OPINION OF ADVOCATE GENERAL ALBER

delivered on 17 September 1998 *

A — Introduction

1. In the present case, the Kingdom of the Netherlands is contesting a reduction of over NLG 82 million in EAGGF reimbursements in the context of the clearance of accounts for 1990. [1] The Commission, the defendant in the proceedings, justifies the reductions on the ground that, for want of an adequate system of controls, the intervention agencies of the Netherlands had bought in butter made from sweet cream by a process not authorised for intervention.

2. Until 1987, the Community legislation provided that intervention agencies were to buy in only butter which — in addition to other conditions concerning water and buttermilk content — had been manufactured from sour cream. [2] Butter made with sweet cream was eligible for intervention purchase only if it had a minimum salt content, by weight, of 2%. [3] Therefore, unsalted butter only qualified for intervention if it was made from sour cream.

3. At the end of the 1970s, a new process known as the NIZO-process, [4] by which butter could also be made from sweet cream, was developed in the Netherlands. The acidifying agent is added only at a later stage in this process with the result that the buttermilk obtained is sweet.

4. Following the introduction and approval of the NIZO-process in the Netherlands, the national authorities informed the Commission that it might in future be difficult to check whether the butter tendered for intervention was made from sweet or with sour cream. It is an undisputed fact that it is no longer possible to determine from the final product whether it was made from sweet or sour cream.

* Original language: German.

1 — Commission Decision No 93/659/EEC of 25 November 1993 on the clearance of accounts presented by the Member States in respect of the expenditure for 1990 of the European Agriculture Guidance and Guarantee Fund (EAGGF), Guarantee Section (OJ 1993 L 301, p. 13).

2 — See Article 1(3)(a)(aa) of Regulation (EEC) No 985/68 of the Council laying down general rules for intervention on the market in butter and cream (OJ, English Special Edition 1968 (I), p. 256), as last amended by Regulation (EEC) No 2714/72 of the Council of 19 December 1972 amending Regulation (EEC) No 985/68 of the Council laying down general rules for intervention on the market in butter and cream (OJ, English Special Edition, 1972, p. 15) and Article 3(a) of Regulation (EEC) No 685/69 of the Commission of 14 April 1969 on detailed rules of application for intervention on the market in butter and cream (OJ, English Special Edition 1969 (I), p. 194).

3 — See Article 3(1)(a)(bb) of Regulation No 985/68 as last amended by Regulation No 2714/72.

4 — NIZO: Nederlands Instituut Zuivel Onderzoek.

5. The monitoring of intervention in the Netherlands is shared between three organisations. The VIB [5] is the authority responsible for intervention for the purposes of the Community rules. It is responsible for the buying-in and storage of butter and also carries out the corresponding checks in order to ensure, in particular, that the packaging of the butter bears the special marking prescribed for intervention. The VIB has delegated part of its checks to the COZ [6], an inspection undertaking governed by private law. The main function of that undertaking is to carry out the inspections, *inter alia* on the spot. Lastly, the AID [7] is the ministerial authority with general responsibility for the controls. It is the AID's task to check that the COZ performs its task conscientiously. The AID also checks the authorisations of the individual dairies to sell into intervention.

6. In 1987, on the basis of an inspection by the AID, the VIB rejected over 25 000 tonnes of butter intended for intervention. According to the Netherlands Government, that butter had been made in part from sweet cream and in part by the NIZO-permeate process which was banned for intervention purposes in the Netherlands. The minutes relating to that inspection were forwarded to the Commission.

7. In April 1989 the Chairman of the Committee on Budgetary Controls of the European Parliament, Pieter Dankert, of the Netherlands, published a report alleging that none of the butter which had been offered for intervention in the Netherlands between 1982 and 1987 had met requirements. All that butter was said to have been produced by the NIZO process.

8. Following that report, the Commission carried out its own investigation in 1989: the findings are set out in its 1993 summary report. [8] According to that report, the Netherlands authorities had never introduced a system of controls whereby the cream used in the manufacture of butter sold into intervention. Analysis of the documents available showed that the butter brought between 1982 and 1987 had been made either by the NIZO or by the equally unauthorised half-and-half process.

9. Although the Kingdom of the Netherlands had been aware of the fact that there were shortcomings in its system of controls since 1977, it was not until early 1987 according to the Commission that they investigated the process used. The fact that in 1987 the AID rejected butter which had actually been accepted for intervention by the COZ shows that the COZ checked the process.

10. It is also stated in the summary report that the Netherlands authorities had been aware since 1982 that there had been attempts to sell butter made from sweet cream into intervention. In reviewing the authorisations

5 — Voedselvoorzienings in- en verkoopbureau.

6 — Centraal Orgaan Zuivelcontrole.

7 — Algemene Inspectiedienst van het Ministerie van Landbouw, Natuurbeheer en Visserij.

8 — Doc. VI/119/93-FR final.

of the undertakings in 1987, the AID found that the dairies had been selling unauthorised butter into intervention since 1982 at least. The Netherlands authorities should have informed the appropriate departments of the Commission accordingly.

11. In view of the seriousness of the shortcomings, the decision was taken to reduce by 10% all expenditure declared for 1987 in respect of butter bought into intervention since 28 February 1985. As a result, the Commission disallowed expenditure in the sum of NLG 82 656 019.

12. The Kingdom of the Netherlands maintains, to the contrary, that, in particular by introducing additional controls, it had done everything that can be required of a Member State in that regard. Since those controls had prevented irregularities, it was not under any obligation to inform the Commission.

13. Accordingly in 1994, the Kingdom of the Netherlands brought an action before the Court of Justice, claiming that the Court should:

— annul Commission Decision No 93/659/EEC of 25 November 1993 on the clearance of the accounts presented by the Member States in respect of the expenditure for 1990 of the European Agricultural Guidance and Guarantee Fund (EAGGF), Guarantee Section (OJ 1993 L 301, p. 13), in so far as it refuses clearance to a sum of NLG 82 656 019, representing expenditure in respect of butter bought into intervention;

— order the Commission to pay the costs.

14. The Commission contends that the Court should:

— dismiss the action as unfounded,

— order the applicant to pay the costs.

B — Pleas in law and arguments

15. The Kingdom of the Netherlands puts forward several pleas in law. First, it claims that the Commission misapplied Article 8(2) of Regulation (EEC) No 729/70 on the

financing of the common agricultural policy. [9] Under that provision the Community is not to bear the financial consequences of irregularities or negligence attributable to administrative authorities of the Member States.

16. However, the applicant submits that it cannot be held responsible for any irregularities or negligence. It did everything — in other words it carried out all the checks which can reasonably be expected of a Member State. Accordingly, the applicant considers that it has fulfilled all the requirements under Article 8(1) of Regulation No 729/70, which provides:

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

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

— prevent and deal with irregularities;

...'

17. The Kingdom of the Netherlands maintains that it complied with all requirements prescribed by the Community rules for the checks to be carried out. However, there are gaps in those rules making it impossible effectively to prevent the sale into intervention of NIZO butter. Thus, for example, Article 2(1) of Regulation No 685/69 requires samples to be taken only from the final product. However, the process by which the butter was made can no longer be determined from the final product, the butter itself.

18. The Commission points out in that respect that the checks prescribed by the Community were laid down at a time when the NIZO process was still unknown. In its submission, however, the checks prescribed, which also apply to the process of the manufacture of the butter, make it perfectly possible for the Member States to ascertain which production process was used for the manufacture. Thus the plant used in the traditional manufacturing process differs from that used in the NIZO process. The NIZO plant needs an opening through which the permeate can be added at a later stage, as well as a special sweet-cream reservoir. There is no need for such a reservoir in the traditional manufacturing process since the cream employed is quite different on account of its properties. Therefore, the process by which the butter was made can be established by an on-the-spot inspection at the dairy.

19. The applicant disputes that claim, arguing that such equipment can be readily converted from one production process to the other. Consequently, inspections cannot establish if

9 — Regulation (EEC) No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy (OJ, English Special Edition 1970 (I), p. 218).

processes other than that in application at the time of inspection were used previously.

20. The Commission disputes this. It refers here to the minutes relating to the inspection carried out by the AID which have been produced by the applicant. The minutes show that in meetings with the dairy managers, the latter had maintained that NIZO production plant could no longer be used for the traditional manufacturing process.

21. The Commission claims that the second means of checking is to analyse the cream and butterfat on the spot. The Commission is referring here to the fact that the NIZO process uses sweet cream as a primary product, obtaining sweet butterfat in the course of production, whereas the traditional process uses sour cream from the very outset, with the result that the buttermilk produced is also sour. The Commission maintains that that can be checked simply by tasting the cream or by analysing the buttermilk at the dairy.

22. The applicant considers that that is also simply a spot-check method which can only be effective if the checking is carried out regularly. The Commission does not deny this.

23. Lastly, the Commission maintains that the third possibility is to examine the books of the dairies. The Commission mentions a number of points which could shed light on the production process applied. For example, the sweet buttermilk produced by the NIZO process is far more readily marketable than sour buttermilk. The Kingdom of the Netherlands disagrees, pointing out that even sour buttermilk can be used as a primary product — for example in making cheese — and is, therefore, marketable.

24. The Commission bases its position in this matter on a report submitted to it by the applicant itself. In that report it is said that it was above all the difficulties in marketing sour buttermilk that prompted the development of a new process which did not yield that product.

25. As a further point the Commission mentions examination of the production plans and costs. The NIZO process makes it possible for production to continue without interruption with the result that there are savings in costs. That can be established by examining the books. Finally, the production process can also be deduced from the quantity of NIZO permeate used. The applicant disputes this. It argues that, firstly, the savings in costs are not great. Secondly, the production process cannot be determined with accuracy from the permeate quantities since the same permeate is also used in making products intended for intervention.

26. As regards the comprehensiveness of the checks and controls prescribed by Community law, the applicant maintains that the Member States cannot be held responsible for the shortcomings in the Community system of controls. It is for the Commission to bring its rules into line with current technology. The Commission was particularly negligent in this respect because the applicant had drawn its attention on a number of occasions to the fact that there could be difficulties as a result of the introduction of the NIZO process. Since it could no longer be determined from the final product whether that product had been made from sweet or sour cream, the applicant had repeatedly requested that the rules be brought into line with the new circumstances.

27. The applicant also argues that, by introducing additional measures extending its system of controls, it had complied with its obligations under Article 8(1) of Regulation No 729/70. It had thus done everything that could reasonably be expected of it.

C — Analysis

28. It now falls to be considered whether it is possible to ensure with reasonable certainty — if necessary, through a combination of the checking methods mentioned by the Commission — that butter made from sweet cream is not sold into intervention.

29. The pleadings of the parties show that they are at least agreed that there are some easily detectable differences in the equipment used in the two processes and that these can be modified, albeit at some cost. It follows that frequent and unannounced inspections might very well shed light on the production method used by the undertaking.

30. With regard to the examination of the books, it is quite possible, having regard to the report, which states that the NIZO process was developed because of the difficulties in marketing sour buttermilk, that the buttermilk sales figures — and perhaps also the names of the buyers — could serve to indicate whether the buttermilk in question was sweet or sour.

31. Whilst it is debatable whether permeate quantities shed sufficient light on the production process, I must agree with the Commission that a combination of the controls it has proposed constitutes a reliable means of verifying the production methods employed. It is therefore not possible to agree with the applicant's assertion that even on the basis of the Commission's proposals it is impossible to determine by which process the intervention

butter was produced, particularly since the applicant itself maintains it had done everything necessary to prevent the sale of NIZO butter into intervention. It follows that even the applicant must consider that there must be some means of checking.

32. Nor can I support the applicant in its attempt to transfer the responsibility for those checks to the Commission. It is settled case-law that the national administrative authorities are responsible for ensuring that the Community rules are strictly observed. [10] The scope of that responsibility in the context of EAGGF financing was determined by the Court in its judgment in *Exportslachterijen van Oordegem*. In that judgment, the Court stated with regard to Article 8(1) of Regulation No 729/70:

'That provision, which expressly lays down in that specific area the obligations imposed on Member States by Article 5 of the Treaty defines, the Court has said, the principles according to which the Community and the Member States must ensure the implementation of Community decisions on agricultural intervention financed by the Fund and combat fraud and irregularities in relation to those operations (*BayWa*, cited above, paragraph 13).

That article thus imposes on the Member States the general obligation to take the measures necessary to satisfy themselves that the transactions financed by the Fund are actually carried out and are executed correctly, even if the specific Community act does not expressly provide for the adoption of particular supervisory measures (Case C-8/88 *Germany* v *Commission* [1990] ECR I-2321, paragraphs 16 and 17).' [11]

33. It follows that the Member States have a general obligation to exercise adequate supervision even if the relevant rules do not expressly provide for this in a given situation.

34. Particularly in cases like this, where the introduction of a new production process creates a new situation so far as controls are concerned, it is for the Member States to adapt their systems of control to that situation. As the Commission correctly points out, that is particularly true in this case, since it was the Member State itself which created that situation by authorising the NIZO process.

35. It must now be determined whether the additional checks carried out by the applicant were indeed sufficient. Before examining this

10 — Case C-48/91 *Netherlands* v *Commission* [1993] ECR I-5611, at paragraph 11; Case C-366/88 *France* v *Commission* [1990] ECR I-3571, at paragraph 20; Case C-8/88 *Germany* v *Commission* [1990] ECR I-2321, at paragraph 17; and Joined Cases 146/81, 192/81 and 193/81 *BayWa* [1982] ECR 1503, at paragraph 26.

11 — Case C-2/93 *van Oordegem* v *BDBL* [1994] ECR I-2283, at paragraphs 17 and 18.

point in detail, it is first necessary to explain in general terms how the Court has allocated the burden of proof in a case such as this. The Commission maintains that it is for the Member States to carry out the necessary checks. For that reason, the Commission cannot, it submits, substitute itself for the national inspectors and evaluate the checks carried out by the Member State in question. The Commission has merely to ascertain that those measures are adequate for the purpose of preventing irregularities. If it were to prove that that these were justified doubts, it could then take appropriate action at the financial level. It would then be for the Member State to show that the conditions for the expenditure to be allowed by the Commission were fulfilled. The Commission makes reference here to the judgment in Case C-48/91. [12]

36. The applicant also cites that judgment but arrived at a different conclusion. The applicant submits that the Commission has not adduced the necessary proof since not the slightest evidence of justified doubt has been put forward. According to the case-law of the Court of Justice, it is for the Commission to show, in the event of dispute, that there has been a breach of the Community rules. In this case, however, the Commission has not even shown that there was a justified doubt but has merely asserted categorically that the supervisory measures taken by the Netherlands were inadequate.

12 — Cited in footnote 10.

37. The parties are correct in referring here to Case C-48/91. In that judgment, the Court stated that: [13] 'The Commission is required not to demonstrate exhaustively that there are irregularities in the data submitted by the Member States but to adduce evidence of serious and reasonable doubt on its part regarding the figures submitted by the national authorities. The reason for this mitigation of the burden of proof on the Commission is that ... it is the State which is best placed to collect and verify the data required for the clearance of EAGGF accounts; consequently, it is for the State to adduce the most detailed and comprehensive evidence that its figures are accurate and, if appropriate, that the Commission's calculations are incorrect'. [14]

38. As can be inferred from the parties' submissions, it is not in dispute that the Commission has at first only to make out a plausible case that there are justified doubts. Whether or not the Commission has done so in this case is, however, in dispute. It must now be examined, in this respect, whether the additional supervisory measures which the applicant claims to have introduced were sufficient to dispel such doubts (or indeed to prevent them from arising at all).

13 — See the judgment in Case C-48/91 (cited in footnote 10), at paragraph 17.

14 — Accordingly, in its resolution of 13 April 1989 on preventing and combating fraud against the European Community budget in a post-1992 Europe, the European Parliament states that 'the Council has still hitherto failed to invest the Commission with adequate monitoring powers to enable it to keep track of how Community revenue and expenditure are managed in the Member States ...' (OJ 1989 C 120, p. 279, point 7).

39. The applicant points out first of all that it defined the terms 'cream' and 'sour' — which are not defined under the Community rules — and that in November 1986 it had banned the NIZO permeate. In response the Commission rightly states that those were no more than basic rules which the applicant should have issued when it approved the NIZO process.

40. However, those conditions, too, call for verification of compliance and the mere fact that they exist cannot, therefore, be adduced as evidence of effective supervision.

41. Secondly, the applicant refers to the inspections carried out by the AID. When the AID checked the authorisations of the undertakings, it also checked, according to the applicant, whether there was a production plant to make butter from sour cream. According to the Commission, that does not amount to an effective check either, since no checks of the kind were carried out between 1982 and 1987. The Commission refers here to Minister Braks's replies to written questions of the Netherlands parliament following the Dankert report. Asked whether the AID had carried out any checks between 1982 and 1987, the Minister replied in the negative. The authorisations were only checked at the VIB's request. The VIB only made such requests in the case of new authorisations or when the VIB's requirements were modified, as was the case in 1982 and 1986.

42. The applicant disputes this. In addition to checking the authorisations of the dairies, the AID also supervised the COZ. The applicant submits, moreover, that it is not permissible for the Commission to rely here on third-party statements in adducing the evidence required of it. Furthermore, the Commission's questions were taken out of context and its own conclusions were attached to them.

43. The Commission points out in response that the documents in question are official government documents which the authorities had forwarded to the Commission and which were also placed on the file. Moreover, those documents are not intended to serve as evidence but as grounds for justification of the Commission's doubts regarding the effectiveness of the system of controls in the Netherlands. There can be no objection to this. Nor can it be said that the Commission took the questions mentioned by it out of context. The Commission submitted the questions and answers not just individually, but as a whole. Nor can it be said that there was, objectively speaking, a context, since the preceding and subsequent questions were not concerned with the checks carried out by the AID. Furthermore, it cannot be said that the Commission drew unjustified conclusions. When the competent Minister states that the AID carried out checks only in 1982 and 1986 and the applicant itself points out that the AID would carry out its checks in the context of the examination of the authorisations of the undertakings, it is perfectly possible to entertain justified doubts regarding the regularity of the AID checks.

44. Lastly, the following point should be mentioned. The applicant's statement, already mentioned, that the production process cannot be inferred from the checks of the industrial plant carried out by the AID since the plant could be swiftly converted, might suggest that those checks were not performed at regular and short intervals. Consequently, there are in fact good reasons for doubting whether the checks undertaken by the AID in the period from 1982 to 1987 were carried out on a regular basis.

45. Furthermore, if it is borne in mind that on the occasion of its inspection in 1987, the AID rejected a not insignificant quantity of butter on the ground that it was made from sweet cream and, at the same time, that it was not certain whether such checks were carried out at all in the preceding years, justified doubts again arise regarding the effectiveness of the Netherlands system of controls in the period before 1987.

46. The Government of the Netherlands mentions, as further supplementary controls, those carried out by the COZ in the course of the manufacturing process. During those inspections, the cream and the buttermilk obtained were tasted and, in the event of doubt, the cream was analysed for its acid content. The Commission too was aware of the fact that the COZ proceeded in this way. It was thus ensured that only butter made by the authorised process was packaged and labelled 'I' or 'Int' as prescribed by the VIB. Only butter packaged in that way could have been sold to the intervention agencies.

47. In response to this, the Commission points out that those checks too were not carried out regularly. On this point it should be said that the applicant itself concedes that such checks in the course of the manufacturing process have no point since the results are selective. This gives at least some reason for doubting whether those checks were carried out on a regular basis and not merely sporadically.

48. The Commission claims, moreover, that the Netherlands did not adapt the instructions issued to the COZ in the matter of the checks to be carried out after an attempted fraud in 1982. (At that time too there was an attempt to sell NIZO butter into intervention.) That fact is clear also from the replies of Minister Brak. When he was asked to submit the written instructions for the COZ control procedures, the Minister replied that no such instructions existed. According to him, the questions in point had already been settled in the 1970s. Nor, again according to the Commission, had the COZ ever systematically checked the accounts. This emerged above all in 1987 when the AID rejected NIZO butter which the COZ had approved.

49. The applicant, on the other hand, submits on this point that the very fact that the NIZO butter had been identified and rejected shows that the system of controls in the Netherlands was effective. There was therefore no reason to adapt the COZ instructions in any way.

50. As has already been mentioned, the Commission considers, however, that the AID was not continuously active and that it was not until 1987 that it carried out the checks anew. As a result, in the period before 1987, the COZ was the only active inspection authority. If it were now to transpire that the butter approved by the COZ had actually been made by the NIZO process, the effectiveness of the system of controls would be placed in serious doubt.

51. The applicant claims, however, that the AID exercised constant supervision over the COZ. Moreover, in the specific instance in 1987, the AID acted at the request of the COZ.

52. The fact that the COZ [15] expressly requested the AID, which, moreover, was the body which was supposed to supervise it, to check the production process suggests that, to say the least, the AID did not carry out its checks on a regular basis.

53. Thus, as regards the effectiveness of the system of controls, justified doubts, at the very least, arose, above all concerning the years before 1987, in view of the uncertainty whether the AID did in fact carry out checks before that year.

54. The reference made by the Commission to the audit reports communicated by the applicant further strengthens those doubts. Those reports were drawn up during the AID's audits in 1987. They show that the managers and the staff of the dairies were not informed of the fact that butter made by the NIZO process did not qualify for intervention. The Commission maintains it made similar findings during its own inspection in 1989. Accordingly, it is impossible to be sure that undertakings producing only, or also, by the NIZO process did not sell that butter to the intervention agencies.

55. For its part, the applicant maintains that with each invitation to tender the VIB also published the conditions for admission to intervention. Accordingly, the ban on NIZO butter must have been known. The fact that the dairy owners were nevertheless insufficiently informed is not a ground for doubting the quality of the checks carried out.

56. It is not possible to concur with the applicant on this. If an undertaking which on its own admission produced for intervention and did so by means of the NIZO process had offered butter for intervention and if that offer had been rejected on the basis of effective checks, then, at the latest since that time, that undertaking would have been informed of the fact that NIZO butter does not qualify for intervention. The fact that the undertakings did not know that the sale of NIZO butter into intervention was prohibited is

15 — The VIB also requested the AID carry out such a check in order to determine whether the dairies were applying in advance the expected amendments to the production rules.

therefore a ground for justified doubts as to the effectiveness of the system of controls. It makes no difference that the applicant claims that NIZO butter sold so well on the free market that there was no need to produce it for intervention. The minutes of the discussions with the dairy owners in the course of the audits show that the dairies also produced NIZO butter for intervention.

57. The applicant contends, moreover, that the audit reports are not admissible as evidence. The fact remains, however, that those reports — which the applicant itself communicated to the Commission — can perfectly well be used to see if they give rise to justified doubts regarding the effectiveness of the system.

58. Lastly, the Commission has maintained that even the COZ had expressed doubts regarding the effectiveness of its system of controls. The applicant, for its part, denies that. The Commission refers, here again, to Minister Braks's reply. When he was asked why an administrative control by means of spot checks on the books was regarded as impracticable, the Minister replied that a check within the meaning of the relevant rules could be carried out only if accompanied by a comprehensive administrative audit of the accounts. By this he means a systematic verification of the production in its entirety, including, therefore, purchases, sales and storage. That gives rise, to say no more, to the question why such an audit was never carried out. In any event, the impression created is that such an audit was not carried out in the Netherlands. Another reply shows that proposals for making changes in the checks, put forward by the COZ, were implemented only very belatedly.

59. It may thus be seen from the pleadings as a whole as well as from the foregoing considerations that there are at the very least justified doubts regarding the effectiveness of the system of controls in the Netherlands; by putting forward submissions to that effect, the Commission has discharged its burden of proving the irregularities alleged against the applicant.

60. The applicant also contests the Commission's calculation of the reductions. The first issue here is the expenditure serving as the basis of calculation. The applicant proceeds on the assumption that the financial correction should apply to the 1987 financial year. In the present case only the quantities bought in by the intervention agencies between 1 December 1986 and 1 July 1987 and the checks made during that period could be relevant. The first date corresponds to the beginning of the 1987 financial year. The date of 1 July 1987 applies since it was from that date that butter made from sweet cream was

eligible for intervention and thus the controls at issue here were no longer necessary. Calculated on the basis of the butter bought in during that period, the reduction would not exceed the sum of NLG 11 million.

61. The Commission argues for its part that the expenditure presented by the applicant for 1987 was considered on the occasion of this clearance of accounts. That expenditure also concerned butter which had been admitted to intervention in the preceding years. Since that was done without proper checks, the Commission could not allow the expenditure concerning that butter *for 1987*. As the accounts in respect of the expenditure declared for 1985 and 1986 had already been cleared, a correction for those years was inappropriate. However, the issue in the context of the clearance of accounts for 1987 was not just the expenditure in respect of the butter bought into intervention in 1987 but rather the expenditure declared for 1987. That expenditure could also concern the purchases carried out in previous years.

62. The applicant contests this, arguing that a clearance of accounts means both that the expenditure is recognised as properly incurred and that it is established that it is in compliance with the Community rules. A clearance of accounts may, it is true, concern butter bought into intervention in the preceding years. However, if the accounts for the prior years are definitively cleared, the expenditure concerned must be regarded as lawful. It follows that butter which had been (lawfully) bought in earlier years cannot in later years give rise to expenditure regarded as lawful.

63. According to the Commission that argument is incorrect. Moreover, it would mean that it is impossible for the Commission to take appropriate action, on the financial level, on irregularities which are only detected some years later. The clearance of accounts for a financial year simply means that in clearing accounts for subsequent financial years the Commission can no longer make a decision on the expenditure relating to that year. In other words, the clearance of accounts is final. It does not mean, however, that the Commission has accepted activities which were carried out in the year in question but the expenditure on which is declared only — as in this case — in later years. Nor can it prevent the Commission from taking appropriate action, on the financial level, on irregularities which are detected only a few years later, provided that the correction is applied in respect of a financial year the accounts of which have not yet been cleared.

64. Article 8 of Regulation (EEC) No 1723/72 of the Commission of 26 July 1972 on making up accounts for the European Agricultural Guidance and Guarantee Fund, Guarantee

Section [16] provides that the decision to make up the accounts is to cover: 'the determination of the amount of expenditure incurred in each Member State during the year in question, recognised as chargeable to the EAGGF, Guarantee Section'. [17] That simply means that the decision on the clearance of accounts determines which expenditure can be taken over by the EAGGF. Moreover, since Article 3 of Regulation No 729/70 provides that only intervention undertaken in accordance with the Community rules is to be financed, it could also be inferred from the above-cited provision that that decision also recognises the expenditure as having been incurred in compliance with the Community rules.

65. According to the case-law of the Court, however, the essential purpose of the decision on the clearance of accounts is 'to ensure that expenditure incurred by the national authorities is in accordance with the Community rules'. [18] The Court also stated that until the accounts are duly cleared, Article 2 of Regulation No 729/70 requires the Commission to refuse to charge to the EAGGF those expenditures not incurred in accordance with the Community rules. That requirement does not disappear merely because the accounts are cleared after the expiry of the period prescribed in Article 5 of Regulation No 729/70.

66. It follows that the main concern of the decision on the clearance of accounts is to prevent the Commission from incurring unjustified expenditure. Notwithstanding the prescribed time-limits, that must be possible until the clearance of accounts becomes final. It would be inconsistent with that aim if, for the reason that irregularities had gone undetected, expenditure which not yet established for that year could be declared later and expenditure which was already established could engender subsequent costs, for example storage costs, in the following years without its being possible for the Commission — despite the fact that the accounts for the following years had not yet been cleared — to take appropriate action of a financial nature on irregularities detected in the meantime in respect of the expenditure declared for the following years. In this regard, the Commission must be allowed to extend the corrections made on the ground of insufficient controls also to the expenditure which was incurred in respect of the butter bought into intervention and stored after 28 February 1985 and which was declared by the applicant for 1987.

67. The applicant also contests the amount of the reductions applied. The Commission, it maintains, applied the 10% reduction arbitrarily. That reduction is unjustified because the Commission has not put forward any specific case or facts concerning infringements committed by the applicant.

16 — OJ L 186, p. 1.

17 — This regulation was repealed with effect from 16 October 1995 by Commission Regulation (EC) No 1663/95 of 7 July 1995 laying down detailed rules for the application of Council Regulation (EEC) No 729/70 regarding the procedure for the clearance of the accounts of the EAGGF Guarantee Section. However, pursuant to Article 9 of Regulation No 1663/95, it remains applicable to the clearance of the accounts of the Guarantee Fund up to those of its financial year 1995. Article 7(1) of Regulation No 1663/95 provides that the accounts clearance decision 'shall determine the amount of expenditure effected in each Member State during the financial year in question which shall be recognised as being chargeable to the EAGGF, without prejudice to decisions taken subsequently in accordance with paragraph 2(c) of that Article' (which moreover provides for even more extensive corrections in certain cases).

18 — Case 349/85 *Denmark* v *Commission* [1988] ECR 169, at paragraph 19.

68. In response, the Commission rightly points out that, according to the case-law of the Court, it could also have refused to charge all the expenditure in question. Thus, the Court has held that, where it proves impossible to establish the extent to which a national measure which is incompatible with Community law has caused an increase in the expenditure entered under a budgetary item of the EAGGF, the Commission 'has no choice' but to disallow all the expenditure in question, not just a percentage thereof. [19] Since it is not possible, in the absence of adequate checks, to establish accurately the extent of the damage caused, it follows that the expenditure could be disallowed in its entirety. The Commission itself makes reference here to a judgment in which the Court stated: 'Since it follows ... that the inspections carried out ... do not constitute thorough scrutiny ..., the Commission could have disallowed charging to the EAGGF of the whole of the sums in question'. [20]

69. Furthermore, the Commission maintains that in this case a 10% reduction must be regarded as very modest. On the basis of the AID inspection in 1987, over 25 000 tonnes of butter were rejected by the intervention agencies on the ground that they had not been manufactured in accordance with the prescribed requirements. That corresponds to 40% of all the butter offered for intervention in 1987. For that reason, a 10% reduction cannot be regarded as too high.

70. The applicant replies that the Commission is basing its contention here on a quantity of butter which — thanks to the applicant's checks — was, specifically, not sold into intervention. However, as shown above, these are good reasons for doubting whether regular and effective checks were carried out in the preceding years. It may, therefore, be assumed that for want of effective supervision in the preceding years the intervention agencies also brought in butter which should not have qualified for intervention. It must be noted in this regard that none of the butter offered for intervention in the preceding years was rejected. However, it cannot be ruled out that no NIZO butter was offered for intervention in the preceding years before and that, all of a sudden, in 1987, 40% of all the butter offered was produced by the NIZO process.

71. The guidelines adopted by the Commission for flat-rate corrections, on a proposal from an inter-directorate group (the Belle Group Report), provide for three possible rates of reduction: 2%, 5% and 10%. A 10% reduction is to be applied where the deficiencies concern the system of controls as a whole, or any key elements thereof, or where they concern the implementation of controls which

19 — Case C-50/94 *Greece* v *Commission* [1996] ECR I-3331, at paragraph 26; Joined Cases 15/76 and 16/76 *France* v *Commission* [1979] ECR 321, at paragraph 32 et seq., and Case 347/85 *United Kingdom* v *Commission* [1988] ECR 1749, at paragraph 13.

20 — Case C-197/90 *Italy* v *Commission* [1992] ECR I-1, at paragraph 39.

are indispensable for the ensuring that the expenditure is properly incurred, so that it may reasonably be assumed that there is a high risk of significant losses.

72. In view of the deficiencies in the system of controls and considering the fact that the butter offered unlawfully for intervention represented up to 40% of all the butter offered for intervention, a 10% reduction cannot be regarded as being unfair.

73. The applicant's objections against the calculation of the reduction must therefore be held to be unfounded.

74. In the context of its first plea in law, the applicant also claims that another regulation was infringed. In its summary report, the Commission had alleged that the applicant had infringed Articles 3 and 5 of Regulation No 283/72 [21]. Article 3 requires Member States to communicate to the Commission a list of the irregularities which have been the subject of primary administrative or judicial findings of fact. Article 5 concerns the recovery of sums wrongly paid. The applicant argues that it did not infringe those provisions since an irregularity within the meaning of Article 3 would only have existed if NIZO butter had actually been bought into intervention. Only actual infringements of the Community rules must be communicated to the Commission. That is clear from the wording of the regulation.

75. The Commission, on the contrary, submits that the term 'irregularity' must be interpreted broadly. It refers here to a working document of its own drafting according to which it is to be assumed that there is an irregularity when a Community rule is disregarded with the aim of wrongfully obtaining sums to the detriment of the EAGGF, whether or not the EAGGF actually suffers a financial loss as a result. The words 'primary administrative or judicial findings of fact' must also be interpreted broadly. They mean the first report of findings drawn up and signed by a competent national authority and concerning a case where it may properly be assumed that the rules have been infringed. That report is not subject to any particular formal requirements.

76. The Commission also maintains that, in this case, the possibility of fraud in earlier years cannot be ruled out. Moreover, it is not just the financial effects of conduct which are important under the system established by Regulation No 283/72, but also their seriousness. This case concerns 40% of all the butter offered in one year. The Netherlands authorities should have been able to conclude from

21 — Regulation (EEC) No 283/72 of the Council of 7 February 1972 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organisation of an information system in this field (OJ L 036, p.1).

this that some of the butter which had already been bought into intervention did not comply with the requirements either. Nor can the possibility of fraud be ruled out in connection with the butter which was not admitted to intervention because of the inspection checks. That butter could have been offered in another Member State. In this case, the risk of fraud was particularly great since it is not possible to distinguish NIZO butter from butter made from sour cream.

77. If one looks to the wording of Article 3, one will find in paragraph (2) that the information to be communicated must indicate which provision has been infringed. That could be understood as meaning that only infringements of Community rules must be notified. Article 4, however, requires each Member State to communicate without delay to the other Member States and to the Commission any irregularities which are liable to have effects outside its territory. That applies also to irregularities which disclose the existence of a new fraudulent practice. This suggests that the primary concern is to prevent new cases of fraud as far as possible. In this connection, it is important — as the Commission has submitted — for the Commission also to be informed of any instances of attempted fraud. Accordingly, Article 7(3) provides that the Commission is to organise meetings at Community level to examine the information obtained 'in particular with regard to the lessons to be learned from it in connection with irregularities'. Lastly, the third recital also requires irregularities to be communicated to the Commission with a view to 'learning the nature of fraudulent practices'.

78. In this context the words 'primary administrative or judicial findings of fact' must also be interpreted broadly. As the Commission rightly submits, it may be assumed that the AID recorded any irregularities which were detected and that these were thus the subject of a primary administrative or judicial finding of fact.

79. Consequently, it is clear from the very wording of the regulation that both terms are to be construed broadly and, consequently, the applicant can be charged with infringing the regulation. That is all the more true in that it must have realised that there had indeed been cases of fraud in preceding years. The fact that the working document to which the Commission refers was drawn up only in 1989 is irrelevant.

80. The arguments put forward by the applicant in connection with its second plea in law — infringement of general principles of law, such as the principle of care and legal certainty — largely concern the issues already examined in relation to its first plea in law. Thus, the applicant claims that the Commission infringed the principle of care *inter alia* by failing to take account the applicant's efforts to introduce an effective system of

controls. In the first part of this Opinion, I have already explained that there were justified doubts regarding the effectiveness of that system of controls.

81. Moreover, the applicant, at this point, again contests the rate of 10% set in calculating the refund, claiming that the Commission had disregarded its own very guidelines to that effect. However, the applicant founds this claim on the assertion that there were no deficiencies in its system of controls. That assertion too has been examined in the context of the first plea in law, with the conclusion that there were justified doubts regarding the effectiveness of the system of controls as a whole. The Commission was therefore entitled, in accordance with its own guidelines, to apply a 10% reduction. It must here again be pointed out that the Commission could — as I have already stated — have decided to disallow the expenditure in its entirety.

82. The applicant also makes the point that, following an inspection carried out by the Commission in 1987 in the context of the clearance of accounts for 1986, the Commission had found no fault whatsoever with the system of controls in the Netherlands. The applicant claims that it was therefore entitled to assume that the Commission also considered its system of controls to be effective and adequate. Consequently, it is not possible that the Commission could have come to the opposite conclusion following an investigation conducted two years later. That would be contrary to the principle of legal certainty.

83. In this case the subject-matter of the inspection carried out by the Commission in 1987 is in dispute. The Commission claims in this regard that the inspection in point concerned a matter entirely different from that which was the subject of the 1989 inspection. In 1987 a general inspection was carried out. The checking of the butter bought into intervention was only part of a wider-ranging examination. In 1989, on the other hand, the inspection was undertaken with the sole aim of verifying whether the suspicions expressed by a Member of the European Parliament concerning checking deficiencies in the context of the buying-in of butter were confirmed. Moreover, the purpose of the 1987 inspection, which was only concerned with intervention in general, was to check whether the rules in force at the time were being observed. As from 1987, however, butter made from sweet cream was admitted to intervention with the result that it was no longer necessary to supervise checking procedures in that regard. Here again, the applicant denies the fact that the 1987 inspection concerned the new rules.

84. It can be taken as accepted that the 1989 inspection was specifically directed to establishing whether or not the applicant had carried out effective checks to ensure that only butter made from sour cream was sold into intervention. In that respect, it is hard to see why the Commission, having found deficiencies in the course of a specific inspection, should not take appropriate action of a merely financial nature because those deficiencies had not yet been detected in an earlier inspection.

That would mean that an inspection concluded with a 'no complaints' finding would preclude all financial consequences for the future even if irregularities were subsequently discovered. As I have already stated, the purpose of the clearance of accounts is to ensure that expenditure complies with the Community rules. It must therefore be possible, until such time as the accounts are duly cleared, to take appropriate action of a financial nature on irregularities which occurred earlier.

85. In this respect, it must again be observed that it is the Member States which are first and foremost responsible for the organisation of controls. The Member States must structure the controls in such a way as to prevent irregularities. In the present case, the applicant has itself pointed out that there can be problems in control procedures. Moreover, it pointed out repeatedly that even the possibilities suggested by the Commission in the matter of controls did not enable effective supervision to be exercised. The applicant cannot plead the fact that the Commission did not detect any irregularities in an earlier inspection in order to avoid its responsibility for organising effective control procedures.

86. By its last plea in law the applicant claims that the Commission infringed Article 190 of the EC Treaty because it did not give adequate reasons for its decision. On the one hand, the applicant here again puts forward considerations which in fact relate to the first plea in law. On the other hand, as regards the question whether the reasons given by the Commission were adequate, reference should be made to the case-law of the Court to the effect that decisions concerning the clearance of accounts do not require detailed reasons if the country concerned was closely involved in the process by which the decision came about and was therefore aware of the reasons for which the Commission considered that it must not charge the sums in dispute to the EAGGF. [22] Since the applicant itself has referred to extensive correspondence exchanged between the Netherlands and the Commission in the years from 1989 to 1993, it must be considered as having been sufficiently involved in the preliminary procedure.

87. Accordingly, it should be held the applicant has failed to make out its case against the decision of the Commission.

Costs

88. Under the first sentence of Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs.

22 — See Case 347/85 (cited in footnote 19), at paragraph 60.

D — Conclusion

89. I therefore propose that the Court should:

(1) dismiss the application;

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