of the period prescribed in Article 5 of Regulation No 729/70 does dispense the Commission from its obligations to refuse to charge to the EAGGF expenditure which the checks which it is able to carry out show not to have been incurred in accordance with Community rules. Since no penalty is imposed for failure to comply with that time-limit, it may therefore be regarded as a merely formal limit, save where the interests of a Member State are affected.

REPORT FOR THE HEARING
delivered in Case 349/85 *

I — Facts

1. According to Article 1 of Regulation No 805/68 of the Council of 27 June 1968 on the common organization of the market in beef and veal (Official Journal, English Special Edition 1968 (I), p. 187), the common organization of the market in beef and veal comprises a price and trading system and covers, *inter alia*, products coming under subheading ex 16.02 B III (b) 1 of the Common Customs Tariff.

According to Article 18 (1) of the same regulation, to the extent necessary to enable the products listed in Article 1 to be exported on the basis of quotations or prices for those products on the world market, the difference between those quotations or prices and prices within the Community may be covered by an export refund. Under Article 18 (5) of the regulation, refunds are to be fixed at regular intervals by the Commission.

Regulations adopted by the Commission in 1980 and 1981 fixed the export refunds for preparations containing beef and veal, products covered by subheading ex 16.02 B III (b) 1 of the Commom Customs Tariff, and, as can be seen from the annexes to those regulations, and from the Annex to Commission Regulation No 187/80 of 29 January 1980 fixing the export refunds on beef and veal (Official Journal, L 23, p. 11), the amount of the refunds depends on the meat content of the goods, expressed as a percentage. The annexes make the following distinctions in regard to subheading ex 16.01 B III (b) 1:

'Other preparations and preserves containing bovine meat or offals, except those finely homogenized:

ex (aa) Uncooked, containing by weight the following percentages of bovine meats (excluding offal and fat):

(11) 80% or more of meat: . . .

(22) 60% or more, but less than 80% of meat: . . .

* Language of the Case: Danish.

(33) 40% or more, but less than 60% of meat: . . .

ex (bb) Other, containing by weight the following percentages of bovine meats (excluding offal and fat):

(11) 80% or more of meat

(22) 60% or more, but less than 80% of meat

(33) 40% or more, but less than 60% of meat

(44) 20% or more, but less than 40% of meat.'

2. Article 1 (2) (a) of Regulation No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy provides that the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (hereinafter referred to as 'the EAGGF') is to finance refunds on exports to third countries.

According to Article 2, refunds on exports to third countries, granted in accordance with the Community rules within the framework of the common organization of agricultural markets are to be financed under Article 1 (2) (a).

According to Article 5 (2) (b), the Commission, before the end of the following year, is to make up the accounts of the authorities and bodies empowered to effect the expenditure referred to in Article 2, on the basis of the annual accounts.

3. By decisions of 28 August 1985, the Commission cleared the accounts presented by the Kingdom of Denmark in respect of EAGGF expenditure for 1980 and 1981. The fifth recital in the preamble to the decisions states that inspections carried out show that a part of the expenditure declared does not satisfy the requirements of Articles 2 and 3 of Regulation No 729/70 and therefore cannot be financed.

4. The Commission's decisions were received at the Permanent Representation of the Kingdom of Denmark on 6 September 1985.

5. It can be seen from the Summary Report of the Commission of 22 October 1985 concerning the clearance of accounts for the two years (Doc. VI/345/84 and Addendum No 1 thereto, of 15 April 1985, Section 3.1.10.2) that the Commission criticizes the Danish authorities for having taken into account the fat-content when determining the percentage of meat in products falling under tariff subheadings 16.02 B 1 (aa) and 16.02 B 1 (bb) (preparations containing bovine meat) on the ground that the beef or veal used normally contains up to 30% fat. The Commission's officers took the view that the words 'excluding offals and fat' left no room for such an interpretation. They therefore made a corrected calculation and refused to finance 'bovine meats' refunds in the sum of DKR 18 175 950.25 for 1980 and in the sum of DKR 31 664 013.16 for 1981.

II — Written procedure and conclusions of the parties

1. The Kingdom of Denmark's application was lodged at the Court Registry on 16 November 1985.

2. By order of 15 October 1986, the United Kingdom of Great Britain and Northern Ireland was given leave to intervene in support of the applicant's conclusions.

3. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate

General, the Court decided to open the oral procedure without any preparatory enquiry.

4. The applicant, the *Kingdom of Denmark*, claims that the Court should:

(1) declare void the Commission decisions (No 85/450/EEC and No 85/451/EEC) of 28 August 1985 on the clearance of accounts presented by the Kingdom of Denmark in respect of the European Agricultural Guidance and Guarantee Fund, Guarantee Section, expenditure for 1980 and 1981, in so far as they provide that the following expenditure incurred by Denmark cannot be financed by the EAGGF, Guarantee Section:

(a) DKR 18 175 950.25 in respect of refunds on beef and veal for 1980,

(b) DKR 31 664 013.16 in respect of refunds on beef and veal for 1981;

(2) order the Commission to pay the costs.

5. The intervener, the *United Kingdom of Great Britain and Northern Ireland*, claims that the Court should declare the decisions partly void.

6. The defendant, the *Commission*, contends that the Court should:

(1) dismiss the application as unfounded;

(2) order the applicant to pay the costs.

III — Submissions and arguments of the parties

The *Government of the Kingdom of Denmark* claims that the Commission's decisions refusing to finance the amounts referred to in the application constitute an infringement of the Treaty or of the rules of law relating to its application.

It claims first that the decisions are based on an incorrect interpretation of Commission Regulation No 187/80 of 29 January 1980 and of the other regulations fixing export refunds on beef and veal applicable in 1980 and 1981, with the result that when the Commission decided not to finance part of the expenditure made by the Danish authorities, it infringed Article 2 of Regulation No 729/70.

Secondly, it claims that since the Commission has not complied with the rule laid down in Article 5 of Regulation No 729/70 it is not entitled to rely on a legal argument which it did not put forward at the proper time.

A — *The interpretation of the regulations fixing the export refunds on beef and veal in 1980 and 1981*

1. The *Government of the Kingdom of Denmark* states that during a visit made by the Commission's officers to Copenhagen in July 1984 in connection with the preparation of the clearance of accounts for 1982 and 1983, they stated for the first time that they considered that the expression 'bovine meats' within the meaning of the regulations in question meant the meat content exclusive of fat as determined by analysis.

(a) The applicant considers that the concept of 'meat content exclusive of fat as

determined by analysis' is a theoretical one and that only chemical analysis can determine the extent to which a basic meat product contains meat which is free of fat. The concept of bovine meats, as used in the regulations fixing the refunds, must be interpreted, in the absence of Community-law criteria, in accordance with its natural meaning, that is to say, as meaning the musculature of the skeleton with its natural content of fat, both visible and invisible.

The applicant refers to the criteria used by the FAO and the WHO in the reference book *Source book for food scientists*, mentioned by the Commission in its reports, and to British and Swedish practice and concludes that the common feature of the various definitions is that fat is regarded as a natural and integral part of meat.

In the Kingdom of Denmark's view, it was natural to rely on the traditional concept to determine the meat content of processed products and, for reasons connected with verification and having regard to production practices, it was decided to take as a point of departure a maximum natural fat-content of 30% for a piece of meat.

According to the applicant, the concept of 'bovine meats (excluding offal and fat)' within the meaning of subheading ex 16.02 B III (b) 1 must be understood as meaning that the finished product must include X% of bovine meats in the usual sense of the term, that is to say including visible or invisible fat, in normal proportions and that no part of that percentage may be replaced by offal or fat. Offal is defined in Chapter II of the Explanatory Notes to the Customs Cooperation Council Nomenclature and cannot come within the concept of bovine meat, although it may contain fat. Similarly, fat is clearly defined and is covered by Chapter XV of the Common Customs Tariff.

(b) The applicant believes that several Member States agree with its definition. The Commission recently sought to establish its interpretation in an authoritarian manner by a tariff decision to be adopted by the Committee on Common Customs Tariff Nomenclature. Since that attempt was unsuccessful, the Commission, acting under the procedure laid down in Regulation No 97/69 of the Council of 16 January 1969 on measures to be taken for the uniform application of the nomenclature of the Common Customs Tariff (Official Journal, English Special Edition 1969 (I), p. 12), submitted a draft regulation to the Council concerning the refund to be applied to products coming under subheading 16.02 B III (b) ex 1 ex (aa) (33) in the nomenclature annexed to Commission Regulation No 2672/85 of 23 September 1985 fixing the export refunds on beef and veal for 1985 (Official Journal, L 253, p. 18). However, it was not possible to obtain a qualified majority in favour of the concept proposed by the Commission, with the result that it was obliged to adopt the provisions to be found in Commission Regulation No 244/86 concerning the classification of goods within subheading 16.02 B III (b) ex 1 ex (aa) (33) of the nomenclature contained in the Annex to Regulation (EEC) No 149/86 fixing the export refunds on beef and veal (Official Journal, L 30, p. 8). The way in which that procedure was conducted is sufficient to show that the Commission's interpretation must be treated with caution, leaving aside the fact that Regulation No 244/86, which constitutes, in appearance, a classification decision, is based on a constructed example.

(c) The applicant draws attention to the fact that the concept of 'bovine meats (excluding offal and fat)' first appeared in Community measures in 1968 and at that time, the concept of 'meat content exclusive of fat as determined by analysis' was neither generally known nor generally used in commercial practice. The Commission cannot but be aware that checks as to the conformity of a product with Community law have always been carried out visually and it could not suddenly, in 1984, introduce a new and technical concept without that concept being precisely defined in law in relation to the regulations fixing the refunds.

(d) According to the applicant, the background to the regulations on refunds supports its interpretation. The refunds for preparations containing bovine meats coming under one of the headings at issue were laid down for the first time in Commission Regulation No 678/77 of 31 March 1977 fixing the export refunds on beef and veal for the period beginning 1 April 1977 (Official Journal, L 84, p. 41). It can be seen that the refund applicable to preparations of bovine meats (excluding offal and fat) containing 80% or more of meat were fixed at precisely the same level as those granted for fresh or chilled forequarters. According to the Danish Government's interpretation, that gives rise to payment of the same refund for prepared and unprepared forequarters. On the other hand, the Commission's interpretation implies the payment of a lower refund for forequarters used in preparations.

The applicant notes that that parallelism was not observed subsequently. In a certain number of regulations, the rates applicable to preparations were fixed at a slightly higher level and in others, at a lower level. However, that situation merely reflects the assessment of the markets at regular intervals.

(e) The applicant considers that its interpretation is also supported by the opportunities available for carrying out checks at places of production. The Commission is certainly right to argue that it is not possible, in chemical analyses, to distinguish between natural fat and fat which has been added. However, the Commission forgets that it is also not possible to distinguish in a chemical analysis between meat and offal. It is therefore necessary to combine the analytical check with a visual check at the place of production.

The applicant claims that checks have always been carried out by the Member States and the producers during the production process itself and that an experienced eye is capable of detecting, at the raw production stage, whether the meat being used has a natural fat-content of less than 30% or if fat has been added. It is even possible to estimate the natural fat-content of the raw product by making use, if necessary, of colour photographs based on analyses of the meat. At the production stage, a factual check is the only practical one. The applicant observes that the proportion of meat contained in the product is indicated as a percentage of total weight in the regulations concerning the refund, which implies that it must be possible for the meat which must be contained in a product to be determined by weighing.

According to the applicant, an analytical check may be made at the time that the finished product is assessed, on condition that it is adapted so as to take account of the fact that beef and veal contain in reality a natural fat-content, which the Danish authorities place at around 30%, since the natural fat-content of forequarters varies between 18 and 36%.

The applicant agrees that the natural fat-content of meat has not been precisely laid down in Community law. None the less, the concept which it defends, and which therefore serves as a basis for the analytical check, is based on concrete data.

(f) With regard to the Commission's objection that the Danish interpretation implies uneven intervals between categories, the applicant replies that that result is due to the transposition carried out by the Commission, which takes account only of the meat content exclusive of fat as determined by analysis. However, the categories are more even if the Danish Government's interpretation is taken as the point of departure.

With regard to the criticism that the Danish interpretation implies a reduction in the analytical limits expressed in terms of meat free of fat, the applicant considers that there is nothing abnormal in the fact that meat preparations contain natural beef or veal as well as other ingredients, and are largely composed of ordinary meat. It is not usual to use a top-quality piece in a preparation.

(g) The applicant contests the proposition that the purpose of the Community policy is to promote exports of high-quality products. The purpose of the regulations concerning refunds is to permit the export of beef and veal products in preparations and it is of no consequence if there is a fairly large quantity of raw material other than beef or veal in the actual products.

(h) The applicant does not agree that the judgments of 7 February 1979 (Case 11/76 *Netherlands* v *Commission* [1979] ECR 245 and Case 188/76 *Federal Republic of Germany* v *Commission* [1979] ECR 343) mean that the effect of a distortion of competition is that the expenditure in question cannot be financed by the Community. Referring to paragraph 9 of the judgment in Case 11/76 and paragraph 8 of the judgment in Case 18/76, the applicant considers that with regard to the refunds at issue, the means available to ensure the uniform application of Community law were not used, as can be seen, for example, from the fact that clear and precise rules were not laid down.

The applicant points out that, in regard to pigmeat preparations, the Commission laid down appropriate analytical limits and methods.

The applicant considers that the Commission, in its defence, has confirmed that the Danish text does not support the Commission's interpretation to the same extent as the other language versions. It considers that the German version supports its interpretation since the term 'Fett' means 'melted fat'.

The applicant therefore considers that the determination of the bovine meat content of processed products was carried out by Denmark in accordance with the rules of Community law.

2. The *United Kingdom of Great Britain and Northern Ireland* notes that the Commission did not draw its interpretation to the attention of the Member States until 1984. The fact that the Commission subsequently took steps to enshrine its interpretation in legislation so as to put the matter beyond doubt amounts to a recognition that the words 'bovine meats (excluding offal and fat)' are capable of differing interpretations.

The United Kingdom claims that until the adoption of Commission Regulation No 2429/86 of 31 July 1986 on the procedure for determining the meat content of meat preparations and preserves falling within subheading ex 16.02 B III (b) 1 of the nomenclature contained in the Annex to Regulation No 2184/86 (Official Journal, L 210, p. 39), there was no Community provision expressly defining the meat content of processed beef products or laying down how that content was to be calculated. In those circumstances, it was left to the Member States to interpret the expression 'bovine meats (excluding offal and fat)' in a reasonable and commonsense way.

The United Kingdom's interpretation is based on the lean beef content of the products and falls therefore between the two extreme interpretations adopted by the Kingdom of Denmark and the Commission. In accordance with domestic practice, lean beef was understood to mean lean muscle tissue from which all visible fatty tissue had been separated, but which could contain up to 10% invisible fat.

In order to determine the lean beef content, the United Kingdom authorities first calculated the fat-free lean meat content by means of an analytical method similar to the one laid down in 1986 in Regulation No 2429/86. The result of that calculation was then multiplied by a coefficient of 100/90 in order to make allowance for 10% invisible fat.

The United Kingdom therefore considers that it has correctly interpreted and applied the relevant Community rules. The interpretation of the words 'bovine meats (excluding offal and fat)' as lean beef, excluding offal and visible fat, merely accords to those words their ordinary and natural meaning.

The juxtaposition of 'offal' and 'fat' in the parenthesis appears to indicate that the type of fat contemplated falls into the same category as offal, that is to say, animal matter which is generally readily excisable from the lean meat. Animal fat and offal are moreover separately defined in the Common Customs Tariff but of course only separable animal fat is capable of being traded as a distinct product.

In the view of the United Kingdom, those indications suggest that only visible fat should be excluded from the calculation of the meat content.

The United Kingdom also considers that its definition accords with the realities of production and provides the producer with a clear guideline as to the level of the anticipated export refund.

The United Kingdom emphasizes that its approach, by providing producers with a clear and practical point of reference, helps to further the objectives of the export refund scheme, which is intended to facilitate Community participation in inter-

national trade and, where necessary, maintain existing or traditional levels of trade.

The United Kingdom concludes that to the extent that the Commission has excluded all natural fat from the determination of the meat content of processed beef products, it has applied an incorrect interpretation of the Community rules in force in 1980 and 1981 and the decisions adopted should therefore be declared partly void.

3. The Commission considers that the applicant's interpretation is irrational and arbitrary.

(a) It considers that the expression 'bovine meats (excluding offal and fat)' in tariff subheading ex 16.02 B III (b) 1 means that in order to calculate the meat content of a product for the purpose of determining the amount of the export refund, the fat contained in that product must be excluded and that, since the applicable rules contain no limitation as to the kind of fat to be excluded, that term must be understood, for the purposes of the calculation, as including fat in all its forms, whether added or natural, visible or invisible.

The Commission states that, in order to resolve the question of interpretation, it starts from the usual meaning of the words 'bovine meats'. Since meat naturally contains fat, the only possible interpretation which can be given to the parenthesis '(excluding offal and fat)' is that it is intended to make clear that within tariff subheading 16.02 B III (b) 1 that natural fat is not to be regarded as part of the bovine meats.

According to the Commission, it follows from that proposition that in order to calculate the meat content of the goods on the basis of which the refund is fixed, both added and natural fat should be excluded.

The Commission's interpretation would thus give the parenthesis its full meaning and purpose. It also makes it possible to calculate the meat content determining the amount of the refund on the basis of a clear and objective criterion, namely the percentage of meat analytically free of fat and, therefore, to comply fully with the fundamental requirement of Community law that it should be applied uniformly in the entire Community. The applicant's fundamental error is that it interprets the expression 'bovine meats' in the opening sentence of subheadings ex (aa) and ex (bb) separately from the parenthesis which follows it, '(excluding . . . fat)', which inevitably causes it to interpret the expressions 'X% of meat' appearing in each of the categories without taking account of that indication. The fact that the expression 'oksekoed (ikke . . . fedt)' (bovine meats (excluding . . . fat)) must be interpreted as a whole may be deduced from the fact that the parenthesis cannot be interpreted in isolation. The close link between the wording 'oksekoed' and the parenthesis which follows it appears even more clearly from a comparative interpretation based on the other language versions which use a preposition or a prepositional expression rather than the Danish adverbial construction.

The applicant's argument to the effect that the expression 'bovine meats (excluding offal and fat)' must be understood as meaning that the finished product must contain X% of bovine meats in the usual sense of the term and that no part of that

percentage may be replaced by offal or fat is a specious argument intended to deprive the parenthesis of its importance. The parenthesis clearly states 'excluding . . . fat'. The applicant's interpretation would require the parenthesis to state 'excluding . . . added fat'. The provision contains no restriction in regard to the nature of the fat to be excluded and consequently, in accordance with the wording thereof, all forms of fat must be excluded.

The Commission emphasizes that it has not failed to take account of the usual meaning of the expression 'bovine meats' because it bases its interpretation precisely on that meaning.

The Commission considers it useful to observe that all the language versions use the same general concept of 'fat' without restricting it and without adding the qualifier 'added'. The specific words designating melted fat are not used in the various versions and the applicant is wrong in claiming that the German word 'Fett' designates melted fat.

The Commission insists that its interpretation is based on the Danish version, confirmed by a comparison with the other language versions. It is thus incorrect to say that the Commission has admitted that the Danish text does not confirm its interpretation to the same extent as the other versions.

(b) The Commission analyses the consequences of the applicant's interpretation and states that it could, in certain cases, lead to the payment of a refund about two and a half times higher.

The Commission observes that the applicant's interpretation leads to an arbitrary result by accepting in the calculation of the meat content on which the amount of the refund is based that that content may be constituted by up to 30% of fat even though there is no basis for that proposition in Community law. Furthermore, the applicant does not explain why that tolerance is established precisely at 30%. It is possible to deduce from the limits which it cites other, equally valid, tolerances.

The tariff heading in question distinguishes between four limits which are, respectively, 80%, 60%, 40% and 20% of weight. The Commission observes that the applicant, by accepting that those percentages include 30% of fat, is lowering the analytical limits expressed in meat free of fat to 56%, 42%, 28% and 14% of weight respectively, as can be seen from the table in the circular contained in Annex 5 to the application.

If the manner in which the various categories are spaced out is considered, it will be noted that the Commission's interpretation, according to which the four limits of 80%, 60%, 40% and 20% of weight must be regarded as the percentage by weight of meat free of fat as determined by analysis, provides an even division of the tariff heading into four equal parts each representing 20%. On the other hand, the applicant's interpretation leads to the result that when the heading is divided on the basis of meat content free of fat as determined by analysis, the first category covers 44% and the three remaining categories cover only 14%, which means that the intervals between the categories vary greatly.

The Commission claims that having regard to the fact that bovine meats of superior quality contain only 2 to 5% of fat, the applicant's interpretation leads to the same

refund, at the highest rate, being paid for goods the meat content of which excluding fat is 56% as for goods the meat content of which excluding fat is 95 to 98%.

The Commission also refers to the following formula in the abovementioned circular: '% of meat determined by analysis = % of meat free of fat as determined by analysis + % of fat as determined by analysis'. That means that the applicant determines the percentage of meat by simply adding the percentage of meat free of fat and the percentage of fat of all kinds, whether natural or added. The contradiction with the expression 'bovine meats (excluding . . . fat)' is so flagrant that it is sufficient to demonstrate the applicant's error.

(c) The Commission emphasizes that the purpose of the common agricultural policy as expressed through the grant of export refunds is to promote products of high quality, that is to say, products with a low fat-content. That can clearly be seen from the division of the subheading into four categories according to the bovine meat content (excluding offal and fat) and by the varying amount of the refund.

A teleological interpretation is sufficient to show that the applicant is mistaken, because its interpretation would favour the export, at the expense of the Community, of goods of inferior quality. When a linguistic and a teleological interpretation arrive at the same result, they take precedence over a historical interpretation. Moreover, the comparison made by the applicant makes no sense because it refers to two products the nature and value of which differ considerably; on the other hand, the fact that the refunds were the same at the time may be explained as pure historical coincidence resulting from the assessment made at that time of the situation in regard to markets and outlets.

(d) According to the Commission, it should also be noted that the applicant's interpretation leads to a distortion of competition, which it does not deny, and which favours Danish producers with lower raw material costs over producers in other Member States which correctly interpret the designation of the goods. The judgments of the Court of 7 February 1979 (Cases 11/76 and 18/76, cited above) clearly show that such a distortion of competition makes it impossible for the expenditure in question to be financed by the EAGGF.

(e) The Commission emphasizes that the analytical check is decisive in determining the meat content of the goods and that the analytical impossibility of making the distinction between natural and added fat relied on by the applicant constitutes a fundamental weakness in its interpretation. The applicant's objection that chemical analysis also does not make it possible to distinguish between meat and offal is irrelevant. On the one hand, this case deals with fat and not offal and, on the other hand, it is perfectly possible to distinguish between meat and fat.

The Commission also emphasizes that the applicant's position is clearly contradicted by the expression 'meats (excluding . . . fat)' when it revises the results of the chemical analysis by increasing the meat content to take account of the fat contained in the product.

With regard to the applicant's views on visual inspection and weighing at the production stage, as well as on production management by weighing the raw materials used, the Commission observes that the question to be decided in this case is what export refund must be paid for a given finished product. It is the meat content, excluding fat, of that product which must be determined and that may be done in a simple and objective manner by means of an analytical check.

It seems to the Commission that the applicant is expressing a production philosophy according to which payment of a refund of the highest possible amount constitutes an end in itself rather than being aid intended to promote the disposal of the product on export markets. One of the weaknesses of the Danish interpretation lies precisely in the fact that it encourages that regrettable tendancy by making it possible in the case of the highest export refund to manipulate the product inside a range of 44%, whereas the Commission's interpretation limits the possibilities of such manipulation to 20%.

However, the Commission regards the fact that undertakings should be able to determine at the time of production the export refund to be paid to them for the proposed production as an interest worthy of protection. The Commission's interpretation also makes it possible to do that and to manage production with a reasonable degree of certainty because the meat content categories are of equal size and of an appropriate range, namely 20%. On the other hand, production management would be rendered more difficult in regard to the three lower categories under the Danish interpretation because the size of those categories would be reduced to 14%.

The Commission states that it has taken account of the circumstance pleaded by the applicant that bovine meats contain natural fat, because the highest export refund is paid once the product contains 80% of meat exclusive of fat and the remainder of the product may very well be composed of fat.

The Commission observes that it agrees that products prepared from bovine meats may, in addition to natural bovine meats, contain other ingredients but it regards it as unacceptable that the highest rate of refund should be paid for a product which contains only 56% of meat, in other words, a little more than half, whereas the remaining 44% is constituted by other ingredients.

(f) The Commission considers that an interpretation based on criteria drawn from Community law clearly show the applicant's error. The interpretation of the designation of the goods under consideration cannot be based on criteria drawn from outside Community law such as the practice in Denmark, in the United Kingdom or in Sweden, FAO or WHO programmes or the reference book *Source book for food scientists.* The Commission observes that it quoted the latter book only to show the average fat content which forms the basis of the rectification of the expenditure declared by the applicant.

(g) With regard to its proposal of 29 October 1985, to the Council for a regulation concerning the classification of goods in subheading 16.02 B III (b) ex 1 ex (aa) (33) of the nomenclature contained in the Annex to Commission Regulation No 2672/85, the Commission states that that proposal merely confirmed the applicable law and that the Commission would have been negligent in failing to submit it since it

had found that a Member State was misinterpreting the nomenclature contained in one of the regulations fixing the refunds. Moreover, the Commission's duty to put an end to such an error of interpretation by providing an authoritative interpretation may be deduced from Regulation No 97/69, as amended by Council Regulation No 2055/84 of 16 July 1984 (Official Journal 1984, L 191, p. 1).

With regard to Regulation No 244/86, the Commission does not see why the details of the vote by which a measure was duly adopted should have any significance whatsoever for the purpose of considering the matters governed by that measure. With regard to the example contained in the regulation, the Commission points out that it is in fact a real product, analysed in 1984 by the Slagteri- og konserveslabatorium of the Danish Ministry of Agriculture. The example chosen illustrates the way in which Danish undertakings obtained export refunds higher than those granted under the interpretation of the contested heading laid down in the regulation.

(h) The Commission denies that it suddenly began to defend a new concept in July 1984. It has always adopted the interpretation set out above and it believed in all good faith that the applicant had adopted the same interpretation. It was only in February 1984 that it noted, on the occasion of an inspection visit, that such was not the case. It thus had no previous opportunity to indicate its precise interpretation to the applicant, which cannot fail to be aware that the Commission carries out inspections by sampling since it is impossible, for the purposes of clearing the accounts, to carry out a systematic check on all the information provided.

The Commission considers that having regard to the extremely doubtful and arbitrary result of the applicant's interpretation, the latter ought, before paying the refunds, to have consulted the Commission. In any event, the applicant cannot claim that its interpretation is due to a lack of precision in the tariff heading, that the Commission should have indicated a method of analysis or that the Danish-language version led it into error. Unless agricultural legislation is to become unacceptably voluminous, the Commission's text is appropriate enough. Furthermore, the Commission, once it noted that Community law was not being applied uniformly, submitted, together with its proposal for the classification of goods under the subheading in question, a proposal for a regulation laying down a method of analysis. However, while the classification proposal was adopted as Regulation No 244/86, the proposed regulation concerning the method of analysis was, at the date of the rejoinder, still being blocked by the same Member States which had voted against the classification proposal.

The Commission thus considers that it has fully met its obligations.

B — *Article 5 of Regulation No 729/70*

1. The *Government of the Kingdom of Denmark* states that the Commission cleared the accounts for 1980 and 1981 in its decisions of 28 August 1985, that is to say, considerably later than the limit of one year laid down in Article 5 of Regulation No 729/70.

(a) The applicant considers that the purpose of Article 5 was to create a legally sanctioned obligation to act on the part of the Commission. The sanction is not invalidity but the fact that the Commission is prohibited from relying on a new legal concept in relation to the clearance of

accounts for 1980 and 1981. The Danish Government cannot accept that fundamental and disputed questions of law should be raised in relation to the clearance of accounts long after the actual decisions adopted by the national administration and that the Commission's failure to observe the provisions of the regulation on financing can produce no effect in law.

The applicant claims that it follows from the judgment of the Court of 13 November 1964 (Joined Cases 90 and 91/63 *Commission* v *Luxembourg and Belgium* [1964] ECR 625) that a time-limit may have legal effect if it is laid down in the Treaty or in a binding legal measure, as is the case in these proceedings, which concern a time-limit fixed by the Council for the purposes of the administration by the Commission of rules on financing under the common agricultural policy.

(b) According to the applicant, the Commission would have done better to have considered the Kingdom of Denmark's supposedly erroneous interpretation in the context of Treaty infringement proceedings. It considers it unfortunate that the procedure for the clearance of accounts can be used without any time-limit and without the guarantees laid down in Article 169 of the EEC Treaty. The procedure used would perhaps be acceptable in the case of an erroneous application of Community rules which was serious and manifest or if the Commission had acted within the time-limit laid down in Article 5 of Regulation No 729/70. In other cases, an unreasonable situation of legal uncertainty is created in regard to the Member States' management, since the procedure for the clearance of accounts may be deflected from its purpose in order to establish the existence of an infringement of the Treaty.

(c) The applicant asks the Commission to explain whether its interpretation has already given rise to doubts on previous occasions and whether it informed any of the Member States of that interpretation at any time.

(d) The applicant points out that in regard to the clearance of accounts for 1977, 1978 and 1979, the Commission financed the payments made by the Danish authorities by way of export refunds for the products at issue; since 1978, in the context of reports made to the Commission, the Kingdom of Denmark's assessment of the rate of refund for which the products were eligible has included a determination by analysis of, on the one hand, lean meat content, meaning in fact 'meat free of fat as determined by analysis' and, on the other hand, meat content.

2. The *United Kingdom of Great Britain and Northern Ireland* submitted no observations on the second submission.

3. The *Commission* regrets that it has not been able, by reason of the considerable increase in the volume of business, to clear the accounts concerned within the time-limit laid down in Article 5 of Regulation No 729/70. However, it disputes the legal consequence which the applicant seeks to draw from that delay.

(a) The Commission contends that the judgment of 13 November 1964 (Joined Cases 90 and 91/63, cited above) established that the general principle of international law concerning reciprocal performance of contracts does not apply in the Community context. In other words, that means that the fact that the Commission was unable to comply with the rule laid down in Article 5 of Regulation No 729/70 does not prevent it from taking account, when clearing the accounts, of the applicant's failure to fulfil its obligations under Community law.

The applicant has deduced from an *obiter dictum* of the judgment cited above that a

time-limit may produce legal effects when it is laid down in a binding measure, as is the case in these proceedings.

The Commission does not deny that the failure to comply with a time-limit may have legal effects. However, it denies that such legal effects could oblige the Community to finance expenditure effected in breach of Community law. In the judgment cited above, the Court began by stating the principle that there could be no relationship between the obligations of the parties in the context of Community law. That statement was general and was not limited to obligations contained in measures not having binding force. Following the *obiter dictum* relied on by the applicant, the Court considered the question of a possible causal connection between the Council's failure to comply with the time-limit and the infringement of Community law by the Member States. The Court considered that a Member State could not plead failure by a Community institution to comply with a time-limit as an excuse for an infringement of Community law which that State had committed before the expiry of the period in question. In this case, the infringements of Community law were committed in 1980 and 1981 whereas the time-limit was exceeded only as from 1 January 1982. There is no causal connection between the exceeding of the time-limit and the applicant's failure to fulfil its obligations under Community law and that constitutes a further ground for rejecting its second submission.

The Commission adds that another fundamental principle, namely that the Member States are liable for the consequences of their interpretation of Community law, is also to be found in the judgment cited above.

(b) The Commission contends that the preparation and dialogue which precede the clearance of accounts are at least as detailed as the pre-litigation procedure under Article 169 and that before the expiry of the period laid down in Article 5 of Regulation No 729/70 it believed in all good faith that the applicant was correctly interpreting the regulations concerning refunds. There was thus no reason why the Commission should not apply the accounts clearance procedure rather than the procedure under Article 169 of the Treaty.

On a general level, the Commission observes that the Court, in its judgment of 7 February 1979 (Joined Cases 15 and 16/76 *France* v *Commission* [1979] ECR 321), decided that the two procedures are independent of each other as they serve different aims and are subject to different rules. The object of the procedure under Article 169 of the Treaty for failure to fulfil obligations is to obtain a declaration that certain conduct of a Member State infringes Community law and to have that conduct stopped, which means that that procedure concerns the future. The procedure for the clearance of accounts serves to determine not only that the expenditure was actually and properly incurred but also that the financial burdens are correctly apportioned between the Member States and the Community, which means that that procedure is concerned with the past and seeks to draw the necessary inferences from the Member States' stewardship by refusing, in particular, Community financing when that stewardship has not been in accordance with Community law. The Commission therefore acted fully in accordance with the Court's case-law by making use not of the Treaty infringement procedure but of the procedure for the clearance of accounts.

(c) With regard to the Kingdom of Denmark's inquiry as to whether the Commission ever informed any of the

Member States of its point of view on the question of interpretation at issue, the Commission replies that it communicated its opinion on the expression 'meats (excluding offals and fat)' to the Irish authorities in a telex message of 8 November 1979. The Commission observed that in that particular case it had no reason to communicate its reply to all the Member States since in its view the text in question could not be interpreted differently. The Commission contends that it had no more reason to state its legal opinion during 1980 and 1981 than during 1982, the year in which the 1981 accounts should have been cleared under Article 5 of Regulation No 729/70, since it accepted in all good faith that the applicant was correctly applying the regulations at issue and it realized the applicant's error only during an inspection visit in 1984. The applicant is therefore wrong to claim that the Commission did not express its legal opinion at the appropriate time. In any event, the Commission considers that its opinion was in no way new in July 1984.

(d) With regard to the information which the applicant has supplied to the Commission since 1978 on the manner of determining the rate of refund, the Commission observes that that information was submitted merely in the form of two columns contained in an annex and entitled 'lean meat content' and 'meat content', without any precise explanation of the meaning of those terms. It was additional information of a general nature which was not checked by the Commission, which of necessity must have recourse to limited spot checks. The Commission considers that it could in no way deduce the applicant's interpretation from the titles of the two columns and it had no reason to react to them.

The Commission also refers to the judgment of the Court of 27 April 1981 (Case 1251/79 *Italy* v *Commission* [1981] ECR 205, paragraph 17). It is clear that the applicant's erroneous interpretation can in no way be imputed to the Commission, which was unaware of that interpretation until the inspection visit in 1984.

The expenditure made on the basis of the erroneous interpretation may not therefore be charged to the EAGGF.

IV — Answer to the question put by the Court

Requested to indicate the way in which the various Member States interpreted, prior to Regulation No 2429/86, the term 'bovine meats (other than offal and fat)', the Commission replied as follows.

(a) Belgium, Germany, Greece, Ireland, Italy and the Netherlands: In these States the term was interpreted as meat free from fat as determined on analysis.

(b) France: In this State the implementation of the provision in question was also founded on the same interpretation but the meat content determined under that interpretation was, owing to the application of a wrong conversion factor, increased by about 10% as regards the calculation of the export refund.

(c) Luxembourg: The provision in question did not apply in this Member State.

F. Schockweiler
Judge-Rapporteur