OPINION OF ADVOCATE GENERAL LÉGER

delivered on 20 May 1999 *

1. The Kingdom of Spain is seeking annulment under Article 173 of the EC Treaty (now, after amendment, Article 230 EC) of Commission Decision 96/701/EC of 20 November 1996 amending Decision 96/311/EC on the clearance of the accounts presented by the Member States in respect of the expenditure for 1992 of the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) and in respect of certain expenditure for 1993. [1]

2. The annex to Decision 96/701, in the section relating to the Kingdom of Spain, shows that expenditure amounting to ESP 721 255 271 was not recognised by the Commission and therefore remains chargeable to that Member State in addition to the expenditure already set out in Commission Decision 96/311/EC of 10 April 1996 on the clearance of the accounts presented by the Member States in respect of the expenditure for 1992 of the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) and in respect of certain expenditure for 1993, [2] with regard to 1992.

3. The expenditure set out in the annex relates to consumption aid for olive oil which the Spanish authorities paid, improperly in the Commission's view, to packaging plants. The present application seeks annulment of the Commission's decision not to refund that expenditure to the Kingdom of Spain.

I — Legal background

A — *The Community rules*

1. The Community rules relating to the market in olive oil

Regulation No 136/66/EEC

* Original language: French.

1 — OJ 1996 L 323, p. 26.

2 — OJ 1996 L 117, p. 19.

4. Council Regulation No 136/66/EEC of 22 September 1966, [3] as amended by Council Regulation (EEC) No 1562/78 of 29 June 1978, [4] and by Council Regulation (EEC) No 2210/88 of 19 July 1988, [5] introduced a common organisation of the market in oils and fats.

5. The purpose of the common organisation of the market in olive oil is both 'to maintain the level of consumption of that product in the Community, having regard to the competition from other vegetable oils, and to ensure that producers receive a fair income for the quantity of olive oil actually produced'. [6]

6. Article 11(1) of Regulation No 136/66, as amended, provides:

'Where the production target price less the production aid exceeds the representative market price for olive oil, a consumption aid shall be granted for olive oil produced and marketed in the Community. The aid shall be equal to the difference between these two amounts.'

Regulation (EEC) No 3089/78

7. Council Regulation (EEC) No 3089/78 of 19 December 1978 lays down the general rules in respect of aid for the consumption of olive oil. [7]

8. Article 1 of Regulation No 3089/78 provides that consumption aid for olive oil is to be granted only to approved olive oil packaging plants.

9. Article 2(1) of that regulation reads:

'The approval referred to in Article 1 shall be given by the Member State concerned only to undertakings which:

(a) have a minimum packaging capacity to be determined;

(b) carry out packaging activities for a minimum period to be determined;

3 — OJ, English Special Edition 1965-1966, p. 221.
4 — OJ 1978 L 185, p. 1.
5 — OJ 1988 L 197, p. 1.
6 — First paragraph in the preamble to Regulation No 1562/78.
7 — OJ 1978 L 369, p. 12.

(c) keep stock records according to rules to be determined; and

(d) agree to undergo any checks laid down for the purposes of the application of the aid system.'

10. Article 3(1) of Regulation No 3089/78 states: 'The approval referred to in Article 2 shall be withdrawn if, except in the case of *force majeure*, one of the conditions for approval laid down in Article 2(1) is no longer met'. In addition, Article 3(2) provides: 'The Member State concerned shall decide to withdraw approval temporarily from any packaging plant which has applied for aid for a quantity of olive oil in excess of the quantity for which entitlement to aid has been agreed'.

11. Article 5 provides: 'Entitlement to consumption aid shall be acquired the moment the olive oil leaves the packaging plant in a package meeting the requirements of Article 4(1)(b)'. [8]

8 — This provision refers to olive oil produced in the Community, which is put up in immediate packaging of a maximum net content to be determined and which bears an identification number.

12. Article 6(1) reads: 'The aid shall be granted, on application by the party concerned, in the Member State in which the oil was packaged in accordance with Article 4(1)(b)'.

13. According to the first paragraph of Article 7, 'The Member States shall institute a system of supervision to ensure that the product for which aid has been applied qualifies for such aid'.

14. The second paragraph of Article 7 provides: 'In particular, checks must be made to ascertain whether the amount of olive oil for which aid has been applied corresponds to:

(a) the amount of olive oil of Community origin which entered the packaging plant;

(b) the amount of olive oil of Community origin which left the plant after being packaged in accordance with Article 4(1)(b) and which was placed on the market in the Community'.

15. Article 8 of Regulation No 3089/78 reads:

'The aid shall be paid when the supervisory body designated by the Member State in which packaging takes place has checked that the conditions for granting the aid have been satisfied.

The aid may, however, be advanced as soon as the aid application is submitted, provided that sufficient security has been provided'.

Regulation (EEC) No 2677/85

16. Commission Regulation (EEC) No 2677/85 of 24 September 1985 lays down implementing rules in respect of the system of consumption aid for olive oil. [9]

17. That regulation was amended in particular by Commission Regulation (EEC) No 571/91 of 8 March 1991 [10] and Commission Regulation (EEC) No 1008/92 of 23 April 1992 [11] in order to increase the effectiveness of the checks.

18. Article 1 of Regulation (EEC) No 2677/85, as amended (hereinafter, Regulation No 2677/85) provides: 'For the purposes of obtaining the approval referred to in Article 2 of Regulation (EEC) No 3089/78, a packaging plant must have a packaging capacity of at least six tonnes of oil per eight-hour working day'.

19. The first sentence of the sixth paragraph of Article 2 of that regulation provides: 'For the purpose of granting approval, the competent authorities of the Member State shall carry out an on-the-spot inspection of the plant and packaging capacity of the undertaking seeking approval'.

20. The first paragraph of Article 3 of that regulation makes it clear that each packaging plant must, from the date on which it is approved, keep records, referred to in that provision as daily 'stock records', giving a certain amount of compulsory information relating in particular to stocks of olive oil, the quality and quantity of olive oil entering the plant, packaged olive oil and olive oil leaving the plant, the number of containers entering the plant and the number of containers used, the number of the purchase invoice for each consignment of olive oil and the number of containers entering the plant, to the sales invoices for each consignment of olive oil, and to movements of oils inside the area and between this area and the storage place.

9 — OJ 1985 L 254, p. 5.
10 — OJ 1991 L 63, p. 19.
11 — OJ 1992 L 106, p. 12.

21. The first and second subparagraphs of Article 5(1) provide that Member States must check by sampling that the oil put up in immediate containers accords with one of the definitions referred to in Regulation No 3089/78. To this end, the inspection authority must, at least once per marketing year, take samples at each approved plant of at least one type of packaged oil in the area of the plant where packaging took place or in any storage place within the meaning of the relevant rules.

22. The first subparagraph of Article 5(2) reads:

'Where the competent authority in each Member State finds that the oil in question does not meet one of the definitions referred to in paragraph 1 as a result of blending or other chemical processes intended to render oil not eligible for consumption aid so eligible, the competent authority shall forthwith withdraw the plant's approval for a period of one to five years depending on the gravity of the infringement, without prejudice to any other penalties. In addition, the plant concerned shall be required to pay the Member State a sum equal to twice the consumption aid applied for in the course of one of the months following that in which the samples were taken. The sum collected by the Member State shall be deducted from the expenditure of the European Agricultural Guidance and Guarantee Fund by the authorities or paying agencies of the Member States.'

23. The second subparagraph of Article 5(2) reads: 'Where irregularities other than those referred to in the first subparagraph are observed, the competent authority shall be notified thereof in each case'.

24. According to Article 6 of that regulation, to qualify for aid, olive oil must be put up in an immediate container of a net content of five litres or less, fitted with a non-reusable sealing device and bearing an identification number.

25. Article 12 of that regulation describes the checks which Member States may or must carry out at approved plants. Article 12(1) provides as follows:

'For the purposes of the checks referred to in Article 7 of Regulation (EEC) No 3089/78, the Member States shall inspect the stock records of all approved undertakings. They shall also carry out random checks on the financial supporting documents relating to the transactions carried out by these undertakings. Each undertaking shall be inspected for this purpose at least once in each marketing year. Inspections shall cover a substantial

percentage of the applications by each undertaking. ...

The Member State may also subject approved undertakings to unannounced checks of the same type as those referred to above.

...

If the approved undertaking plant packages both olive and seed oil, the checks referred to in this Article may be extended to stock records and accounts in respect of the packaging of oils other than olive oil.

In the course of the inspections referred to in the first subparagraph Member States shall check that:

As a horizontal check and particularly where there is doubt about the accuracy of the figures in the aid applications, the Member State shall undertake regular checks among persons supplying raw materials and packaging and operators to whom the packaged oil has been supplied.

— the total quantities of oil stored in bulk and packaged and the empty packagings physically present at the undertaking and the storage place referred to [in this regulation] correspond with

...'

— the data contained in the stock records.

If any doubt arises as to the accuracy of the information given in the application for aid, Member States shall also check the accounts of approved undertakings.

26. Article 12(6) reads: 'Where it is found by the competent authority that an application for aid relates to a quantity greater than that for which the entitlement to aid was recognised, the Member State shall immediately withdraw approval for a period of from one to five years, depending on

the seriousness of the infringement, without prejudice to any other penalties'.

2. The Community rules on the funding of the common agricultural policy

27. Article 1(2)(b) of Council Regulation (EEC) No 729/70 of 21 April 1970 on the financing of the common agricultural policy [12] provides that the Guarantee Section of the European Agricultural Guidance and Guarantee Fund is to finance intervention intended to stabilise the agricultural markets.

28. Article 3(1) of that regulation provides that intervention intended to stabilise the agricultural markets, undertaken according to Community rules within the framework of the common organisation of agricultural markets, is to be financed.

29. Article 8(1) of Regulation No 729/70 requires Member States to satisfy themselves that transactions financed by the Fund are actually carried out and are executed correctly, to prevent and deal with irregularities, and to recover sums lost as a result of irregularities or negligence. Article 8(2) provides that the financial consequences of irregularities or negligence attributable to administrative authorities or other bodies of the Member States are not to be borne by the Community.

30. Article 9 of that regulation states that the Commission may undertake supervision within the framework of the management of Community financing, including inspections on the spot. The officials appointed by the Commission to carry out such inspections are to have access to the books and all other documents relating to expenditure financed by the Fund. They may in particular check whether administrative practices are in accordance with Community rules, whether the requisite supporting documents exist and tally with the transactions financed by the Fund, and the conditions under which transactions financed by the Fund are carried out and checked.

B — *The system of supervision introduced by the Kingdom of Spain*

31. There are two agencies in charge of supervision in Spain.

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

The Servicio Nacional de Productos Agrarios, [13] which is responsible for:

— granting approval to recipient plants;

— making direct payments of aid, and of advances on condition that the required security is lodged;

— imposing any penalties.

The Agencia para el Aceite de Oliva, [14] which carries out the inspections required under the Community rules.

II — Facts

32. In connection with the clearance of accounts in respect of 1992, Commission officials carried out two inspections in Spain, on 30 September and 1 October 1993 and between 14 and 18 March 1994, at the Agency's offices, to assess the procedures used in supervising consumption aid for olive oil, pursuant to Article 9 of Regulation No 729/70.

33. According to the inspection report dated 31 May 1994, [15] a summary of which was sent to the Spanish authorities by letter of 7 September 1994, those inspections revealed serious flaws.

34. The system set up by the Spanish authorities provided that supervision of plants was to be carried out at the Agency's premises in Madrid, merely on the basis of an inspection of documents, together with an annual on-the-spot inspection. Major flaws were detected in the way the statutory records were kept, and in some cases no records had been kept at all, but the conclusions of the Spanish inspection reports made no mention of these facts. Furthermore, the penalties imposed bore no relation to the seriousness of the alleged offences.

35. During their inspections EAGGF officials carried out random re-checks of 27

13 — National Agricultural Products Authority, hereinafter 'Senpa'.

14 — The Olive Oil Agency, hereinafter 'the Agency'.

15 — Annex I to the statement of defence.

files on various plants. The end results of those checks showed:

— that it was impossible to carry out an effective check on stocks entering and leaving the following plants: Hispanoliva, Martínez Henarejos, Cooperativa Virgen C. Santa, Lorenzo Sandúa, Fernández y Ruiz de Aguilar, Cooperativa Jesús de la Cañada, Hijos de Joaquín Seguí, Cooperativa Uteco Jaén, Camar and Rodríguez Sevillano, and that stocks did not tally in the case of the following plants: Uteco Jaén, Cooperativa Virgen C. Santa, Fco. J. Sánchez Fernández and Aragonesa del Aceite de Oliva;

— a general absence of records in the following plants: Sagarra Bascompte, Amador Rodríguez, Lorenzo Sandúa, Hurtado Tenorio, Fco. J. Sánchez Fernández, Camar, Olivar de Segura, Aragonesa del Aciete and Emiliano Vivas.

36. The Commission, represented by its Directorate-General for Agriculture, subsequently conveyed to the Spanish authorities on 22 September 1994 its conclusions regarding the clearance of accounts of the Guarantee Section of the EAGGF in the olive oil sector for 1992, informing them that the EAGGF proposed, 'in view of all the deficiencies detected in the management of the measure', a correction equal to 50% of the total amount of the consumption aid for olive oil due to the Kingdom of Spain, that is, ESP 15 447 431 500.

37. On 17 October 1994 the Agency sent a document to the Director-General of the EAGGF in which it replied to the observations made in the inspection report of 31 May 1994.

38. Copious correspondence was exchanged between the Spanish authorities and the Commission and two bilateral meetings were held on the subject, one in Brussels on 25 October 1994, the other in Madrid on 14 January 1995.

39. Following these numerous contacts the Commission proposed to the Spanish authorities in a letter dated 13 June 1995 that the flat-rate financial correction should be replaced by a correction of ESP 721 255 271 in respect only of the 27 files which had been directly investigated by the EAGGF inspectors.

40. According to the Commission, financial corrections on the basis of individual files were limited to those cases where it had been clearly demonstrated that either

the conditions existed for the withdrawal of authorisation or the gaps in the records or the incoming or outgoing stock entries, or other grounds, prevented the Agency's authorities from carrying out effective checks.

41. As a consequence, the findings made at four of those plants justified a financial correction equal to 100% of the aid granted, whilst those at nine other plants resulted in a financial correction equal to 10% of that aid.

42. On 10 July 1995 the Commission officially informed the Kingdom of Spain of its conclusions on the clearance of the Guarantee Section of the EAGGF for 1992.

43. The Spanish authorities, disagreeing with the section of the conclusions relating to consumption aid for olive oil, sought the intervention of the Conciliation Body set up under Decision 94/442/EC. [16]

44. The Conciliation Body delivered its conclusions on 5 December 1995. Paragraph 7 of the conclusions reads as follows:

'The Conciliation Body well understands the concerns of the Commission and the perplexity of the Spanish Authorities. It cannot ignore the failings on the part of certain plants revealed in the documentary evidence supplied by [the Agency] but must also conclude that there has been a certain amount of inconsistency in the Commission's approach when deciding on the appropriate financial consequences. The Conciliation Body questions in particular the justification for the Commission's approach in taking only a limited number of the files available to [the Agency] and arriving at corrections of either 10% or 100%.

It requests the Commission officials to re-examine with the Spanish authorities the possibility either of further adjusting the rates of correction more to suit each plant or of replacing their current correction proposals with a flat-rate correction of 2% of the total expenditure on the measure in 1992'. [17]

45. In response to this, the Spanish authorities requested the Director-General of the EAGGF, in a letter dated 27 December 1995, to agree to the Conciliation Body's proposal to reduce the correction percen-

16 — Commission Decision 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).

17 — Annex VIII to the application for annulment.

tages to a level which was fair, bearing in mind the errors, regarded as minor by the Spanish administration, which had been detected in each case.

46. In its reply dated 18 January 1996, the Commission informed the Spanish authorities and the Chairman of the Conciliation Body that 'it cannot accede to the Conciliation Body's request either to individualise and further adjust the correction rates to suit each of the plants concerned (not contested by the Spanish authorities), or to replace its proposed corrections by an overall correction of 2% of all the expenditure for 1992 (a possibility already discussed with the Spanish authorities, which they had dismissed)'. [18]

47. On 20 November 1996 the Commission adopted Decision 96/701 imposing the financial correction of ESP 721 255 271 which is the subject of the present action.

III — The application

48. The Kingdom of Spain puts forward two submissions in support of its application for annulment. The first concerns infringement of the rules on the common organisation of the market in oils and fats and those on the financing of the common agricultural policy. The second concerns infringement of the principle of proportionality. The Spanish Government also requests that the Commission be ordered to pay the costs.

49. The Commission pleads that the application should be dismissed and that the Kingdom of Spain should pay the costs.

A — *The submission that the rules on the common organisation of the market in oils and fats and those on the financing of the common agricultural policy have been infringed*

50. The Kingdom of Spain maintains that the EAGGF is under an obligation to provide finance, since the plants receiving the aid and the Spanish authorities have complied with the Community rules applying within the framework of the common organisation of the agricultural markets, in accordance with Article 3 of Regulation No 729/70.

51. It analyses in turn each of the 13 files on which the Commission based its decision and concludes that there are no irregularities justifying the contested financial corrections.

18 — Paragraph 15(2) of the Commission defence.

52. The Spanish Government therefore considers that the Commission's withholding of funding constitutes a breach of Community law.

53. The Commission submits that the case-by-case claims made against its decision not only fail to prove the error of judgment which the applicant attributes to it, but, quite the contrary, go to show that the Kingdom of Spain acknowledges the inadequacies and irregularities of which it is accused, which relate essentially to the supervision of the aid recipients.

54. It points out that Decision 96/701 merely brought about a substantial reduction in the correction initially offered to the Kingdom of Spain, by changing from a flat-rate correction system to a system of spot checks on files. Thirteen of the 27 files were looked into due to the persistence of the irregularities noted.

55. The Commission wishes to point out that it complied scrupulously with the Community rules, in particular as regards the four plants to which a correction of 100% was applied. These, it argues, concerned the following very serious cases:

— aid was wrongly paid because the conditions for granting it were not met and, moreover, there was a suspicion that the plant's delivery notes and invoices had been tampered with (Lorenzo Sandúa);

— the amount of aid applied for by the plant was greater than that which it was entitled to claim, and other irregularities were uncovered concerning stock records (Olivar de Segura and Agroalimentaria Minerva);

— chemical testing revealed the unauthorised presence of 0.5 p.p.m. of trichloroethylene and other serious irregularities were also detected (Hurtado Tenorio).

56. The Commission considers that it is unnecessary to analyse individually each of the files on which a financial correction of 10% was imposed, since they are examined in detail in the final report and described by the applicant.

57. It adds that neither the description of the facts, nor the explanations put forward by the Kingdom of Spain, nor the documentary annexes accompanying the application prove that there were no accounting irregularities either in relation to stock and incoming and outgoing consignments, or as regards the conditions relating to the transparency of the accounts and finances of the plants concerned.

58. The Commission claims that Decision 96/701 therefore complies in all respects with the relevant Community rules.

59. The Kingdom of Spain replies that its line of argument is supported by documentary evidence which the Commission has not specifically refuted. It alleges that the Commission merely rejected in general terms the applicant's submissions without substantiating the serious doubts it has regarding the figures provided by the Spanish authorities.

60. Before considering the evidence put forward by the Spanish Government in support of its action, it is appropriate to recall the rules relating to the burden of proof.

1. The burden of proof

61. The Commission claims that in cases involving its decisions on the clearance of EAGGF accounts it is not required, according to the case-law of the Court, to prove exhaustively that the information supplied to it is unsound, but that it is sufficient for the Commission to provide some evidence of the serious and reasonable doubts it has regarding figures supplied by national administrations.

62. The Kingdom of Spain, in contrast, considers that according to the Court's settled case-law on this matter it is for the Commission to establish that there is an infringement of the rules governing the common organisation of the agricultural markets.

63. The Court has held that 'only refunds granted and intervention undertaken "in accordance with the Community rules" within the framework of the common organisation of agricultural markets are financed by the EAGGF'. [19]

64. The Court has ruled in this connection that 'it is for the Commission to prove an

19 — Case 347/85 *United Kingdom* v *Commission* [1988] ECR 1749, paragraph 11. See more recently, for example, Case C-242/96 *Italy* v *Commission* [1998] ECR I-5863, paragraph 58.

infringement of the rules on the common organisation of the agricultural markets ... Accordingly, the Commission is obliged to give reasons for its decision finding an absence of, or defects in, inspection procedures operated by the Member State in question ...'.[20] Hence the latter 'cannot rebut the Commission's findings by mere assertions which are not substantiated by evidence of a reliable and operational supervisory system. If it is not able to show that they are inaccurate, the Commission's findings can give rise to serious doubts as to the existence of an adequate and effective series of supervisory measures and inspection procedures ...'.[21]

65. The Commission must therefore provide evidence of the existence of facts contravening Community rules which the system of supervision introduced by the Member State concerned has not been able to detect or penalise. That Member State is thus required to demonstrate either that the facts established by the Commission do not infringe Community rules or that its system of supervision is not at fault. If it does not manage to do so the logical inference could be that the alleged irregularities are sufficient to establish that the Member State's system of supervision has failed, thereby justifying the financial correction imposed in the clearance of the accounts.

66. According to those principles, it is necessary to examine the evidence gathered by the Commission following the EAGGF inspections which led to the financial correction, and the evidence relied upon by the Kingdom of Spain in support of its action.

2. The existence of infringements of Community law

67. According to the Commission, the purpose of the EAGGF inspection mission was to evaluate the Agency's work in connection with consumption aid. Since December 1990 the Commission had noted that the number of packaging plants had risen abnormally. It states that the mission's task was to inspect the files submitted by the Agency's inspectors on completion of their work.[22]

68. The financial correction applied by the Commission in Decision 96/701 was worked out on the basis of the irregularities noted in the following 13 plants at either 10% or 100% of the aid improperly allocated to each of them.

20 — Judgment in *Italy* v *Commission*, cited above, paragraph 58.

21 — Ibid., paragraph 59.

22 — Annex I to the defence. Inspection report on the checks on the expenditure declared under the EAGGF Guarantee V.C. Section for 1992 — Oil and fats sector, of 31 May 1994, pp. 3 and 4.

Financial correction of 100%:

— Lorenzo Sandúa,
— Hurtado Tenorio,
— Olivar de Segura,
— Agroalimentaria Minerva;

five invoices; the plant did not submit its VAT records or its accounts since the documents concerned were in the hands of an outside accountant.

Financial correction of 10%:

— Sagarra Bascompte,
— Amador Rodríguez,
— Fernández y Ruiz de Aguilar,
— Uteco Jaén,
— Argonesa de Aceite de Oliva,
— Martínez Henarejos,
— Hispanoliva,
— Hijos de Joaquín Seguí,
— Emiliano Vivas.

70. Examination of the documents drawn up at the time of the Agency's inspection confirms each of those points. They are expressly mentioned in the report compiled on 17 March 1992 and in the report of 26 November 1992. Photocopies of the allegedly falsified delivery notes attached to the file show that the notes in question had indeed been altered. No evidence was produced to explain how that anomaly might have occurred.

71. According to the Spanish Government, the aid was paid in accordance with the rules.

(a) Lorenzo Sandúa

69. The EAGGF's findings regarding the Agency's supervision of this plant, as set out in the table annexed to the inspection report of 31 May 1994,[23] noted the following irregularities in particular: the Agency's inspectors expressed their suspicions that there might have been some falsification of delivery notes but no consequences were drawn from that finding; the plant's stock records did not show the 25-litre containers appearing on the last

72. It submits that when the Agency suspected falsification of the delivery notes it suggested to Senpa that the deadline for submitting its report should be extended, and that during that period it made inquiries before coming to the conclusion that, although it had not identified any application that failed to comply with requirements, it was appropriate that future inspections of the records and of the accounts and business papers should be supplemented, as it had been, by horizontal checks with traders and recipients.

23 — Annex I to the defence.

73. In this connection, it is sufficient to state that no evidence has been produced by the Spanish Government showing that further investigation was carried out or describing the content of the alleged investigation.

74. The various items of evidence found by the EAGGF investigators thus point to serious failures to comply with the Community rules on the common organisation of the market in oils and fats, as with the requirements in respect of supervision by Member States laid down in the rules on the financing of the common agricultural policy.

75. There is therefore no need to challenge the financial correction imposed in respect of those irregularities.

(b) Hurtado Tenorio

76. The EAGGF's findings regarding the Agency's supervision of this plant, as set out in the table annexed to the inspection report of 31 May 1994 [24] and in the letter which the Commission sent to the Spanish authorities on 13 June 1995, [25] noted the following irregularities in particular: the stocks did not tally with the business books and the results of the tests carried out at the plant revealed that the oil contained 0.5 p.p.m. of trichloroethylene although the maximum permitted level is 0.1 p.p.m. According to the Commission, that trichloroethylene content should have led the competent authorities to analyse the entire stock and to take the necessary action. It considers that the aid was paid without proper investigation.

77. Examination of the documents drawn up at the time of the Agency's inspection confirms each of those points. The report of 16 November 1992 shows that, under the heading 'stock records' in the section for movements of olive oil in bulk, and the section for incoming and outgoing containers, none of the information required was entered against the appropriate item. The report also shows that physical stocks did not correspond with the records, and some of the information in the records did not tally with the business papers. [26]

78. Furthermore, the Agency's summary report dated 12 April 1993 contains evidence that the EAGGF's allegations against Hurtado Tenorio concerning the composition of the olive oil were true. [27]

24 — Annex I to the defence.

25 — Annex to Annex V to the application for annulment, p. 7.

26 — Annex XI to the application for annulment, 'Hurtado Tenorio' file, pp. 6, 7, 9, 11 and 18.

27 — Annex XI to the application for annulment, 'Hurtado Tenorio' file.

79. The Spanish Government states that the discrepancies between the stocks were due to the fact that the quality of the oils changes naturally and that oil which is initially described as 'extra virgin' may subsequently become 'virgin'. This change may be reflected in corrections to the records, but has no effect on the amount of aid. This, according to the applicant, explains why the physical stocks did not tally with the recorded stocks.

80. It must be pointed out that the Kingdom of Spain has not produced any evidence in support of this allegation to show that the deficiencies noted within the plant concerned could be explained in the way it claims.

81. The applicant refers to a discrepancy of 5 litres between the data given in the subsidiary record and those in the business papers, a discrepancy which it classes as insignificant. This evidence only partly conveys the true situation, since other discrepancies can be found in the section of the report relating to the checks on whether the stocks correspond: there are unsubstantiated discrepancies between the recorded stocks and the physical stocks of bulk oil and between the recorded stocks and the physical stocks of oil put up in containers. [28] In addition, there is also a difference, albeit a small one, between the recorded stocks and the physical stocks of containers, contrary to the relevant rules.

82. The Spanish Government adds that it is wrong to refer to the possible presence of trichloroethylene in the oil as an impurity when this might be due to pollution, which would not come under Regulation No 2677/85. The situation at issue was on the contrary an infringement of Article 4 of Regulation No 3089/78, which gives a definition of olive oil, and so there was no justification for withdrawal of authorisation.

83. It should be mentioned that the sampling referred to in Article 5(1) of Regulation No 2677/85 is intended precisely to test whether the oil complies with one of the definitions contained in Regulation No 3089/78 and might, if appropriate, result in withdrawal of approval as provided for in Article 5(2). In this particular case, the oil was not regarded as complying. The position maintained by the applicant that the question of the definition of olive oil should be treated separately from that of withdrawal of approval is thus unfounded.

84. It follows that the irregularities established and the fact that they had no effect on the approval granted to the plant concerned justify the financial correction applied by the Commission.

28 — Ibid., p. 9.

(c) Olivar de Segura

85. The EAGGF's findings regarding the Agency's supervision of this plant, as set out in the table annexed to the inspection report of 31 May 1994,[29] noted the following irregularities in particular: there were no details of the inspections of the accounts, with only one handwritten reference to the relevant books; nor was there any detail given of the checks on the consignments of olive oil coming into the plant; again, there was only one handwritten reference to the relevant books; lastly, the inspector's final report was incorrect since, although he stated that everything was in order, there was a note to Senpa stating that 4 580 kg had been deducted due to errors which occurred during copying into the account books. In the letter it sent to the Spanish authorities on 13 June 1995 the Commission states that the application for aid related to an amount of oil greater than that which the plant could legitimately claim.[30]

86. Examination of the documents drawn up at the time of the Agency's inspection confirms each of those points. The section of the report of 8 September 1992 relating to the inspection of the business papers and the entries of olive oil[31] contains a handwritten note that the relevant records had been approved. The form contained in the report intended for a summary of the irregularities detected during the inspection bears only the inspector's signature, thus indicating the absence of any anomalies, although the Agency's correspondence of 28 January 1993 concerning the application for consumption aid by the plant concerned reveals that the application for aid relates to an amount 4 580 kg greater than the amount guaranteed. The discrepancy in the amount given in that document is attributed simply to an error in copying the dates into the account books, without any further explanation or justification.

87. The Spanish Government states that the EAGGF's statements do not correspond to the facts since the inspectors checked the records and there is evidence of their checks. It adds that the inspector proposed a reduction in the aid applied for proportionate to the excess amount and that the Agency endorsed that view in opposing payment of the aid in respect of that amount. It considers that the penalty of withdrawing approval is not justified and that examination of the accounts shows that it was just an error.

88. This line of argument cannot be accepted.

89. As regards the reporting of the investigation carried out, it must be stated that a mere reference to the plant's records renders the reports useless and reduces the

29 — Annex I to the defence.

30 — Annex to Annex V to the application for annulment, p. 9.

31 — Annex XI to the application for annulment, 'Olivar de Segura' file, pp. 12 and 13.

effectiveness of any checks, since such a way of operating makes it more difficult for checks to be made by any authority, be it national or Community, apart from the one that conducted the inspection.

90. As regards the quantity to which the application for aid relates, besides the fact that the inspection report does not mention this point, it should be noted that the competent authorities found there was an error but gave no explanation of it and hence made no attempt to check whether or not Article 12(6) of Regulation No 2677/85 ought to have been applied in that case.

91. The Commission has therefore claimed, quite rightly, that since the application contained an irregularity approval should have been withdrawn, and that in the circumstances the aid was obtained unlawfully. There are therefore no grounds for challenging the financial correction imposed in this connection.

(d) Agroalimentaria Minerva

92. The EAGGF's findings regarding the Agency's inspection of this undertaking, as set out in the table annexed to the inspection report of 31 May 1994[32] and in the letter sent by the Commission to the Spanish authorities on 13 June 1995,[33] noted the following irregularities in particular: the checks carried out by the Agency disclosed unexplained discrepancies between the physical stocks and the recorded stocks and showed that an application for aid had been made in respect of an amount greater than that for which entitlement was recognised, for a reason which could not simply be an accounting error. The Commission considers that, in those circumstances, the aid was obtained unlawfully.

93. Examination of the documents drawn up at the time of the Agency's inspection, in particular the report of 21 July 1992, confirms the existence of discrepancies between the recorded stock of containers and the corresponding physical stock. Among those discrepancies it is revealed that 1 320 containers out of 8 211 of the same type counted at the plant did not appear in the records.[34] The Agency inspector remarked that there was the possibility of an error.

94. The Spanish Government claims that the scale of the discrepancy between the figures shows there was no irregularity and that in its view they corresponded sufficiently closely. It adds that a discrepancy of 1 320 units out of a total of 130 000 containers stored in the plant at the time should be viewed against the almost total correspondence ascertained in other cases,

32 — Annex I to the defence.

33 — Annex to Annex V to the application for annulment, p. 9.

34 — Annex XI to the application for annulment, 'Agroalimentaria Minerva' file, p. 10 of the report, point 4.3.

which makes it probable that an error occurred.

95. It should be pointed out that the four sets of figures relating to containers, which the Spanish inspectors compared, reveal discrepancies amounting to several hundreds of units at least, which, even when compared with the figures for the four categories of stocks at issue of between 10 500 and 95 600 units, cannot be regarded as negligible amounts. In particular, the figure of 1 320 units set against a total of 8 211 in its corresponding category constitutes a substantial discrepancy which it is difficult to put down to a mere error.

96. As for the claim that the application for aid was unlawful, the Spanish Government states that the Agency's report did not accept an amount of 3 069 kg of olive oil in the application submitted by the plant for the month of December 1991, and that that amount was deducted following an accounting error made by the plant. It maintains that that fact meant that the penalty contained in Article 12(6) of Regulation No 2677/85 could not be imposed since the plant had not made a false statement, deliberately or through serious negligence, in order to obtain aid to which it was not entitled.

97. The claim that there was a simple clerical accounting error is in my view insufficient, in the absence of any evidence to support such an assumption, to justify the failure to apply Article 12(6) of Regulation No 2677/85.

98. The financial correction imposed by the Commission should therefore be accepted.

(e) Sagarra Bascompte

99. The EAGGF's findings regarding the Agency's inspection of this undertaking, as set out in the table annexed to the inspection report of 31 May 1994 [35] and in the letter sent by the Commission to the Spanish authorities on 13 June 1995, [36] noted the following irregularities in particular: the Agency's inspectors were unable to check the recorded stocks; they noted discrepancies between the recorded stocks and the physical stocks of containers; no business papers were submitted to them on their first visit. Following a further examination at the Agency's offices, the Agency concluded that the stocks did tally and that the documents and records were in order, without giving any convincing explanations, in the Commission's view, as to how the irregularities originally noted had vanished. The Commission considers that the aid was paid without proper investigation.

35 — Annex I to the defence.

36 — Annex to Annex V to the application for annulment, p. 6.

100. Examination of the documents drawn up at the time of the Agency's inspection confirms each of those points. The Agency's inspector mentioned in the report of 19 January 1993 that he had not been able to check whether the physical goods corresponded with the goods shown in the records since the accounts ledgers were not available.[37] Discrepancies were noted between the recorded stocks and the physical stocks of containers.[38] Furthermore, there is no evidence to explain how the Agency managed to make the figures tally once the records had been examined.

101. The Spanish Government states that the stock records were up to date and that the inspection procedure had taken place normally. It asserts that the procedure started with checks on the records, during which the inspector examined the records submitted to him by the undertaking, followed by a site visit, after which the results of the two parts of the inspection were assessed at the Agency's offices.

102. The applicant maintains therefore that the records were checked before the inspection. It does not supply any evidence of this however. No written document has actually been included in the file establishing the existence of such a preliminary investigation, describing the procedure adopted or setting out the findings reached by the investigators.

103. The Spanish Government adds that no significant discrepancy was detected in the checks on the stocks of containers.

104. It fails, however, to provide any explanation of the figures noted by the inspectors, which indicate a difference of 8 000 units in one case and 1 320 units in the other.[39]

105. All of this evidence is sufficient to justify the financial correction imposed by the Commission.

(f) Amador Rodríguez

106. The EAGGF's findings regarding the Agency's inspection of this undertaking, as set out in the table annexed to the inspection report of 31 May 1994,[40] noted the following irregularities in particular: the Agency's inspectors certified that the plant's packaging facilities had not undergone any alteration, on the basis of the statements made by its representative, without carrying out any investigation themselves; there were no 25-litre containers; the 1- and 5-litre containers were not inspected; there is no information in the report regarding

37 — Annex XI to the application for annulment, 'Sagarra Bascompte' file, p. 10.

38 — Ibid., p. 10a, point 4.3.

39 — Ibid.

40 — Annex I to the defence.

consignments of olive oil leaving the plant. The letter sent by the Commission to the Spanish authorities on 13 June 1995 states that the aid was paid without proper investigation. [41]

107. Examination of the documents drawn up at the time of the Agency's inspection confirms each of those points.

108. The inspection report of 10 December 1992 contains the words 'no change since last inspection according to the undertaking' in the section relating to the description of the packaging facilities and storage areas. [42]

109. That document also notes a discrepancy in that there were 21 physical units of 25-litre containers less than the 384 units shown in the records. The report of 26 January 1993 does not mention any containers. [43]

110. The inspectors clearly mentioned in the report of 10 December 1992 that it was not possible to count the 1-litre and 5-litre containers. [44]

111. The only entry in that document for findings regarding olive oil leaving the plant is a reference to an annex and to the subsidiary records. [45] No general or detailed information on olive oil leaving the plant appears in that section.

112. The Spanish Government disputes the complaints made against it.

113. As regards the accusations relating to the lack of any changes in the plant's packaging facilities, it maintains that on an initial visit to an undertaking details of the facilities are always described in the report on the basis of mere observation. During subsequent visits the inspector examines the existing facilities again and checks whether there have been any changes since the last time. If so, he indicates this in his report. If not, he ascertains from a representative of the plant that no alteration likely to pass unnoticed on a visual examination has taken place.

114. The explanation given by the Kingdom of Spain would be acceptable if the systematic examination of the facilities which should take place during each inspection were described in the report. The inspector's remarks however make no

41 — Annex to Annex V to the application for annulment, p. 7.

42 — Annex XI to the application for annulment, 'Amador Rodríguez' file, pp. 2 and 3.

43 — Ibid., p. 9, and report of 26 January 1993, p. 9, point 4.3.

44 — Page 8.

45 — Page 13.

mention of this point, and reading them thus gives the impression that no check, not even a purely visual one, was made and that the evidence that there had been no alterations either to the premises or to the facilities lay solely in the statement made by the plant which was being inspected.

115. The applicant goes on to explain that the 21 missing containers were not intended for marketing the olive oil, which is the reason why they were not taken into account. It does not, however, produce any evidence in support of its assertions.

116. As regards the fact that 1- and 5-litre containers were not inspected, the Kingdom of Spain alleges that they were checked by a reckoning process, which indicated there was no significant discrepancy.

117. These explanations by no means relieve the plant from its responsibility, since it is established that those containers could not be counted according to the usual method. Nor do they justify the working methods of the inspectors, who merely noted that it was impossible to carry out their checks without giving any reasons or describing the alternative inspection method which was ultimately used.

118. Lastly, the Spanish Government maintains that there is information available on the olive oil leaving the plant. The applicant does not however produce the documents containing this information.

119. All the above considerations therefore justify the financial correction imposed by the Commission.

(g) Fernández y Ruiz de Aguilar

120. The EAGGF's findings relating to the Agency's inspection of this plant, as set out in the table annexed to the inspection report of 31 May 1994,[46] noted the following irregularities in particular: there were no records of stocks of olive oil put up in containers or of stocks of containers; the inspectors concluded that there was 'nothing to report', although no inspection could be carried out to establish that there were no discrepancies. The letter sent by the Commission to the Spanish authorities on 13 June 1995 states that the aid was paid without proper investigation.[47]

121. Contrary to what the Commission claims, it appears from the inspection report of 13 July 1992 that stock records relating to stocks of olive oil put up in

46 — Annex I to the defence.

47 — Annex to Annex V to the application for annulment, p. 8.

containers and stocks of containers did exist and were inspected. [48]

122. However, the section of the report relating to checks on whether the recorded stocks corresponded to the physical stocks does not give any entry relating to stocks of olive oil put up in containers or to stocks of containers, which leaves doubt as to whether a check was made to see if they did correspond. [49]

123. The Spanish Government maintains that although the inspector did not show in his report at the time of the inspection that the physical stocks corresponded to the recorded stocks, he mentioned it subsequently in the report which he drew up at the Agency's offices. It states that the fact that the inspector mentioned in his report, on completion of the inspection procedure, that there was 'nothing to report' shows that everything was in order and not that the necessary checks had not been made.

124. Suffice it to state, however, that the Kingdom of Spain does not provide any evidence in support of the assertion that the check on whether the stocks corresponded was eventually carried out.

125. This finding is sufficient to justify the complaint made by the Commission to the Spanish Government that there was no proper investigation of the packaging plant in question.

(h) Uteco Jaén

126. The EAGGF's findings regarding the Agency's inspection of this plant, as set out in the table annexed to the inspection report of 31 May 1994 [50] and in the letter sent by the Commission to the Spanish authorities on 13 June 1995, [51] noted the following irregularities in particular: the inspectors approved the equipment, filling plant and storage area without carrying out any checks and purely on the basis of the statement made by the undertaking; it was not possible to check whether stocks of olive oil put up in containers corresponded to the stocks of containers; the aid was thus paid without proper investigation.

127. Examination of the documents drawn up at the time of the Agency's inspection confirms each of those points. The Agency's inspectors made an entry in the section of the report of 23 July 1992 intended for details of the packaging plant and the storage depot, to the effect that the equipment and premises concerned had not undergone any change since the last inspec-

48 — Annex XI to the application for annulment, 'Fernández y Ruiz de Aguilar' file, pp. 6 to 8.

49 — Ibid., p. 9, points 4.2 and 4.3.

50 — Annex I to the defence.

51 — Annex to Annex V to the application for annulment, p. 8.

tion, merely on the basis of a statement by the representative of the plant. [52]

128. That report does not mention any record of stocks of oil put up in containers or stocks of containers, which made it difficult to check whether the recorded stocks corresponded to the physical stocks.

129. As regards the complaint that the entry in the report that there had been no change was made on the basis of a statement by the representative of the plant, the Kingdom of Spain refers to the arguments put forward above in respect of Amador Rodríguez. [53] As regards the lack of data relating to stocks, it states that the recorded stocks were checked at the Agency's offices.

130. It should be pointed out that no evidence was produced in support of this latter assertion. As for the first complaint, I merely refer to my reasoning with regard to Amador Rodríguez, which applies also in this case. [54]

131. The financial correction imposed by the Commission must therefore be approved.

52 — Annex XI to the application for annulment, 'Uteco Jaén' file, pp. 2, 3 and 5.

53 — See point 115 of this Opinion.

54 — Ibid., point 116.

(i) Aragonesa de Aceite de Oliva

132. The EAGGF's findings regarding the Agency's inspection of this undertaking, as set out in the table annexed to the inspection report of 31 May 1994 [55] and in the letter sent by the Commission to the Spanish authorities on 13 June 1995, [56] noted the following irregularities in particular: the accounts and stock records were not up to date; there were no details regarding olive oil entering and leaving the plant; no documents relating to the plant's approval were available at the time of the inspection; it was not possible to check whether the recorded stocks corresponded to the physical stocks; the aid was therefore paid without proper investigation.

133. Examination of the documents drawn up at the time of the Agency's inspection confirms each of those points.

134. The report of 9 March 1993 notes that the stock accounting was incomplete. [57] The plant's representative was not able to produce confirmation of the competent authority's approval. [58] The records were not available, with the result that the

55 — Annex I to the defence.

56 — Annex to Annex V to the application for annulment, p. 9.

57 — Annex XI to the application for annulment, 'Aragonesa de Aceite de Oliva' file, pp. 6, 7, 9 and 18.

58 — Ibid., p. 5, point 1.1, and p. 18.

inspectors were not able to check whether the recorded stocks corresponded to the physical stocks. [59] Neither the report nor any other document on the file provides data on olive oil entering and leaving the plant. [60]

135. The Spanish Government maintains that discrepancies were detected in the records because Aragonesa de Aceite de Oliva is a newly-approved plant, but that the records do none the less make it possible to follow stock movements. It adds that the report mentions checks on the bulk olive oil which had entered and left the plant, that is to say, the movements listed in the records examined by the Agency. The applicant points out also that the report states that 100% of the supporting documents relating to olive oil entering and leaving the plant were examined. Lastly, it explains that submission of the documents relating to the plant's approval is a purely formal requirement, which does not affect the inspection procedure since the Agency has a copy of the approval issued by the competent authority.

136. These arguments are unacceptable. Although some of the irregularities noted may be tolerated from time to time by the administration from a purely instructional viewpoint in order to ensure that the plants concerned comply with the legal requirements more closely in the future, I do not consider it acceptable to disregard the legal consequences of such irregularities where, as in the present case, they are so numerous and relate to all of the plant's activities.

137. One must state therefore that although the plant was granted approval only recently this cannot justify the fact that no precise details are given of the number, nature and dates of movements of olive oil between the plant and outside businesses, which constitutes one of the bases on which aid is assessed. The fact that a complete inspection was made of the business papers, which is confirmed by the Spanish Government on the basis of the figures given in the report, does not adequately compensate for the lack of information on whether the recorded stocks correspond to the physical stocks, where there is no evidence to show that they do.

138. I therefore consider that the Commission is entitled to make the disputed financial correction.

(j) Martínez Henarejos

139. The EAGGF's findings regarding the Agency's inspection of this plant, as set out in the table annexed to the inspection

59 — Ibid., p. 9, point 4.2.
60 — Ibid., pp. 12 and 13.

report of 31 May 1994 [61] and in the letter sent by the Commission to the Spanish authorities on 13 June 1995, [62] note that the records in respect of olive oil stored in bulk, of olive oil put up in containers and of containers were not up to date at the time of the Agency's inspection and it was not possible to make an on-the-spot check as to whether the recorded stocks corresponded to the physical stocks. Both sets of data, when finally obtained from the plant, showed discrepancies which, although only of relative significance, were particularly numerous. Aid was thus paid without proper investigation.

140. Examination of the documents from the Agency's inspection confirms each of those points. The report of 6 October 1992 reveals that the records for each of the abovementioned categories of product were not available on the day of the inspection. [63] Discrepancies between the recorded stocks and physical stocks of these products, noted subsequently, appear in all cases with regard to olive oil stored in bulk and to containers, and in almost half the cases with regard to oil put up in containers. [64]

141. The Spanish Government maintains that the fact that the data did not correspond, as was discovered following the inspection carried out at the Agency's offices, should not be regarded as significant. According to the applicant, those discrepancies are due to the fact that the plant puts its oil up in 16 different types of container.

142. The arguments put forward by the Kingdom of Spain cannot justify the near-total divergence between the records and the physical stocks at Martínez Henarejos. Were those arguments to be accepted, it would be tantamount to saying there was no point in an undertaking keeping accurate records of its stocks, as required under the rules. The Spanish Government also fails to explain why it regards the number of different types of container as an obstacle to keeping proper records, since the units reckoned for accounting purposes and as physical units should in principle be the same.

143. It is apparent from this information that the financial correction decided on by the Commission is justified.

(k) Hispanoliva

144. The EAGGF's findings regarding the Agency's inspection of this plant, as set out in the table annexed to the inspection

61 — Annex I to the defence.

62 — Annex to Annex V to the application for annulment, p. 9.

63 — Annex XI [to the application for annulment], 'Martínez Henarejos' file, p. 10, before the addition of further data by the Agency's inspectors.

64 — Ibid., p. 10, after further data was added by the Agency's inspectors.

report of 31 May 1994 [65] and in the letter sent by the Commission to the Spanish authorities on 13 June 1995, [66] noted the following irregularities in particular: the packaging facilities, the storage area and the structure of the plant were not inspected at first hand; the containers were not inspected either; there was no check made as to whether the physical stocks of containers corresponded to the recorded stocks of containers; there were no details concerning checks on olive oil entering and leaving the plant. Aid was thus paid without proper investigation.

145. Examination of the documents drawn up at the time of the Agency's inspection confirms each of those points. The Agency's inspectors recorded in the section of the report of 5 August 1992 intended for the description of the features of the packaging facility, the storage depot and the structure of the plant that the undertaking had stated that no changes had taken place since the previous inspection. [67] The section of the report relating to checks on containers contains a comment by the inspector that, due to the large number and variety of sizes of the containers, no inspection had been made of them. [68] The table in the report relating to checks on whether the recorded stocks corresponded to the physical stocks of containers was not completed by the inspectors. [69] Lastly, the sections of the report relating to olive oil entering and leaving the plant had not been completed. [70]

146. The Spanish Government refers to the abovementioned method [71] used by the inspectors to investigate the plant's plant and premises. I do not think that method ensures proper supervision for the reasons already given. [72]

147. The applicant states that the inspectors decided not to carry out a precise count of the containers present since the data contained in the stock records corresponded to the amounts of oil put up in containers which were physically present in the plant at the time of the inspection.

148. This line of argument fails to take into account the fact that Article 12(1) of Regulation No 2677/85 stipulates that Member States must check that the total quantities of oil stored in bulk in containers and the empty containers physically present in the plant correspond to the figures given in the stock records. It cannot for that reason be accepted.

65 — Annex I to the defence.

66 — Annex to Annex V to the application for annulment, p. 10.

67 — Annex XI to the application for annulment, 'Hispanoliva' file, pp. 2 to 4.

68 — Ibid., p. 8, point 3.3.

69 — Ibid., p. 9, point 4.3.

70 — Ibid., pp. 12 and 13.

71 — See point 115 of this Opinion.

72 — Ibid., point 116.

149. The financial correction imposed by the Commission in this instance cannot therefore be challenged.

(l) Hijos de Joaquín Seguí

150. The EAGGF's findings regarding the Agency's inspection of this plant, as set out in the table annexed to the inspection report of 31 May 1994 [73] and in the letter sent by the Commission to the Spanish authorities on 13 June 1995, [74] noted the following irregularities in particular: invoice numbers were not entered in the stock records; errors were discovered in the recording of amounts of olive oil; the labels on the containers did not include any identification number; the recorded stocks did not correspond to the physical stocks. Aid was thus paid without proper investigation.

151. Examination of the documents from the Agency's inspection confirms each of those points. The Agency inspector's comments recorded in the report of 6 May 1992 indicate that invoice numbers were omitted from the stock records. [75] According to the inspector, the description of some quantities of oil did not correspond to their actual quality. [76] The Agency's inspector stated clearly that the labels on the containers of virgin olive oil did not include any identification number. [77] Lastly, comparison of the recorded stocks and the physical stocks pointed to the existence of discrepancies in all cases. [78]

152. The Spanish Government submits that the discrepancies found are not significant since they affect only a total of 142 litres. It adds that the inspectors carried out individual checks, that is to say, they examined the invoices and receipts relating to the commercial transactions and also the entries in the tax records of the business papers submitted.

153. The figure put forward by the applicant does not take into account all the discrepancies discovered at the time of the inspection, since discrepancies amounting to several hundred units were revealed between the recorded and physical estimates of quantities of olive oil stored in bulk, on the one hand, and those of the stocks of containers, on the other. [79] Furthermore, the Spanish Government does not specify what conclusions it draws from the fact that the inspectors carried out individual checks, nor does it indicate the extent to which this is likely to reduce its liability in granting aid paid without any proper investigation.

73 — Annex I to the defence.

74 — Annex to Annex V to the application for annulment, p. 10.

75 — Annex XI to the application for annulment, 'Hijos de Joaquín Seguí' file, p. 6.

76 — Ibid., p. 7.

77 — Ibid., p. 10.

78 — Ibid., p. 9.

79 — Ibid.

154. The financial correction imposed by the Commission cannot for those reasons be challenged.

(m) Emiliano Vivas

155. The EAGGF's findings regarding the Agency's inspection of this plant, as set out in the table annexed to the inspection report of 31 May 1994, [80] noted the following irregularities in particular: stock was missing, it was not possible to check containers, and there were significant omissions in the accounts. Aid was thus paid without proper investigation.

156. Examination of the documents drawn up at the time of the Agency's inspection confirms each of those points. Neither the report of 21 December 1992 nor that of 15 July 1993 contains any figures relating to quantities of olive oil stored either in bulk or in containers. [81] It appears from the first of those reports that it was not possible to check the containers on that occasion since the containers were not properly arranged. [82] Some invoices relating to olive oil leaving the plant were missing and were replaced by delivery notes, which were the only documents to be checked. [83]

157. The Spanish Government claims that the absence of stocks of olive oil was attributable to the plant's low level of operation and cannot be regarded as an anomaly. As regards the containers, it states that the inspector estimated their number by a process of reckoning, which confirmed that the physical stocks corresponded to the recorded stocks. Lastly, the applicant states that there was an invoice for each of the consignments of oil checked leaving the plant, apart from one where there was a delivery note, as the invoice had not yet been issued due to the amount of time required between actual delivery and invoicing.

158. It should be stated that, although the absence of stocks cannot be regarded as an anomaly, the absence of proper supervision is unacceptable, and in this particular case was due to inadequate inspection of stocks of containers. [84] Furthermore, the Spanish Government has failed to demonstrate that the check made of the delivery note was due to circumstances relating to the time required for issuing the invoice.

159. There is accordingly no reason to challenge the financial correction imposed by the Commission.

80 — Annex I to the defence.

81 — Annex XI to the application for annulment, 'Emiliano Vivas' file, p. 8 of the reports, points 3.1 and 3.2.

82 — Ibid., report of 21 December 1992, pp. 8 and 9, points 3.3 and 4.3.

83 — Ibid., p. 13.

84 — Ibid., p. 8, point 3.3, and p. 9, point 4.3.

160. The foregoing information demonstrates, to my mind, that the plants in question committed a large number of infringements of the rules relating to the common organisation of the market in oils and fats. Those infringements were not adequately investigated in accordance with the measures laid down in Regulation No 729/70. In accordance with Article 8(2) of that regulation, the Community should not have to bear the financial consequences of irregularities or negligence attributable to administrative authorities or other bodies of the Member States.

B — *The plea that the principle of proportionality has been infringed*

161. The Kingdom of Spain claims that the principle of proportionality, which is a general principle of Community law, requires that Community institutions should not, when exercising their powers, go beyond what is necessary and appropriate to achieve the desired objective.

162. It considers that in adopting Decision 96/701 the Commission infringed that principle both by requiring withdrawal of the approval granted to several plants and in the choice of the percentages on the basis of which the financial correction was assessed.

1. Withdrawal of approval

163. The Spanish Government states that the relevant Community rules provide for two cases in which approval should be withdrawn: the first, where withdrawal should be permanent, is if the conditions laid down for granting approval have been infringed; the other, where withdrawal should be temporary, is if aid has been sought in respect of a quantity of olive oil greater than the quantity to which entitlement has been granted or if the olive oil fails to comply with the statutory definitions.

164. It considers that, by calling for temporary withdrawal of the approval granted to Olivar de Segura and Agroalimentaria Minerva, the Commission was in breach of Community law and infringed the principle of proportionality.

165. The applicant claims that temporary withdrawal is not automatic since it is subject to two conditions being met.

166. The quantity of oil for which aid was improperly applied for must be significant, according to the second subparagraph of Article 12(6) of Regulation No 2677/85, which provides that the aid improperly applied for must exceed the checked quantity for which entitlement to aid has been recognised by at least 20%.

167. Fraudulent intent must also be proved. The applicant quotes Article 5(2) of Regulation No 2677/85, which states that withdrawal shall take place if the oil in question does not meet one of the definitions referred to as a result of blending or other chemical processes 'intended to render oil not eligible for consumption aid so eligible'. It asserts that the requirement that there must be fraudulent intent is to be inferred from the actual wording of the text.

168. The Spanish Government therefore claims that the two undertakings in question cannot be penalised by withdrawal of their approval since the quantities of oil at issue are insignificant and they cannot be accused of any fraudulent intent. It states that the corresponding amount of aid was not paid to the plants concerned.

169. The Commission maintains that the requirement of a minimum quantity of 20%, which applies in respect of the temporary withdrawal of approval under Article 12(6) of Regulation No 2677/85, is contained in a regulation amending Regulation No 2677/85, which entered into force after the end of the 1992 accounting period. It accordingly takes the view that that condition does not apply in the present case.

170. It contends that it is wrong to speak of an error when the application for aid clearly shows a quantity greater than that for which entitlement to aid has been recognised, and that it is wrong to deny the intent to defraud when the tests reveal the presence of trichloroethylene. The Commission considers that the company managers are, at all events, responsible for the final composition of their products and for describing those products in a way that ensures they are entitled to aid according to the relevant conditions.

171. The Kingdom of Spain states that making temporary withdrawal subject to the requirement that there must be a minimum amount of surplus is inherent in the necessary degree of proportion which should exist between the infringement committed and the penalty imposed.

172. It claims that the line of reasoning adopted by the Commission is inconsistent with the statement that the Commission asked to be included in the minutes of the meeting of the Management Committee for Oils and Fats held on 26 February 1993 to the effect that 'Article 12(6) of Regulation No 2677/85 provides for cases where incorrect statements are made deliberately or through serious negligence, and cases of clerical error are excluded from the scope of that provision'.

173. The Spanish Government adds, finally, that it is incomprehensible that an application for aid relating to an incorrect but negligible quantity should be penalised by withdrawal of approval prior to the 1993 reform, whereas, had it been made after that date, the same application would not have had the same consequences.

174. The Kingdom of Spain's plea that the principle of proportionality has been infringed is therefore divided into two limbs.

175. The applicant disputes the obligation imposed on it by the Commission to order withdrawal of the approval granted to those plants when, according to the first limb, no fraudulent intent can be imputed to them and, according to the second limb, the surplus quantity of olive oil stated in the application is insignificant.

(a) The requirement that fraudulent intent be demonstrated

176. Both Article 3(2) of Regulation No 3089/78 and Article 12(6) of Regulation No 2677/85 state that a Member State must order temporary withdrawal of the approval granted to a packaging plant which has made an application for aid relating to a quantity of olive oil greater than that for which the entitlement to aid was recognised.

177. The wording of those provisions does not contain any ambiguity regarding the obligation on Member States to withdraw approval where an application relates to a quantity greater than the quantity allowed.

178. Thus Article 3(2) of Regulation No 3089/78 provides that the Member State concerned 'shall decide to withdraw approval temporarily', and Article 12(6) of Regulation No 2677/85 provides that 'the Member State shall immediately withdraw approval', *without making that decision subject to any condition apart from* that of establishing that the quantity of olive oil exceeds the quantity allowed.

179. The Community rules do not therefore require any evidence to be supplied in advance of fraudulent intent on the part of the trader making the application.

180. Article 5(2) of Regulation No 2677/85, which the Spanish Government quotes in support of its line of reasoning, does not apply to an application for aid relating to a surplus amount. It actually provides for the case of temporary withdrawal of approval due to a change in the nature of the olive oil as a result of blending or other chemical processes. However, there is no question of that type of irregularity in the proceedings involving the two plants referred to above.

181. As regards the interpretation of Article 12(6) of Regulation No 2677/85 concerning the demonstration of fraudulent intent or serious negligence which the Commission gave at the meeting of the Management Committee for Oils and Fats on 26 February 1993, it must be pointed out that that position is not contradicted by Decision 96/701.

182. It is apparent from the Commission's statement that it interprets the provision in question as meaning that clerical errors are excluded from the scope of the provision, and that any other irregularity must be deliberate or the result of serious negligence, as the case may be. Now, as I have said, the Spanish authorities stated that the surplus quantities included in the applications were the result of unintentional errors on the part of the packaging plants, but have not managed to demonstrate the existence of such errors or, *a fortiori*, to establish that they were purely clerical errors.

(b) The requirement that there should be a minimum amount exceeding the quantity on which the application for aid is based

183. The principle that a minimum amount is required before approval can be withdrawn does not follow from the version of Article 12(6) of Regulation No 2677/85, as amended by Regulation (EEC) No 643/93, [85] relied upon by the applicant. That version in fact entered into force after the end of the 1992 accounting period. [86]

184. Of course, for reasons relating both to the need to impose penalties only where strictly necessary and to compliance with the principle of proportionality, it may be accepted that, even if it enters into force after the facts in the case, a new rule which makes loss of approval subject to a further condition should apply also as regards those facts.

185. However, the present action was brought in order to challenge the financial correction imposed on a Member State by reason of the manner in which it carried out its responsibilities with regard to the financing of the common agricultural policy. The case therefore concerns whether it carried out proper investigations of certain businesses and not the measures which should have been taken against the plants concerned, particularly in the light of laws adopted after the facts.

186. Considered in this light, it is necessary to assess, according to the rules applying at the time the Agency's investigations took place and not in the light of subsequent law, whether the Kingdom of Spain exercised proper supervision and whether proper

85 — Commission Regulation of 19 March 1993 (OJ 1993 L 69, p. 19).

86 — Article 2 of Regulation No 643/93 states that it was to enter into force on the seventh day following its publication in the *Official Journal of the European Communities*, that is to say, 27 March 1993.

action was taken subsequently by the Spanish administration in respect of the irregularities that were found. Thus, in order to assess whether the Kingdom of Spain complied with the rules enforceable in respect of those irregularities and, if appropriate, to establish that they did not give rise to the measures prescribed at that time under the relevant law, it is necessary to view the situation as it was at the date of the inspections.

187. However, although Article 12(6) of Regulation No 2677/85 allows a Member State to adapt the measure to suit the facts of which the plant in question is accused by stipulating that approval is to be withdrawn for between one and five years depending on the seriousness of the infringement, the Spanish authorities simply reduced the amount of aid in proportion to the excess amount. There is reason to believe that such a measure is likely to reduce the deterrent effect of the measure prescribed by the Community legislature in Article 12.

188. It is clear from all those considerations that the Commission may legitimately base the financial corrections imposed on the Kingdom of Spain on the fact that no temporary withdrawal of approval was ordered in respect of Olivar de Segura and Agroalimentaria Minerva although those plants had made applications for aid in respect of a quantity greater than that to which they were entitled. The fact that that excess was under 20% and that no fraudulent intent on the part of the plants concerned was formally proved is irrelevant in this regard.

2. The percentage rates of the financial corrections

189. The Kingdom of Spain considers that the financial corrections decided on by the Commission are unjustified and manifestly disproportionate in relation to the insignificance of the errors committed by the plants in question.

190. It believes that, in making an initial financial correction equal to 50% of the total aid paid in 1992 and then altering it six months later to 100% of the aid granted to four packaging plants and to 10% of the aid granted to nine others, the Commission has been inconsistent and shown that it has not applied any pre-established criteria, with the result that the financial correction bears no relation to the infringement.

191. The Spanish Government adds that the Commission did not follow the criteria which it had itself laid down in its communication of 3 June 1993 to the EAGGF Committee regarding the assessment of the financial consequences during the preparation of the decision on the clearance of accounts of the Guarantee Section of the EAGGF, in which it proposed three categories of financial correction depending on the seriousness of the shortcomings established. [87]

87 — Annex III to the defence, doc. VI/216/93.

192. The Commission's response is that the correction made does not infringe the principle of proportionality.

193. It states that the criteria applied in order to determine the disputed financial correction were adopted during contacts with the Spanish authorities made following the inspections carried out by the Commission and at bilateral meetings. According to the Commission, those contacts made it possible to adopt a method of correction to be used for a limited number of files and justified the re-examination of the initial conclusions and of the correction initially proposed.

194. It should be pointed out that, although the difference between the correction initially proposed by the Commission and that ultimately adopted may quite rightly cause surprise, that significant reduction in the amount is not such as to render unlawful the financial correction finally adopted under Decision 96/701.

195. Only the measure finally adopted by the Commission, because it is the only one which adversely affects the Member State concerned, can be taken into account in support of an application for annulment based on infringement of the principle of proportionality. Proposals for financial corrections, which are by nature likely to change, cannot therefore be relied on to support the argument that the difference between the proposals and the final decision proves that the Commission's positions were inconsistent.

196. I should add that the Commission's decision to abandon the proposal for a financial correction of 50% of the total amount of aid paid by the Kingdom of Spain in favour of corrections calculated on the basis of the aid allocated to 13 plants, nine of which had a correction of 10% of such aid applied to them, is a measure which is undoubtedly more advantageous for the Spanish Government.

197. Above all, the reduction in the level of the correction was the result of the exchanges of information which took place between the Kingdom of Spain and the Commission before Decision 96/701 was finally taken. In thus permitting the Kingdom of Spain to submit its observations on the inspection report of 31 May 1994 and on the initial proposal for financial corrections, the Commission complied with the requirements of the adversarial process and prepared the case with the object of making only those corrections that were strictly justified.

198. As regards the disproportionate nature of the financial corrections, it should be pointed out that the Court has consistently held that Article 3 of Regulation No 729/70 permits the Commission to charge to the EAGGF only sums paid in accordance with the rules laid down in the various sectors of agricultural production, while leaving the Member States to bear the burden of any other sum paid, in particular

any amounts which the national authorities wrongly believed themselves authorised to pay in the context of the common organisation of the markets. [88]

199. Although it is therefore for the Commission to prove an infringement of the Community rules, as I have stated above, the Member State concerned must demonstrate that the Commission committed an error as to the financial consequences to be attributed to it. [89]

200. In this particular case it is clear from Part III(A)(2) of this Opinion that the Commission has proved that the Kingdom of Spain breached several Community rules in the area of agriculture.

201. In particular, the facts which justified the imposition of a financial correction of 100% were capable of having a significantly adverse effect on the Community budget. The EAGGF inspections revealed, among other irregularities, suspicion that invoices had been falsified, applications for aid relating to quantities of olive oil greater than those for which entitlement had been recognised and oil the composition of which did not meet the statutory definitions because of blending or chemical processes designed to obtain aid to which there was no entitlement.

202. Those inspections thus proved that an adverse effect on the Community budget was likely. As the Court has consistently held in this connection, the Commission cannot be required to do more than that, since it cannot carry out the systematic checks and since analysis of the current state of a given market depends on information gathered by the Member States. [90]

203. Moreover, the amount of the financial correction does not appear to me to be excessive or disproportionate.

204. Firstly, the percentages adopted by the Commission, which range from 10% to 100%, are applied in the calculation of the total financial correction only in proportion to the amount of the aid improperly paid to the plants responsible for the irregularities. They are therefore not set at a comprehensively flat rate.

205. Secondly, the higher percentage was imposed where, for reasons relating to

88 — See, for example, Case 238/86 *Netherlands* v *Commission* [1988] ECR 1191, paragraph 25, and, more recently, Case C-238/96 *Ireland* v *Commission* [1998] ECR I-5801, paragraph 100.

89 — *Ireland* v *Commission*, cited above, paragraph 101.

90 — Ibid., paragraph 103.

compliance with the conditions for awarding the approval or the aid in question, the latter should not have been granted. It is not unusual therefore to add to the total amount repayable to the Kingdom of Spain all the amounts improperly paid.

206. Thirdly, the rate of 100% relates, as explained, to four plants responsible for serious irregularities.

207. Lastly, the application of a lower rate in respect of the less significant irregularities noted in the nine other packaging plants shows that the calculation of the financial correction took into account the degree of seriousness of the facts.

208. As regards the Spanish Government's argument that the Commission did not comply with the criteria laid down in its communication of 3 June 1993, it should be pointed out that in that document the Commission does not exclude 'refusing all the expenditure and so a higher correction rate [than 10%] may be regarded as appropriate in exceptional circumstances'.[91] It did not therefore make the 10% rate a limit which could not be exceeded.

91 — Annex III to the defence, doc. VI/216/93, Appendix 2, p. 3, last paragraph.

209. Above all, the correction rates of 2%, 5% and 10% set by the Commission in its communication are intended to apply to all the expenditure of a Member State where failure of that State's supervision systems is challenged, as the wording of the communication indicates.

210. In this particular case, it is not disputed that the inspection method used by the Commission and agreed with the Spanish authorities was that of checking a sample of files, which involves investigating a specified number of plants in order to reveal individual irregularities. The financial corrections are therefore assessed on a plant-by-plant basis, which may mean that in some cases the conditions for the payment of aid are not met and may justify the application of maximum rates.

211. These various factors lead me therefore to the view that the financial correction adopted by the Commission does not conflict with the principle of proportionality. It has been shown that in its Decision 96/701 the Commission also did not infringe the rules relating to the common organisation of the market in oils and fats and to the financing of the common agricultural policy. In those circumstances, the application for annulment must be dismissed.

Conclusion

212. In the light of the foregoing I propose that the Court:

(1) dismiss the action;

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