Commission and the Member States on

46 — With regard to this provision see point 34 above.

the basis of Community solidarity must apply. The Belle Group Report made this explicit and the Commission has accepted these obligations.

85. Regulation No 1287/95 is applicable under Article 2(1) only for the financial year beginning on 16 October 1995, that is to say the 1996 financial year. Accordingly, an infringement of the correction procedure introduced by that regulation appears to be irrelevant for a decision on the clearance of accounts for the 1994 financial year. However, Article 2(2) states:

'Refusal to grant financing as referred to in Article 5(2)(c) of Regulation (EEC) No 729/70 may not relate to expenditure claimed against a financial year prior to 16 October 1992, but without prejudice to decisions regarding the clearance of the financial years preceding the entry into force of this regulation.'

86. This provision concerning the temporal applicability of the correction procedure is unfortunately worded. It is almost impossible to ascertain to which circumstances before the 1996 financial year the correction procedure is applicable so that Article 2(2) can be effective. It is also noticeable that in the present case the Commission relies on inapplicability for the first time, whilst in the similar Case C-242/97, which concerned the 1993 financial year, it assumed, along with the applicant Member State Belgium, that the correction procedure was applicable. [47]

87. The question may remain open, however, whether the correction procedure is applicable to the contested corrections. As can be seen from the arguments below, the substance of Article 5(2)(c) of Regulation No 729/70 has no significance for the decision in the dispute. The pleas of the Netherlands are based on general principles which are valid irrespective of the rules governing the correction procedure.

(b) The lawfulness of basing corrections on the investigations in February, April and May 1994

Submissions of the parties

88. The Netherlands Government is above all critical of the fact that, according to the announcement and the investigation report, the investigations had related to the 1992 and 1993 financial years. In the absence of specific investigations for 1994, the Commission merely extrapolated the results of investigations that had been conducted.

47 — See Case C-242/97 (cited in footnote 25, paragraph 29 et seq.), which clearly assumes that the correction procedure is applicable.

The Commission was not authorised, however, to decide on a correction on such a purely hypothetical basis. In addition, the Summary Report for the 1993 financial year already contained the proposals for the corrections relating to the 1994 financial year. That report was not based on investigations which related to 1994.

89. In so far as the corrections for 1994 had been based on investigations which took place in 1994, they did not take any account of the measures which had been introduced in the further course of the year in response to the Commission's criticism. Furthermore, the Commission used working documents to provide evidence of the scope of those investigations for the first time in the defence, thereby infringing the rights of the defence of the Netherlands.

90. Moreover, the Commission made corrections to the clearance of accounts for 1993 and 1994 on the basis of the same investigations and therefore relied twice on the same deficiencies.

91. Lastly, in 1996 the Commission recognised, in the course of investigations which related expressly to 1994, that the Netherlands measures were adequate. Those investigations had related expressly to the physical checks with regard to prefinancing. Whilst the investigations in 1994 had more extensive objectives, the Commission's criticism had related specifically to the physical checks.

92. The Commission stresses that the checks in question took place during the 1994 financial year, which began in October 1993 and ended in October 1994. The control practices of the Netherlands in 1994 had also been the subject of these investigations. It refers to the investigations from 11 to 15 April 1994 at Waalhaven (Rotterdam) customs office and from 16 to 20 May 1994 at Nijmegen customs office, which both related expressly to the information available and the practices of the Netherlands authorities at that time. Furthermore, it is clear from the documents produced during the investigations that the individual transactions verified had also primarily concerned the 1994 financial year. The Summary Report related expressly to those investigations and not to the report for the 1993 financial year.

93. The fact that the year 1994 was initially not mentioned in the heading of the announcements of the investigations [48] certainly cannot give sufficient grounds to preclude the use of the results for 1994.

94. Furthermore, it is settled case-law that the Commission may charge only the expenditure which the Member States have

48 — Faxes of 3 February, 30 March and 4 May 1994, Annex 7 to the application.

incurred in accordance with the applicable rules.[49] On the other hand, the context in which the Commission finds that a Member States has infringed those rules is of secondary importance.

95. The investigations on the basis of which the Commission recognised the Netherlands' measures to be adequate in 1996 had related to a different subject, that is to say not to prefinancing in the cereals and beef and veal sectors, but to physical checks by the customs offices. In addition, the two investigations did not overlap in time, since although the year 1994 was mentioned in connection with the investigations in 1996, the investigations had related almost exclusively to 1995 and 1996.

96. Lastly, there had been no double use of the same deficiencies either. The deficiencies related both to 1993 and 1994 and would therefore require corrections in both years.

Analysis

97. As the conciliation body has already found,[50] the Commission conducted its investigations in 1994. They also covered the control practices applied at that time by the Netherlands authorities. Whilst it is regrettable that this was not stated in the heading of the announcements of the investigations, the Netherlands authorities must have realised, because of the point in time and at the latest when the investigations were conducted, that they would also concern the 1994 financial year. The Commission was therefore able to use the results of the investigations for its decision concerning the correction to the clearance of accounts for the 1994 financial year.

98. The Commission did use those investigations for the corrections to the clearance of accounts in 1993 and 1994, but that does not constitute a double penalty imposed in respect of the same deficiencies. Rather, the deficiencies found in the course of the investigations permit conclusions to be drawn as to the control practices of the Netherlands authorities in 1993 and 1994. The clearance of accounts for both years therefore had to be corrected.

99. The recognition expressed in the letter of 18 December 1996 does not ultimately contradict the findings of the investigation from 1994. Irrespective of the subject of the investigation — in 1996 the physical checks on exports were investigated, in 1994 the checks on prefinancing arrangements — the conclusions expressly state that the Netherlands had taken the measures approved of only following the criticism by the Commission. In so far as that

49 — The Commission refers for example to the judgment in Case C-28/94 (cited in footnote 33, paragraph 50).

50 — Section 16 of the report of 13 February 1997.

document contains information concerning the time when the measures were introduced, it is not clear that they also concerned the 1994 financial year. Consequently, the findings of the investigations in 1994 are not refuted.

(c) The justification for the corrections

100. The Netherlands complains that the investigations were not sufficiently representative to justify conclusions regarding deficiencies in the whole system of the Netherlands checks on advance payments in the cereals and beef and veal sectors. In addition, the investigations would not justify the inference of significant financial risk.

(i) The representative nature of the investigations

Submissions of the parties

101. The Netherlands points out first of all that the corrections are based not on loss which has actually been incurred, but on an extrapolation of deficiencies in the Netherlands controls supposedly found in spot checks which would give rise to a risk of loss.

102. In the view of the Netherlands, the Commission investigated an insufficient number of customs offices. In addition, the selection of customs offices was not representative. In this respect, the Netherlands also relies on a statement made by the conciliation body to that effect. [51]

103. Furthermore, the Commission's guidelines would restrict the imposition of corrections expressly to the part of the Member State in which the deficiencies were found, if there were not sufficient grounds to suggest that such deficiencies concerned the entire territory of the Member State in question. Lastly, in its notification of 28 July 1995, the Commission stated that the Netherlands authorities had given a satisfactory answer to its questions regarding Veendam customs office and had undertaken to comply with the recommendations regarding Zaandam customs office. Consequently, there were no deficiencies in the case of two of the three customs offices in the cereals sector.

104. The Commission points out that the undertakings which it proposed to investi-

51 — Section 20 of the Conciliation Report of 13 February 1997: 'L'organe de conciliation observe toutefois qu'il n'est pas entièrement établi que ce risque ait été majeur, compte tenu du petit nombre de contrôles faits par les services de la Commission et du faible nombre d'irrégularités observées à l'occasion de ces contrôles'.

gate had received 57% of advance payments in the cereals sector in 1992 and 39.67% of advance payments in the beef and veal sector. The investigations did not concern all checks on exports either, but only the checks where advance payments were made. However, these had been the subject of extensive investigations by the Commission, that is to say not solely with respect to physical checks.

105. In the beef and veal sector, at the request of the Netherlands authorities, the Commission decided not to investigate one selected undertaking. The remaining two undertakings had received more than 16% of advance payments in the beef and veal sector in 1994; the third undertaking, in contrast, did not receive any advance payments.

106. In the case of the HPA and the PVV, the Commission evaluated the procedures and checks which were applicable for all Netherlands authorities at the beginning of the verifications. Subsequently, it investigated selected customs offices — at which the undertakings under investigation submitted the payment declarations — together with the relevant warehouses and the undertakings. The customs offices were spread over the entire territory of the Netherlands.

107. As regards Zaandam customs office, compliance by the Netherlands authorities with the recommendations does not show that there had been no deficiencies there previously, but the opposite.

Analysis

108. Whether the spot checks are representative depends not only on the number of customs offices inspected; it is sufficient if the percentage of the amount or extent of prefinancing checked is sufficiently high to enable representative conclusions to be drawn for the overall situation. [52] In the judgment in Case C-242/97 the Court has already stated that investigations which, in respect of undertakings and customs offices, covered 22.8% and 25% of advance payments in the beef and veal sector and 32.3% in the cereals sector are sufficiently representative to permit extrapolation. [53]

109. Therefore, at least the investigations in the cereals sector (57% of the advance payments in 1992) are sufficiently representative.

52 — Opinion in Case C-242/97 (cited in footnote 25, point 152).

53 — Cited in footnote 25, paragraph 106.

110. In the beef and veal sector, on the other hand, the situation is not as clear. In that sector, only the proportion of the undertakings selected for investigation (39% of the advance payments in 1992) is known. An investigation of those three undertakings would therefore be sufficiently representative. The proportion of the undertakings which were actually investigated after the Commission had decided not to investigate one of the selected undertakings is not known for 1992, but only for 1994. In that year, the two investigated undertakings received 16% of advance payments, whilst no advance payments were made to the third undertaking. That proportion appears to be only just sufficient to justify conclusions as to the overall situation.

(ii) The decision not to investigate one undertaking in the beef and veal sector

111. In addition, consideration must therefore still be given to whether the Netherlands may rely on the restriction of the investigation resulting from the Commission's decision not to investigate one undertaking.

112. The Netherlands takes the view that the Commission could have selected another undertaking without any difficulty.

113. The Commission contends that it had merely respected a wish of the Netherlands authorities to this effect. It had announced its intention to investigate that undertaking a long time in advance and had also extended its investigations in respect of the PVV to that undertaking. However, the Netherlands authorities had notified it only upon the conclusion of the investigations at the PVV of the enquiries which had been running for some considerable time. Therefore, it had no longer been possible to select another undertaking.

114. The decision by the Commission not to investigate that undertaking was necessitated by the obligation to cooperate in good faith with the national authorities — in particular the criminal prosecuting authorities. [54] On the other hand, in this regard the Netherlands authorities failed to fulfil their duty to cooperate in good faith with the Commission. There is no clear justification for notifying the Commission of the ongoing enquiries only at the last moment. The Netherlands authorities had been informed since 3 February 1994 that the Commission wished to investigate that undertaking. [55] The Netherlands explicitly stresses that this investigation had been decided on before the Commission had announced its investigation. [56] Giving notification in due time would have allowed the Commission to select another undertaking before the PVV visit and to direct the preliminary investigations to that undertaking. On the other hand, in the present case switching the investigation to another undertaking would have required another

54 — See the order in Case C-2/88 *Zwartveld* [1990] ECR I-3365, paragraph 17 et seq.

55 — Fax of 3 February 1994, p. 2, Annex 7 to the application.

56 — Letter of 7 March 1997, bottom of p. 2, Annex 1 to the reply.

PVV visit. The Netherlands cannot now found its action on the consequences of the failure to act for which it is at fault. [57] It is therefore also apparent from the original selection made by the Commission that the investigations are sufficiently representative.

(iii) The financial risk

115. With reference to the assessment by the conciliation body, the Netherlands claims that the Commission did not furnish evidence of any significant financial risk for the Community stemming from the deficiencies that were found. However, such evidence is a prerequisite for the correction made.

116. The Commission refers to the large amounts of the advance payments. In addition, the conciliation body merely took the view that it had not been fully established that there existed a very high risk. The Commission's guidelines stated that the susceptibility to fraud of the system in question is a determining criterion for the risk to which deficiencies found would give rise. Prefinancing in the beef and veal and cereals sectors inherently entails the following risks:

— storage and export of products which are of lower quality than indicated;

— declaration of not yet existing quantities which result in the undertaking receiving an unjustified credit;

— unjustified receipt of the refunds established in advance;

— failure to comply with prescribed time-limits;

— unjustified receipt of advantages under the principle of equivalence.

This has also been recognised by the Netherlands Ministry of Justice.

57 — See Case 148/78 *Ratti* [1979] ECR 1629, paragraph 22, and the Opinion of Advocate General Sir Gordon Slynn in Case 8/81 *Becker* v *Finanzamt Münster-Innenstadt* [1982] ECR 53, 80.

117. In the view of the Commission, there is a significant risk, in particular because

— the customs authorities did not know where the prefinanced goods were stored;

— the checks were made on the basis of a fax and in the event of a negative result the correct weight would simply be indicated on the declaration without any penalty being imposed;

— the exporter knew whether he would be checked by customs;

— different exporters would store their cereals together without separating their quantities;

— boxes of beef and veal would not be opened etc.

118. Furthermore, the Commission refers to case-law under which it is for the Commission to prove deficiencies, whilst it is for the Member State to refute its conclusions regarding the resulting financial risks. [58] It claims that the Netherlands made no arguments on this point.

119. In view of the susceptibility to fraud of the system of advance payments and the deficiencies in checks that were found, the assumption of a significant financial risk to the Community is in principle justified. It is not apparent on what grounds the conciliation body based its view that the small number of investigated offices and the deficiencies found did not justify such an assumption. As has already been explained, the investigated offices are sufficiently representative. The first part of the first plea must therefore be dismissed.

(3) The second part of the first plea: the principles of cooperation in good faith and *audi alteram partem*

Submissions of the parties

120. The Netherlands Government takes the view that the Commission failed to fulfil its duty of cooperation in good faith by failing to wait for the report of the conciliation body before submitting its Summary Report for 1993. The Commission also refused a dialogue in good faith

58 — The Commission refers to the judgments in Case C-209/96 *United Kingdom* v *Commission* [1998] ECR I-5655, paragraph 52, and Case C-28/94 (cited in footnote 33, paragraph 75).

with the Netherlands authorities concerning the corrections for 1994, as was also found by the conciliation body. The Commission merely set out the improvements made and the counter-arguments of the Netherlands authorities, but neither refuted them nor inferred consequences.

121. The Netherlands stresses in particular that its prompt implementation of the measures which the Commission requested on 11 January 1994 was not taken into consideration.

122. The Commission refers to the abovementioned contacts with the Netherlands authorities, in the course of which it certainly took their arguments into consideration. It also cooperated with the conciliation body. The report mentioned by the Netherlands was merely a draft. The production of such a draft did not conflict with the activity of the conciliation body. Rather, under Article 2(2) of Decision 94/442 [59] this requires a proposal for a correction with an indication of a figure. Furthermore, it allowed all participants the opportunity to comment on the conciliation report. Only then and taking into consideration the conciliation report and the comments of the Member States did the EAGGF Committee finally discuss the Summary Report for 1993. With regard to the corrections for 1994 there were subsequently further contacts with the Netherlands authorities.

Analysis

123. With regard to cooperation with the conciliation body the Commission rightly observes that Decision 94/442/EC requires first a proposal for a correction from the Commission. Furthermore, this decision clearly assumes the possibility that, at the time when the conciliation body's report is adopted, the Commission has already accepted the proposal for a decision on the clearance of accounts in question. [60] Therefore the proposal of definitive measures is compatible with the referral to conciliation if the Commission waits for the report of the conciliation committee before taking the final decision. [61] In the present case, the final decision, Commission Decision 98/358, was not taken until 6 May 1998, long after the final report of the conciliation body. Moreover, the Commission has shown, in Addendum I to the Summary Report for 1993 of 26 February 1997, [62] that it takes the findings of the conciliation body in the Summary Report into consideration if it finds them appropriate.

59 — The decision is cited in footnote 13 and the abovementioned provision states: 'A request for conciliation is admissible only where the financial adjustment recommended by the Commission in respect of a budget heading either
— exceeds ECU 0.5 million; or.....'.

60 — Article 2(6) of Decision 94/442 states: 'The report drawn up... shall be sent:
...
— to the Commission *when the accounts clearance decision is proposed*.' (My emphasis.)

61 — With regard to consultation of the Parliament before a decision by the Council see Case C-417/93 *Parliament* v *Council* [1995] ECR I-1185, paragraph 10 et seq., and Case C-21/94 *Parliament* v *Council* [1995] ECR I-1827, paragraph 17 et seq.

62 — Annex XI to the defence.

124. As far as the duty of cooperation in good faith is concerned, it does not mean that one side has to accept all the ideas of the other side. In addition, it does not require a detailed and explicit reply to each argument put forward by the other side at each stage of the proceedings. Rather it is permissible, at the advanced stages of the proceedings in particular, merely to respond to individual new arguments.

125. Furthermore, the extensive correspondence between the Commission and the Netherlands authorities, which has been produced, indicates that those authorities were informed early on of the alleged deficiencies found in the control system. It is obvious from this correspondence that there had been a lively exchange of information which, although it had not led the Commission to revise its opinion on the existing shortcomings, does show that the Commission had examined each individual point. There is therefore no infringement of the principle of cooperation in good faith.

126. It can be inferred from the conciliation body's final report, which refers generally to the conciliation proceedings with Italy, Germany, the Netherlands, Belgium and France, that the Netherlands merely claimed that, contrary to the complaints made by the Commission, it could submit check reports on the basis of which the contents of the boxes of beef and veal were inspected in checks during the advance payment period. Aside from the fact that this claim relates to only a very small section of the Commission's criticism, its substance cannot be verified on the basis of the documents submitted. The Netherlands did not, according to the conciliation report, refute the essential assertions made by the Commission in the conciliation procedure. The criticisms made by the Member States affected by the corrections are confined to arguing that the Commission's verifications were not representative, that the risk of fraud was overestimated and that there was no appropriate legal basis for the checks demanded by the Commission. Even the conciliation body assumed that the checks made by the Member States were not adequate. Moreover, the Commission's verifications were representative and the deficiencies reported so important and generalised that they could not be assumed to be mere exceptions to the normal practice of supervision in the Member States. This led to a risk of loss for the EAGGF. Admittedly it was not fully proven that there was always a very high risk of loss and the Member States had also announced measures to improve the situation. Nevertheless, the steps taken by the Commission were imperative since the same or similar deficiencies had already been the subject of complaints in previous years.

127. This also shows that the Netherlands was not able to call into question the factual assertions made by the Commission even in the course of the conciliation procedure, although it was aware of them. The allegation that the Commission did not

cooperate in good faith with the Netherlands authorities is therefore unfounded.

B — *Second plea: failure to ensure legal certainty*

(1) The Commission's failure to comply with its undertaking

128. The Netherlands Government points out that, in its letter of 11 January 1994 and in the Summary Report for 1992, the Commission set the Member States a final time-limit of 1 July 1994 to implement the measures proposed by the Commission. It threatened financial consequences only if that time-limit was not observed. The Commission disregarded that assurance when it imposed penalties for the whole 1994 financial year on the basis of investigations before 1 July 1994.

129. It should be pointed out in this respect that the assurance concerned only physical checks on exports, whilst the corrections were made as a result of deficiencies in controls in the advance payment system. Therefore, that assurance cannot preclude the contested corrections.

(2) Mitigating circumstances

130. The Netherlands Government argues that it notified the Commission several times of improvements to controls. It claims that, as was also recognised by the conciliation body, this constitutes mitigating circumstances within the meaning of the Belle Group Report which the Commission failed to take into consideration.

131. In Case C-242/97, the Court stated:

'It must be observed, first, that so far as the amount of the financial correction is concerned, the Commission may even refuse to charge to the EAGGF the whole of the expenditure in question if it finds that there are no adequate control procedures.

Second... the EAGGF finances only intervention undertaken in accordance with the Community rules in the framework of the common organisation of agricultural markets. Since... it is the State which is best placed to collect and check the data required for the clearance of EAGGF accounts, it is the State which is required to adduce the most detailed and comprehensive evidence that its figures are accurate and, if appropriate, that the Commission's estimates are incorrect.' [63]

63 — Cited in footnote 25, paragraph 122 et seq.

132. The Netherlands Government has not shown that the criteria applied by the Commission were arbitrary and unfair.

C — *Third plea: infringement of the principle of equal treatment*

135. The Netherlands Government points out that according to case-law the Commission also infringes the principle of equal treatment if it fails to comply with its assurances and guidelines.

133. In this respect, it should be noted, on the one hand, that the Commission's guidelines provide for consideration of mitigating circumstances only if there are doubts as to the level of the rate of correction to be applied. No such doubts exist in the present case. On the contrary, in the beef and veal sector the Commission did not opt for the maximum rate possible under its guidelines of 10%, but for the lower rate of 5%, even though the effectiveness of the controls was also highly dubious in the beef and veal sector.

136. Since it has already been stated that the Commission has not infringed either its assurances or its guidelines — to be precise: the requirements of the Belle Group Report — this plea is also unfounded.

D — *Fourth plea: infringement of the duty to state reasons*

134. Furthermore, the improvements mentioned by the Netherlands Government relate on the one hand to the abovementioned physical checks on exports, which the Commission had criticised long before the investigations at issue. On the other hand, the improvements did not in any case take place immediately, as is required in the Belle Group Report, but only after considerable delay.

137. In this plea the Netherlands Government complains primarily that it is not apparent from either the contested decision or the contacts with the Commission why the arguments made by the Netherlands authorities were not taken into consideration. As a result of these deficiencies in the statement of reasons, the Netherlands could not defend itself satisfactorily. It mentions the following points where the Commission failed to state reasons why it

did not concur with the Netherlands' arguments:

— failure to take into consideration the improvements made;

— the extension of the corrections to 1994, even though the investigations had concerned 1992 and 1993;

— acceptance of the existence of supposed deficiencies which the Netherlands authorities had contested with detailed argument;

— failure to observe the assurance of 11 January 1994;

— the production of the Summary Report for 1993 before the adoption of the conciliation report;

— failure to take into consideration the finding of the conciliation body that the small number of checks did not justify the inference of a significant risk of loss;

— failure to take into consideration mitigating circumstances and the failure by the Commission to act by adopting clarifying rules for checks in the form of Regulation No 2221/95.

138. In the judgment in Case C-242/97 the Court recently held as follows:

'On this point, the Court has consistently held that, in the particular context of the preparation of decisions relating to the clearance of accounts, the statement of reasons for a decision must be regarded as sufficient if the Member State to which the decision was addressed was sufficiently involved in the process by which the decision came about and was aware of the reasons for which the Commission took the view that it must not charge the sum in dispute to the EAGGF'. [64]

139. Therefore, it must be inferred from the ongoing dialogue between the Commission and the Member State that a Member State has the information which it requires in order to defend itself against the allega-

64 — Cited in footnote 25, paragraph 95.

tions made by the Commission. However, the present application is clearly based on the complaint that, despite the extensive contacts between the Commission and the Netherlands authorities in the present case, no real dialogue took place. Rather, the Commission is alleged simply to have ignored all the arguments put forward by the Netherlands. If the Commission did actually act in that way, this would constitute not only an infringement of the principle of cooperation in good faith, but also an infringement of the duty to state reasons.

140. However, such an accusation can refute the appearance of ongoing dialogue only if the Netherlands were duly to demonstrate each individual point where it put forward arguments to which the Commission supposedly failed to respond before it adopted the decision.

141. The Netherlands does not fulfil this duty to present evidence. It confines itself largely to reiterating the arguments put forward in the other pleas. Furthermore, the Netherlands claims only in general terms that these arguments had already been presented to the Commission during the contacts and that the Commission ignored them. This argument is not sufficient to refute the appearance of adequate information through the ongoing dialogue evidenced by the correspondence, especially since the Commission was able to refute those arguments in the judicial proceedings.

142. The explanation given by the Netherlands also contradicts, at least in part, the contents of the case-file. For example, the arguments put forward by the Netherlands are documented, at least in part, in the conciliation report. Furthermore, the letter from the Commission of 28 June 1996 contains a statement on the failure to take into consideration the improvements that had been made in the meantime, even though, according to the explanation given by the Netherlands, the Commission is alleged to have consistently ignored that argument. Documents which could prove the serious allegation made by the Netherlands were not submitted.

143. This plea must therefore also be rejected.

VI — Costs

144. Under Article 69(2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs, if applied for by the successful party. Since the Commission has applied for costs against the Kingdom of the Netherlands, the latter, as the unsuccessful party, must pay the costs.

VII — Conclusion

145. On the above grounds, I propose that the Court should:

(1) dismiss the action;

(2) order the Kingdom of the Netherlands to pay the costs.