JUDGMENT OF THE COURT (Sixth Chamber)
8 May 2003 *

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* Language of the case: Spanish.

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In Case C-349/97,

Kingdom of Spain, represented by S. Ortiz Vaamonde, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by X. Lewis, acting as Agent, assisted by M. Carro, abogado, with an address for service in Luxembourg,

defendant,

APPLICATION for the annulment of Commission Decision 97/608/EC of 30 July 1997 amending Decision 97/333/EC on the clearance of the accounts presented by the Member States in respect of the expenditure for 1993 of the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) (OJ 1997 L 245, p. 20), in so far as it relates to the Kingdom of Spain,

THE COURT (Sixth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, C. Gulmann, V. Skouris, F. Macken and N. Colneric (Rapporteur), Judges,

Advocate General: P. Léger,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 21 February 2002,

gives the following

Judgment

1 By application lodged at the Court Registry on 13 October 1997, the Kingdom of Spain brought an action pursuant to the first and second paragraphs of Article 173 of the EC Treaty (now, after amendment, the first and second paragraphs of Article 230 EC) for the annulment of Commission Decision 97/608/EC of 30 July 1997 amending Decision 97/333/EC on the clearance of the accounts presented by the Member States in respect of the expenditure for 1993 of the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) (OJ 1997 L 245, p. 20, 'the contested decision'), in so far as it relates to the Kingdom of Spain.

2 The contested decision states that part of the expenditure declared by the Kingdom of Spain did not meet the conditions imposed by the Community rules and therefore could not be financed by the Guarantee Section of the EAGGF (the Fund), namely expenditure relating to aid for the production and consumption of olive oil and for the production of dried fodder. The following financial corrections were imposed:

(a) Production aid for olive oil:

— a flat-rate financial correction of 10% of the aid paid by the Kingdom of Spain during the 1992 to 1993 marketing year, or ESP 5 939 261 511;

— a financial correction of ESP 224 414 161, corresponding to the amount of aid granted to two approved producer groups and their members;

— a financial correction of ESP 217 007 368 of the expenditure relating to the register of olive cultivation.

(b) Consumption aid for olive oil:

— a correction of ESP 26 849 245, corresponding to the amount of aid granted to two approved oil-packaging plants;

— a flat-rate correction of 2% of the aid paid by the Kingdom of Spain during the 1992 to 1993 marketing year, or ESP 811 514 867.

(c) Production aid for dried fodder:

— a correction of 2% of the expenditure declared by Spain, or ESP 384 545 035.

3 The specific reasons for the unlawfulness of those transactions were set out in Summary Report VI/5210/96 of 15 April 1997 on the results of the checks for the clearance of the accounts of the EAGGF Guarantee Section for 1993 ('the Summary Report').

I — Legal background

A — *General legislation*

4 Article 1(1), (2) and (3) of Council Regulation (EEC) No 729/70 of 21 April 1970 on the financing of the common agricultural policy (OJ, English Special Edition 1970 (I), p. 218) provide that the Community, through the Guarantee Section of the EAGGF, will finance intervention intended to stabilise the agricultural markets, granted in accordance with the Community rules within the framework of the common organisation of agricultural markets.

5 Article 8(1) of Regulation No 729/70 provides that Member States are to take, in accordance with national provisions laid down by law, regulation or administrative action, the measures necessary to satisfy themselves that transactions financed by the Fund are actually carried out and are executed correctly, to prevent and deal with irregularities and to recover sums lost as a result of irregularities or negligence.

6 Article 8(2) provides that in the absence of total recovery the financial consequences of irregularities or negligence are to be borne by the Community, with the exception of the consequences of irregularities or negligence attributable to administrative authorities or other bodies of the Member States. The sums recovered are to be paid to the paying authorities or bodies and deducted by them from the expenditure financed by the Fund.

7 Article 9(1) of Regulation No 729/70 provides that Member States are to make available to the Commission all information required for the proper working of the Fund and take all suitable measures to facilitate the supervision which the Commission may consider it necessary to undertake within the framework of the management of Community financing, including inspections on the spot. Member States are to communicate to the Commission the laws, regulations or administrative provisions which they have adopted for the application of legal acts of the Community relating to the common agricultural policy in so far as those acts have financial consequences for the Fund.

8 On 21 December 1989 the Council adopted Regulation (EEC) No 4045/89 on scrutiny by Member States of transactions forming part of the system of financing by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund and repealing Directive 77/435/EEC (OJ 1989 L 388, p. 18). Article 1(1) thereof concerns inspection of the commercial documents of entities receiving or making payments, referred to as 'undertakings', in order to ascertain whether transactions relating directly or indirectly to the system of financing by the

Guarantee Section of the EAGGF have actually been carried out and have been executed correctly. Article 2(1) provides that Member States are to carry out checks on the commercial documents of undertakings, taking account of the nature of the transactions to be checked. The detailed procedure for such checks is laid down in paragraphs 2 to 4 of that article.

9 As regards the financial consequences with regard to clearance of the accounts of the EAGGF Guarantee Section in the event of deficiencies in the checks carried out by Member States, a Commission interdepartmental working party has adopted criteria, which have been approved by the Commission and communicated to all the Member States within the EAGGF Management Committee, where they were received favourably (Document VI/216/93 of 1 June 1993). Those criteria provide for three categories of flat-rate correction, as follows:

— 2% of expenditure where the deficiency is limited to certain aspects of the inspection system which are of minor significance or the performance of checks which are not essential in order to ensure that expenditure was incurred lawfully, so that it may reasonably be concluded that the risk of loss for the Fund is minor;

— 5% of expenditure where the deficiency concerns significant aspects of the inspection system or the performance of checks which play a major role in determining whether expenditure incurred was lawful, so that it may reasonably be concluded that the risk of loss for the Fund is significant;

— 10% of expenditure where the deficiency concerns all or fundamental aspects of the inspection system or the performance of essential checks which are designed to ensure that expenditure was lawful, so that it may reasonably be concluded that there is a high risk of comprehensive loss for the Fund.

10 Document VI/216/93 notes that it is possible for all the expenditure to be disallowed and that a higher rate of correction may therefore be considered appropriate in exceptional circumstances.

B — *Specific legislation*

1. Regulations relating to production aid for olive oil

(a) General provisions

11 Council Regulation 136/66/EEC of 22 September 1966 (OJ, English Special Edition 1965-1966, p. 221) as amended by Council Regulation (EEC) No 2046/92 of 30 June 1992 (OJ 1992 L 215, p. 1) ('Regulation No 136/66') established the common organisation of the market in oils and fats.

12 Article 5 of Regulation No 136/66 introduced a system of production aid for olive oil in order to contribute to the establishment of a fair income for producers. Article 5(2) provides that aid will be granted, on the one hand, to olive growers whose average production is less than 500 kg of olive oil per marketing year, on the basis of the quantity of oil actually produced, and, on the other hand, to other growers on the basis of the number and production potential of the olive trees cultivated by them and of the yields of such trees, as determined according to a standard method, and provided that the olives produced have actually been pressed.

13 As regards the latter case, the second subparagraph of Article 2(4) of Council Regulation (EEC) No 2261/84 of 17 July 1984 laying down general rules on the granting of aid for the production of olive oil and of aid to olive oil producer organisations (OJ 1984 L 208, p. 3) as amended by Council Regulation (EEC) No 3500/90 of 27 November 1990 (OJ 1990 L 338, p. 3) ('Regulation No 2261/84') states that the aid will be equal to the amount obtained by applying the average olive yields and oil yields over the previous four marketing years, established according to a standard method.

14 Council Regulation (EEC) No 1413/82 of 18 May 1982 amending Regulation No 136/66 (OJ 1982 L 162, p. 6) introduced a special system based on the action of olive growers' groups or their associations, which are responsible for carrying out certain transactions linked to the application of the system of aid. The eighth recital in the preamble to that regulation states that since the activity of associations is to make more rigorous checks on the production of growers who are members of the groups belonging to such associations, the latter should be paid the advance on the amount of the aid.

15 Article 20c(1)(b) of Regulation No 136/66 provides that recognised producer groups ('RPGs') should be capable of verifying the olive and olive oil production of their members. Likewise, Article 20c(2)(b) states that associations of RPGs must be able to coordinate and verify the activities of the groups which make up the associations. Article 20c(3) provides that recognition will be withdrawn from a group or association where the conditions for recognition have not been or are no longer fulfilled.

16 The first subparagraph of Article 5(3) of Regulation No 2261/84 states in that regard that by 30 June of each year RPGs are to declare to the competent authority any changes made in their structure since their recognition or last annual declaration and report any notices of withdrawal of or application for

membership received. The second subparagraph of Article 5(3) states that the competent authority is to ascertain, on the basis of this statement and of any appropriate enquiries, whether the conditions for recognition continue to be met. If they are no longer met or if the structure of a group does not allow for its members' production to be checked, the competent authority must, under the third subparagraph of Article 5(3), without delay and at the latest before the beginning of the following marketing year withdraw recognition and notify the Commission of its decision to do so.

17 Article 11(2) of Regulation No 2261/84 provides that Member States must ensure that the sums made over to the associations and to producer groups in application of paragraph 1 of that article are used by them only for financing the activities for which they are responsible under that regulation. Article 11(3) provides that if sums withheld by a producer group are not used, in whole or in part, for the purposes of financing the activities for which it is responsible they must be deducted from the expenditure financed by the EAGGF.

18 Article 2(3) of Regulation No 2261/84 states that the aid shall be granted on application by the parties concerned to the Member State in which the oil has been produced. The first subparagraph of Article 2(4) provides that in the case of olive growers whose average production is not less than 500 kg of olive oil per marketing year, the aid will be granted in respect of the quantity of oil actually produced at an approved mill. Article 5(1) of Commission Regulation (EEC) No 3061/84 of 31 October 1984 laying down detailed rules for the application of the system of production aid for olive oil (OJ 1984 L 288, p. 52) as amended by Commission Regulation (EEC) No 928/91 of 15 April 1991 (OJ 1991 L 94, p. 5) ('Regulation No 3061/84') provides that the application for aid to be submitted by each olive grower must include certain information, including the approved mill or mills at which the oil was produced, together with particulars for each mill of the quantity of olives used and the quantity of oil produced. The application must be accompanied by a declaration from the mill confirming the information supplied by the olive grower.

19 In order to obtain approval, the mills concerned must fulfil a number of conditions. Article 13(4) of Regulation No 2261/84 provides that in cases where one of the conditions for approval is no longer fulfilled, approval will be withdrawn for a period in keeping with the gravity of infringement. Article 13(6) provides that where the withdrawal of approval has serious consequences on the pressing capacity in a given production zone, it may be decided to approve the mill under special inspection arrangements. To that end, the Member State must, under Article 9(4) of Regulation No 3061/84, submit a reasoned request to the Commission specifying the type of control which it undertakes to exercise over the mill in question.

(b) Inspection system

20 Article 14(1) of Regulation No 2261/84 provides that each producer Member State is to apply a system of checks to ensure that the product in respect of which aid is granted is eligible for such aid.

21 Article 1(2)(d) and (e) of Regulation No 3061/84 states in that regard that the first crop declaration submitted by an olive grower must include the number of olive trees producing olives for the manufacture of oil and the total number of oil-yielding olive trees in production. Article 1(5) provides that where some of the olives have been used for purposes other than the production of olive oil, the aid shall be paid in proportion to the olives intended for the production of olive oil.

22 Article 9(2) of Regulation No 3061/84 requires that the stock records of oil mills should be standardised and daily updated, and should show certain specific data, including, under (a) and (e) respectively, the quantities of olives entering the mill, batch by batch, stating the producer and the owner of each batch, and the

quantities of oil leaving the mill, batch by batch, stating the consignee. In the version applicable at the relevant time in the present case, Article 9(2)(e) read as follows: 'the quantities of oil leaving the mill, batch by batch, stating the consignee. Where the quantity of olives crushed comprises several batches of less than the minimum quantity required to make up a pressing in the case of both mills with a traditional production cycle and mills with a continuous production cycle, the stock records must include the overall quantity of oil leaving the mill, broken down between the consignees in proportion to the quantities of olives crushed by each of them'.

23 Article 14(3) of Regulation No 2261/84 provides that in the course of each marketing year producer Member States are to carry out checks on the activities and the stock records of a certain percentage of approved mills. Article 14(3a) states that for the purposes of paying aid to olive growers whose average production is at least 500 kg of olive oil per marketing year, the producer Member States are to check the accuracy of the crop declarations on the basis of criteria to be determined, the correspondence between the quantity of oil entered in the aid application and that stated in the stock records of approved mills, the compatibility between the olive production declared by each olive grower as having been pressed at an approved mill and the particulars given in his crop declaration on the basis of criteria to be determined. With regard to olive growers whose average production is less than 500 kg of olive oil per marketing year, Article 14(4) of Regulation No 2261/84 provides that the checks must permit verification of the accuracy of the crop declarations on the basis of criteria to be determined and the existence of evidence of the olives having been pressed in an approved mill.

24 Article 10(1) of Regulation No 3061/84 stipulates that the checks provided for in Article 14(3) of Regulation (EEC) No 2261/84 are to cover at least 10% of the approved mills operating during the marketing year concerned. Article 10(3) provides that in checking the accuracy of crop declarations as indicated in Article 14(3a) and (4) of Regulation No 2261/84, Member States shall make use *inter alia* of data in the register of olive cultivation and the computerised database ('files'), the figures from on-the-spot checks made on the grower and the yields of olives and oil set for the zone in which the holding or holdings are located.

25 Article 15(3) of Regulation No 2261/84 provides that where the checks specified in Articles 13 and 14 of that regulation do not confirm the figures in the stock records of an approved mill, the Member State concerned must, without prejudice to any sanctions which may be imposed on the mill, determine, for each producer whose average production is at least 500 kg of olive oil per marketing year and who has had his olive crop pressed in the mill in question, the quantity of oil for which aid is to be given. Article 15(4) provides that for the purpose of determining the quantity eligible for aid the Member State must refer in particular to the olive yields and olive oil yields fixed in accordance with the standard method laid down in Article 18, which provides that they are to be fixed by homogeneous production zones.

(c) Register of olive cultivation and computerised database on olive cultivation

26 In order to obtain the information needed both to determine the Community's potential production of olives and olive oil and to improve the operation of the Community aid system for olive oil, the Council adopted Regulation (EEC) No 154/75 of 21 January 1975 on the establishment of a register of olive cultivation in the Member States producing olive oil (OJ 1975 L 19, p. 1), as amended by Council Regulation (EEC) No 3788/85 of 20 December 1985 amending, on account of the accession of Spain and Portugal, certain regulations in the oils and fats sector (OJ 1985 L 367, p. 1, 'Regulation No 154/75').

27 Article 1(1) of Regulation No 154/75 provides that Member States producing olive oil are to set up a register of olive cultivation to cover all olive-growing holdings within their territory. The second indent of the third subparagraph of Article 1(2) of that regulation provides that the time-limit for the establishment of that register expires on 1 November 1986 for the Kingdom of Spain.

28 Commission Regulation (EEC) No 2276/79 of 16 October 1979 (OJ 1979 L 262, p. 11) as amended by Commission Regulation (EEC) No 1279/89 of 10 May 1989 (OJ 1989 L 127, p. 24) ('Regulation No 2276/79') laid down detailed rules for the establishment of a register of olive cultivation in the Member States producing olive oil. Article 6a of Regulation No 2276/79 provides that Member States producing olives must undertake, in accordance with the procedure laid down in Article 6(1) of that regulation, an annual updating of the register of olive cultivation, taking account in particular of any changes in cultivation declarations submitted by olive growers. Article 6b(1) provides that producer Member States which acceded to the Community after the entry into force of that regulation may carry out trials to determine what method for obtaining information is best suited to olive cultivation as practised in those States. To that end, the Member States concerned must transmit a programme of trials to the Commission for approval by 31 December 1988 at the latest. Article 6b(2) provides that the Commission will notify the Member States of its decision on the programme submitted, where appropriate together with the changes which it considers desirable. After approval by the Commission, the programme is to be carried out with all speed under the responsibility of the Member State concerned.

29 The second subparagraph of Article 3(3) of Regulation No 154/75 provides that the register of olive cultivation is to be financed, by means of a reduction in production aid, under the same procedure as is specified for the expenditure referred to in Articles 2 and 3 of Regulation (EEC) No 729/70. Article 3(5) of Regulation No 154/75 states that eligible expenditure is that incurred under contracts between the competent authority of the producer Member State and natural or legal persons entrusted with the relevant work, or, in cases where the Member State has the work done by its own official departments, the costs incurred other than administrative and supervision costs. The Member States are to notify the Commission beforehand of the content of the contracts, the tender specifications or the estimated cost of the work.

30 Article 16(1) of Regulation No 2261/84 also requires each producer Member State to draw up and keep up to date a permanent computerised database on olive and olive-oil production. The last recital in the preamble to that regulation states that in order to resolve the difficulties raised by detailed and effective checking

and verification it will be necessary to set up in each Member State a computerised database containing all the information needed to facilitate checking and the prompt detection of irregularities. Article 17(2) of that regulation provides that the databases must be compatible with the computerised data system used for the register of olive cultivation.

31 The first subparagraph of Article 14(5) of Regulation No 2261/84 requires Member States to use those databases for the checks and verifications provided for in that regulation. Article 16(2) provides that the databases must contain all the information necessary in order to facilitate checking and the prompt detection of irregularities, including data on the production of oil mills. In addition, the second subparagraph of Article 11(1) of Regulation No 3061/84 provides that the Member States are to enter in the databases the data contained in the register of olive cultivation as soon as such data becomes available.

32 The first subparagraph of Article 11(2) of Regulation No 3061/84 provides that all the components of the computerised databases must be operational before 31 October 1990.

2. Regulations relating to consumption aid for olive oil

33 The general rules relating to consumption aid for olive oil were laid down in Council Regulation (EEC) No 3089/78 of 19 December 1978 (OJ 1978 L 369, p. 12) as amended by Council Regulation (EEC) No 3461/87 of 17 November 1987 (OJ 1987 L 329, p. 1) ('Regulation No 3089/78'). Article 4 of that regulation provides that such aid will be granted in respect of olive oil produced in the Community which complies with certain requirements. Article 1 provides

that consumption aid for olive oil will be granted only to approved olive oil packaging plants. Article 2(1) provides that approval is to be given by the Member State concerned only to undertakings which have a minimum packaging capacity to be determined, carry out packaging activities for a minimum period to be determined, keep stock records according to rules to be determined and agree to undergo any checks laid down for the purposes of the application of the aid system. Article 3(1) provides that such approval will be withdrawn if, except in the case of *force majeure*, one of the conditions for approval laid down in Article 2(1) of the abovementioned regulation is no longer met. Article 3(2) provides that the Member State concerned will decide to withdraw approval temporarily from any packaging plant which has applied for aid for a quantity of olive oil in excess of the quantity for which entitlement to aid has been agreed.

34 The first paragraph of Article 7 of Regulation No 3089/78 requires Member States to institute an inspection system to ensure that the product for which aid has been applied qualifies for such aid. The second paragraph of Article 7 provides that such inspection must, in particular, make it possible to ascertain whether the amount of olive oil for which aid has been applied corresponds to the amount of olive oil of Community origin which entered the packaging plant and the amount of olive oil of Community origin which left the plant after being packaged in accordance with Article 4(1)(b) of that regulation and which was placed on the market in the Community.

35 Commission Regulation (EC) No 2677/85 of 24 September 1985 (OJ 1985 L 254, p. 5) laid down the rules for implementing the system of consumption aid for olive oil. Article 1 of that regulation provides that, for the purpose of obtaining the approval referred to in Article 2 of Regulation No 3089/78, a packaging plant must have a packaging capacity of at least six tonnes of olive oil per eight-hour working day. Article 2 lays down the requirements with regard to granting approval. Article 3 provides that each packaging plant must keep daily stock records giving specified information, including, according to subparagraphs (d) and (e), the number of immediate containers entering the plant, by capacity, and the number of immediate containers used, by capacity. Article 6(1) provides that to qualify for aid, olive oil must be put up in an immediate container of a net

content of five litres or less. Articles 9 and 11 lay down the rules governing applications for and payment of aid. Article 9(3) of Regulation No 2677/85, as amended by Commission Regulation (EEC) No 643/93 of 19 March 1993 (OJ 1993 L 69, p. 19), provides that the Member State must pay the aid within 150 days of submission of the application for the quantities for which entitlement to aid has been recognised following on-the-spot checks. This period may be extended, however, if further enquiries become necessary as a result of checks.

36 Article 12 of Regulation No 2677/85, as amended by Commission Regulation (EEC) No 571/91 of 8 March 1991 (OJ 1991 L 63, p. 19), concerns the content of such checks. The first subparagraph of Article 12(1) provides that for the purposes of the checks referred to in Article 7 of Regulation No 3089/78, the Member States must systematically inspect the stock records of approved packaging plants. They must also carry out random checks on the financial supporting documents relating to the transactions carried out by these undertakings. The third subparagraph of Article 12(1) of Regulation No 2677/85, as amended by Regulation No 571/91, states that in the course of the inspections referred to in the first subparagraph of that provision Member States shall check that the total quantities of oil stored in bulk and packaged and the empty containers physically present at the undertaking and the storage place correspond with the data in the stock records. The fourth subparagraph of Article 12(1) of Regulation No 2677/85, as amended by Regulation No 571/91, provides that if any doubt arises as to the accuracy of the information given in the application for aid, Member States shall also check the accounts of approved undertakings.

37 Article 12(6) of Regulation No 2677/85, as amended by Regulation No 571/91, provided that where it was found by the competent authority that an application for aid related to a quantity greater than that for which the entitlement to aid was recognised the Member State was immediately to withdraw approval for a period of from one to five years, depending on the seriousness of the infringement, without prejudice to any other penalties. However, Article 12(6) as amended by Regulation No 643/93 states that the penalty to be imposed on the packaging

plant is to be equal to between three and eight times the aid improperly applied for. The second subparagraph of that paragraph states that where the quantity in respect of which aid has been improperly applied for exceeds the checked quantity for which entitlement to aid has been recognised by at least 20%, the Member State, in addition to imposing a financial penalty, is also to withdraw approval for a period of from one to three years depending on the seriousness of the infringement.

3. Establishment of an inspection agency for the olive oil sector

38 The first subparagraph of Article 1(1) of Council Regulation (EEC) No 2262/84 of 17 July 1984 laying down special measures in respect of olive oil (OJ 1984 L 208, p. 11) as amended by Council Regulation (EEC) No 593/92 of 3 March 1992 (OJ 1992 L 64, p. 1) ('Regulation No 2262/84') requires each producer Member State, in accordance with its legal structure, to set up a specific agency for the purpose of carrying out certain activities and checks in connection with Community aid for olive oil, except for export refunds. Article 1(2) provides in particular that in order to ensure that the rules in respect of production aid are correctly applied, the agency must:

— check that the work of the producer groups and associations complies with Council Regulation No 2261/84;

— verify the accuracy of the data set out in the crop declarations and aid applications, without prejudice to the checks carried out by the Member State pursuant to Article 14 of Regulation No 2261/84;

— conduct checks of approved mills;

— monitor the approved packaging plants in accordance with Article 7 of Council Regulation No 3089/78 and, where necessary, the professional bodies recognised under Article 11(3) of Regulation No 136/66/EEC.

39 The fourth and fifth subparagraphs of Article 1(4) of Regulation No 2262/84 provide that Member States are to act upon the agency's findings as promptly as possible and regularly communicate to the Commission details of the action taken and the penalties imposed as a result of the agency's findings on the basis of its checks.

40 In December 1987 Spain set up the Agencia para el Aceite de Oliva (Olive Oil Agency, 'the AAO'), whose duties include checking that the activities of producer groups comply with the Community regulations.

41 However, the Servicio Nacional de Productos Agrarios (SENPA), which became the Fondo Español de Garantia Agraria ('FEGA'), is the body responsible for direct payment of aid, advances on payment of the necessary deposit, and imposing any penalties.

4. Regulations relating to production aid for dried fodder

42 Council Regulation (EEC) No 1117/78 of 22 May 1978 (OJ 1978 L 142, p. 1) as amended by Council Regulation (EEC) No 2275/89 of 24 July 1989 (OJ 1989 L 218, p. 1) ('Regulation No 1117/78') established a common organisation of the market in dried fodder. Among the products covered by that regulation, Article 1 of the regulation distinguishes between fodder that is artificially dried and fodder that is dried by other means, that is to say sun-dried, the latter being covered by

the second and fourth indents of Article 1(b). In respect of products that are artificially dried, Article 5(1) of Regulation No 1117/78 provides that aid will be granted where the guide price, which is fixed for each marketing year, is higher than the average world market price. The first subparagraph of Article 5(2) provides that that aid will be equal to a percentage to be determined of the difference between these two prices. The second subparagraph of Article 5(2) provides that the aid for sun-dried products will be reduced by an amount fixed taking account of the difference in the cost of producing artificially dried products and those that are sun-dried.

43 The second paragraph of Article 4 of Commission Regulation (EEC) No 1528/78 of 30 June 1978 laying down detailed rules for the application of the system of aid for dried fodder (OJ 1978 L 179, p. 10) as amended by Commission Regulation (EEC) No 810/93 of 2 April 1993 (OJ 1993 L 82, p. 14) ('Regulation No 1528/78') fixed the amount of the difference referred to in the second subparagraph of Article 5(2) of Regulation No 1117/78.

44 Article 5, first paragraph, (a), of Council Regulation (EEC) No 1417/78 of 19 June 1978 on the aid system for dried fodder (OJ 1978 L 171, p. 1) as amended by Council Regulation (EEC) No 1110/89 of 27 April 1989 (OJ 1989 L 118, p. 1) ('Regulation No 1417/78') provides that the aid referred to in Article 5 of Regulation No 1117/78 will be granted, at the request of the interested party, for dried fodder from processing plants with a maximum moisture content of between 11% and 14%, variable according to the form of presentation of the product. Article 6 of Regulation No 1417/78 provides that that aid will be granted only to those processing plants which:

'(a) keep stock accounts which include at least details:

— of the quantities of green, or, if appropriate, sun-dried fodder which is used; however, if the special situation of a processing

plant so requires, the quantities may be estimated on the basis of areas sown,

— of the quantities of dried fodder produced and the amount and quality of the dried fodder leaving the plant;

(b) supply, where necessary, other supporting documents required for checking their entitlement to aid'.

II — Substance

A — *Production aid for olive oil*

1. Flat-rate correction of 10% of total expenditure declared in respect of production aid for olive oil

45 It should be made clear first of all that the EAGGF finances only intervention undertaken in accordance with the Community rules within the framework of the common organisation of agricultural markets (see, in particular, Case C-278/98 *Netherlands* v *Commission* [2001] ECR I-1501, paragraph 38, and Case C-263/98 *Belgium* v *Commission* [2001] ECR I-6063, paragraph 35).

46 It should be noted in this connection that it is for the Commission to prove an infringement of the rules on the common organisation of the agricultural markets (see Case C-281/89 *Italy* v *Commission* [1991] ECR I-347, paragraph 19, Case C-55/91 *Italy* v *Commission* [1993] ECR I-4813, paragraph 13, and Case C-253/97 *Italy* v *Commission* [1999] ECR I-7529, paragraph 6). The Commission is therefore obliged on each occasion to give reasons for its decision finding an absence of, or defects in, inspection procedures operated by the Member State in question (see Case C-8/88 *Germany* v *Commission* [1990] ECR I-2321, paragraph 23).

47 However, the Commission is required not to show exhaustively that the checks carried out by the national authorities were inadequate or that the figures they have transmitted are irregular, but to produce evidence of its serious and reasonable doubt regarding such checks or figures (see Case C-54/95 *Germany* v *Commission* [1999] ECR I-35, paragraph 35, and Case C-28/94 *Netherlands* v *Commission* [1999] ECR I-1973, paragraph 40).

48 The Member State, for its part, cannot rebut the Commission's findings by mere assertions which are not substantiated by evidence of a reliable and operational supervisory system. If it is not able to show that they are inaccurate, the Commission's findings can give rise to serious doubts as to the existence of an adequate and effective series of supervisory measures and inspection procedures (see Case C-253/97 *Italy* v *Commission*, cited above, paragraph 7).

49 The reason for this mitigation of the burden of proof on the Commission is that it is the Member State which is best placed to collect and verify the data required for the clearance of EAGGF accounts; consequently, it is for that State to adduce the most detailed and comprehensive evidence that its checks have been carried out and its figures are accurate and, if appropriate, that the Commission's assertions are incorrect (Case C-54/95 *Germany* v *Commission*, cited above, paragraph 35, and Case C-28/94 *Netherlands* v *Commission*, cited above, paragraph 41).

50 It is in the light of those considerations that the evidence supplied by the Spanish Government against the findings on which the Commission based the contested decision should be considered.

(a) Inadequate communication between the AAO and the autonomous communities

51 The Commission states in point 4.7.2.2.1 of the Summary Report that relations between the AAO and the autonomous communities responsible for the management of production aid for olive oil in Spain were too limited. The AAO does not, for example, know what criteria are used by the different autonomous communities to identify producers whose yield has been abnormal, or the method for and extent of the verifications on which the AAO will base any proposal to withdraw approval.

(i) Arguments of the parties

52 The Kingdom of Spain asserts that the Commission itself examined a list, sent to the AAO by the autonomous communities in respect of the 1992/93 marketing year, of 1 800 cases in which it was suspected that the yield was excessive. That information alone is sufficient to show the amount of contact there is between the competent institutions.

53 In addition, the AAO receives information in writing each marketing year concerning olive growers who declare that they have obtained yields per tree or olive-oil yields that are above the set limits. That is sufficient to show that the AAO is always aware of the limits set with regard to yields.

54 The Commission's response is that one of the deficiencies it reported was the fact that it is the autonomous communities which decide unilaterally which cases they notify to the AAO, so that neither the AAO nor FEGA has the opportunity to ascertain whether the producers which the autonomous communities consider to be 'abiding by the rules' are in fact doing so, and whether the checks which the autonomous communities have made in order to establish whether those producers are abiding by the law are effective.

55 In addition, the Commission states that what it regards as a deficiency in the system is, first, the fact that the tolerance limits for yields are laid down unilaterally by the autonomous communities without any prior consultation with the AAO or FEGA and, secondly, the fact that those limits are laid down without any comparison being made with the representative yields of homogeneous production zones. The unilateral establishment of those limits by the autonomous communities predetermines therefore their subsequent decision regarding cases in which there is an abnormal yield and, hence, the majority of the checks made by the AAO.

(ii) Findings of the Court

56 The Kingdom of Spain does not deny that the criteria used by the autonomous communities in order to identify producers with an abnormal yield were laid down by the autonomous communities without any prior consultation with the AAO.

57 Since the defining of those criteria is a key factor in the control which the AAO is required to exercise, the absence of such consultation is sufficient to warrant the Commission's finding that relations between the AAO and the autonomous communities were too limited.

(b) The finding that the autonomous communities do not withdraw approval from oil mills in 10% of cases proposed by the AAO and in 50% of cases as regards RPGs

58 The Commission states in point 4.7.2.2.2 of the Summary Report that, in the first place, in 10% of cases proposals made by the AAO to withdraw approval from oil mills are not implemented by the various autonomous communities. In practice, it is only when 'fraudulent intent' is detected that withdrawal is put into effect. Secondly, in 50% of cases the autonomous communities fail to follow up proposals made by the AAO to withdraw approval from RPGs. A period of three months is granted in order for the RPG in question to put an end to the irregularities found, and in a number of cases the period of grace is extended indefinitely.

(i) Arguments of the parties

59 The Kingdom of Spain asserts that the case made by the Commission for making the financial correction is almost exclusively that the infringements established by the AAO did not lead to withdrawal of recognition from several RPGs: Aproliva, Oparagon, Orpoaragon and Agroles.

60 So far as Aproliva is concerned, it states that the AAO did not propose withdrawal of recognition but suggested that the company should be given a warning; the discrepancies discovered by the Agency were only random instances and did not warrant withdrawal. After 1994 it was even found that those discrepancies had been rectified. As for the other three RPGs, they were monitored by the autonomous communities in order to check whether the

shortcomings established warranted withdrawal of recognition. It was apparent not only that such a measure was unwarranted but also that the discrepancies had been rectified in the following marketing years.

61 In addition, the Kingdom of Spain maintains that the Commission applied the correction penalty twice over, on the basis of similar arguments: on the one hand in order to support the flat-rate correction and on the other hand in order to justify a specific limited correction in respect of APROL-JJAA (Badajoz) and OPROL (Toledo).

62 It considers that the quality of the checks made by the AAO on RPGs met the requirements of the Community regulations, as the EAGGF had itself indicated in the report on the AAO inspection conducted between 22 and 26 May 1995 and in its letter of 3 June 1996.

63 The Commission points out that all the proposals to withdraw approval made by the AAO are based on the existence of serious irregularities and on failure to comply with the requirements and conditions which the Community regulations impose with regard to the granting of recognition, and are detected as the result of inspections which that Agency carries out within the RPGs and at the oil mills. In the Commission's view it is established, and not disputed by the Kingdom of Spain, that following the inspections made by the EAGGF it was found that in the case of the RPGs the autonomous communities follow less than 50% of the recommendations to withdraw approval issued by the AAO, and in the case of the oil mills they do not follow them in 10% of cases. Thus the autonomous communities are failing systematically to meet their obligations to withdraw recognition or approval merely for reasons of expediency, although they have no discretion in that regard. They simply 'monitor' until the RPG concerned rectifies the discrepancies found, even where that means that irregularities and infringements persist for several marketing years.

64 The Commission emphasises the fact that the discrepancies detected by the AAO as regards Aproliva are, contrary to what the Kingdom of Spain maintains, of considerable seriousness: it was found that the aid had been calculated without deducting the trees intended for the production of table olives, a clear infringement of the Community regulations. In the Commission's view that means that the RPG is not ensuring, by means of the checks it is required to carry out, that the Community regulations are being correctly applied.

(ii) Findings of the Court

65 Article 5(3) of Regulation No 2261/84 provides that the competent authority 'must, without delay and at the latest before the beginning of the following marketing year', withdraw recognition from an RPG where the conditions required for recognition are no longer met, and notify its decision to do so to the Commission.

66 The Spanish Government does not deny the Commission's claim that in 10% of cases proposals made by the AAO to withdraw approval from oil mills were not implemented. It does not contend either that the AAO's proposals in that regard were unwarranted. It is therefore demonstrated that the Spanish authorities made inadequate checks in that context.

67 As regards the RPGs, the Spanish Government likewise does not deny that in at least 50% of cases the AAO's recommendations were not followed.

68 It maintains that the discrepancies alleged against Aproliva, Oparagon, Orpoaragon and Agroles did not warrant withdrawal of recognition. However, it did

not demonstrate why the AAO's proposals with regard to the three last-named RPGs were incorrect. In none of the cases did rectification of the shortcomings established during the following marketing years justify not withdrawing recognition at the time the obligation to withdraw arose.

69 More generally, the Spanish Government did not challenge the Commission's finding that all the proposals for withdrawal made by the AAO were based on the existence of serious irregularities and failure to comply with the requirements and conditions which Community regulations impose in respect of recognition.

70 In addition, the Commission is right to regard an infringement of the Community regulations such as calculation of production aid for olive oil without deducting trees intended for the production of table olives as a serious shortcoming which must be penalised by withdrawal of recognition.

71 Consequently, the Commission has also demonstrated that there was a serious inadequacy with regard to the checks since recognition was not withdrawn from RPGs in several cases.

72 As regards the Spanish Government's view that the argument based on failure to withdraw recognition cannot be used both for a specific correction and for a flat-rate correction, suffice it to say that the fact that withdrawal of recognition was not systematic is part of the finding that the inspection system was inadequate, whilst specific corrections must be tackled case by case.

(c) The absence of an operational register of olive cultivation

73 The Commission states in point 4.7.2.2.3 of the Summary Report that the purpose of the register of olive cultivation is to allow for exhaustive administrative scrutiny of applications for aid, but that such scrutiny did not take place in the present case. The Spanish register of olive cultivation is encountering operational difficulties which raise doubts as to whether it can be used. Moreover, the data in the register of olive cultivation were not validated by the date of the Summary Report. It cannot therefore be relied upon as against the producers.

(i) Arguments of the parties

74 The Kingdom of Spain points out that on 10 May 1989 the Commission approved the programme of trials for setting up the register of olive cultivation, a programme which was submitted in accordance with Article 6b of Regulation No 2276/79. Commission staff were fully aware of the progress of the annual plans and the time-limit set for final completion of the work, which was 1998.

75 The register of olive cultivation is fundamental in assisting certain checking tasks, but the fact that there is no register or that it is operating imperfectly does not mean that no checks are being made. In Spain the majority of applications for aid come from olive growers whose average production is 500 kg or over and aid is granted to them in respect of the amount of oil actually produced. This amount can only be verified by means of checking at the oil mill where the olives produced on the holding concerned are pressed. That is why the prime objective of the AAO's programmes of work was to carry out checks at the approved oil mills.

76 The Commission points out that the register of olive cultivation should have been fully established and operational during the agricultural season corresponding to the EAGGF's clearance of accounts for the financial year 1993.

77 It also points out that the technical cooperation which resulted in approval of the annual work plans for the introduction of the register of olive cultivation cannot remedy the Kingdom of Spain's infringement of the Community regulations, and even less be interpreted as implicit acceptance by the Commission of that delay or of the consequences it has for the system of aid.

78 The Commission also contends that the register constitutes the fundamental instrument for the checking procedures provided for under the Community regulations. The system of production aid for olive oil does not rely principally on the checking of oil mills since it is not they but the olive growers which receive the aid. If a check revealed that the oil mill had committed a fraud, the producers which had used it to press their olives would continue to receive production aid, although the amount of the aid would be calculated at a flat rate on the basis of a quantity of oil determined by the Member State. Checking the oil mills does not therefore ensure that the total amount of aid granted is lawful.

(ii) Findings of the Court

79 Article 1(1) of Regulation No 154/75 provides that the Member States producing olive oil must establish a register of olive cultivation to cover all olive-growing holdings within their territory. Article 1(2)(b) provides that the register of olive cultivation should be fully operational by 1 November 1992 in the case of the Kingdom of Spain.

80 The Spanish Government does not deny that the register of olive cultivation was not completed by that date.

81 Since no provision of Community law authorises the Commission to exempt the Kingdom of Spain from complying with that time-limit, the latter cannot rely on the fact that the Commission had knowledge of the annual plans for drawing up the register of olive cultivation and provided technical assistance in that regard.

82 As regards the impact on the checks to be carried out of the fact that the register of olive cultivation is incomplete, the significance of the data contained in the register, in particular with regard to the number of olive trees to be taken into account, must be stressed. On the one hand, determining the quantities of olive oil produced which are likely to benefit from the aid depends, as regards olive growers whose average production is below 500 kg of oil per marketing year, on olive yields and oil yields set on a flat-rate basis, which requires an accurate knowledge of the number of olive trees. On the other hand, this constitutes the base upon which cross-checking is done.

83 It follows therefore that the Kingdom of Spain has not been able to refute the Commission's findings with regard to the register of olive cultivation.

(d) The absence of a computerised database

84 According to point 4.7.2.2.4 of the Summary Report, the EAGGF found that there was no central computerised database, so that no effective verification could reasonably be carried out in view of the large number of beneficiaries.

(i) Arguments of the parties

85 The Kingdom of Spain contends first that the computerised databases were only partly lacking. The content of the databases provided for in Article 16 of Regulation No 2261/84 was already included in the incomplete databases giving the results of the checks conducted, the data relating to crop declarations and the data contained in the programmes of homogeneous zones.

86 Moreover, Regulation No 3061/84 laid down a period of six years for setting up the databases. It was therefore logical for the Kingdom of Spain also to enjoy a similar period, running from its accession to the European Communities, for perfecting the database.

87 Furthermore, the competent authorities had all the information for 1993 that was required to be entered in the database.

88 The Kingdom of Spain goes on to refer to the Commission's finding, in point 4.7.2.2.4 of the Summary Report, that the majority of Spanish oil mills issue all the pressing certificates only at the end of the marketing year and divide the total quantity of oil obtained between the olive growers in proportion to the quantity of olives brought by each of them, which means that the oil yield per producer is a lost parameter, since the yield of all the producers whose olives are pressed at the same mill is therefore the same. It considers that those circumstances obtain in only a very small number of cases, namely at the small oil mills in mountainous areas which press the olives of a small group of farmers in the regions concerned.

89 Finally, the Kingdom of Spain points out that the majority of oil mills determine a yield for each producer which is directly dependent upon the oil yield of each of its batches. For technical reasons the yield cannot be calculated in such a way that each batch of olives can be tracked individually (within the existing industrial process) and the oil produced by that batch weighed separately. The major technological changes which have taken place at Spanish oil mills and the widespread introduction of continuous extraction, together with other circumstances, make such a procedure technically impossible. However, technological progress has made it possible to develop ways of determining very accurately the amount of oil corresponding to each batch and of finally obtaining different yields for each producer.

90 The Commission points out first of all that by acknowledging the 'partial' absence of a computerised database the Kingdom of Spain acknowledges the infringement of Article 16 of Regulation No 2261/84 and Article 11 of Regulation No 3061/84. That partial absence means there is no systematic prior checking covering all crop declarations and all applications for aid.

91 The computer printouts of the records of the checks carried out during the 1992/93 and 1993/94 marketing years submitted by the Kingdom of Spain do not cast any doubt on the existence of the infringements established since, besides the fact that they relate only to checks carried out at the oil mills, it is not possible to ascertain from them that all the data which Article 16(2) of Regulation No 2661/84 stipulated must be collected was actually available. For example, those printouts do not contain the data on the stock records.

92 The Commission goes on to point out that the administrative checks made in order to justify the abnormal yields are inadequate and do not include comprehensive plausibility analyses of the yields obtained by each RPG, homogeneous production zone and oil mill, although such analyses are essential. Contrary to what the Kingdom of Spain alleges, the majority of oil mills wait and issue all the pressing certificates at the end of the marketing year, on the basis of

the total amount of oil produced during the entire period, which means that all the producers which use that oil mill obtain the same yield. The value of the parameter of the oil yield per producer is thus lost.

93 The Commission points out lastly that Article 9(2) of Regulation No 3061/84 requires that stock records should be standardised and updated daily, and should show certain specific data. Although subparagraph (e) of that provision stipulates that the data must give the quantities of oil leaving the mill, batch by batch, stating the consignee, and although, where the quantity of olives pressed comprises several batches of less than the minimum quantity required to make up a pressing, the stock records must include the total quantity of oil leaving the mill, broken down between the consignees in proportion to the quantities of olives crushed by each of them, the requirement to update stock records daily is by no means removed in the latter case, which is relied upon by the Kingdom of Spain.

(ii) Findings of the Court

94 Article 16 of Regulation No 2261/84 requires each producer Member State to set up and keep up to date a permanent computerised database on olive and olive-oil production. The last recital in the preamble to that regulation states that 'experience has shown that, despite the large number of specific checks introduced, the number of growers to be supervised makes detailed and effective checking and verification difficult;... it is necessary to resolve these difficulties by setting up in each Member State [a computerised database] containing all the information needed to facilitate checking and the prompt detection of irregularities'.

95 Article 11(2) of Regulation No 3061/84 provides that all the components of the computerised database must be operational before 31 October 1990. The

Community regulations make no provision for further time for the Kingdom of Spain. Its argument for a further six years for the introduction of a computerised database cannot therefore be allowed.

96 Only a partial database was available during financial year 1993, as the Kingdom of Spain acknowledged. Furthermore, the computer printouts of the records of the checks carried out at the oil mills during marketing years 1992/93 and 1993/94, submitted by the Kingdom of Spain in evidence, do not contain all the data which must be collected according to Article 16(2) of Regulation No 2261/84. Thus the data which should be shown in the stock records do not appear on the database.

97 It is clear from the above that the Kingdom of Spain has not been able to refute the Commission's finding that there was no central computerised database as provided for by Regulation No 2261/84.

98 In so far as the parties have raised in this context the question whether the total quantity of oil obtained was assigned in proportion to the quantity of olives brought in by each producer, those arguments relate to a separate complaint which will be considered under (f) below.

(e) Checks at the oil mills

99 The Commission states in point 4.7.2.2.5 of the Summary Report that in the absence of any available computerised database the checks made at the oil mills

were inadequate as regards determining the sample to be checked and as regards preparation for such checks, since the only precedents used were the previous checks made by the AAO itself. The number of cross-checks made was too small.

100 The EAGGF maintains that in the absence of a register of oil cultivation and a computerised database the Member State should have carried out more detailed checks at the oil mills. In any case, 'mills belonging to cooperatives which have a number of interests and activities within the olive oil sector represent prima facie a higher level of risk than single-activity mills'.

(i) Arguments of the parties

101 The Kingdom of Spain considers, first, that the operation of a cooperative oil mill in principle represents a lower risk of irregularities which might give rise to the receipt of improper aid, in particular because of the ongoing checks made by the members themselves and the involvement of members in decision-making through special bodies, and because of the various administrative checks and periodic systematic inspections carried out by the official institutions granting the associations credit.

102 Second, the Kingdom of Spain challenges the Commission's statement that the absence of a central computerised database precludes an accurate determination of the sample of oil mills to be checked and, consequently, verification of the plausibility of the quantity of olives pressed by a mill corresponding to the quantity of olives or trees declared by the producers.

103 On the one hand, the criteria for determining which oil mills should be checked are set out in the activity programmes forwarded to the Commission for each marketing year. On the other hand, the significance of the criteria adopted for selecting a sample is, at any event, dependent on the size of the sample. Since during each marketing year between 40% and 60% of the total number of oil mills are inspected, it follows that all the oil mills are checked every two or three years.

104 According to the Kingdom of Spain, by seeking to establish a link between the quantity of olives pressed at a mill and the number of olive trees declared by the producers the Commission has selected a plausibility criterion which is not very satisfactory, since the majority of producers of any size (whose holdings are very far apart geographically) take their olives to different oil mills each year, depending on price, distance, circumstances, etc.

105 Third, the Kingdom of Spain recognises the importance of cross-checking, designed to check the destination of the oil obtained and, in case of doubt, the accounts. However, it denies that electricity consumption is a criterion for checking a mill's production, particularly because mills use electricity for a number of different activities, not all linked to olive pressing. Moreover, the inspection report drawn up on 19 April 1996 following the Commission inspection (by Directorate-General XX, responsible for financial control), which took place at the offices of the AAO between 22 and 25 May 1995 ('the report of 19 April 1996'), confirmed that the checks and verifications were carried out 'in accordance with the instructions contained in the *expediente* [inspection brief] which covers all the checks and verifications required by the regulations'.

106 The Commission's response is first of all that the absence of a register of olive cultivation and of a computerised database meant that more exhaustive checks had to be made at the oil mills, in particular certain types of cross-checks. The

checking procedure used by the Kingdom of Spain was not, however, up to the standard, as regards quality or quantity, required in order to make up for that absence. That was so in particular in the case of mills belonging to cooperatives, where there is clearly a greater risk of fraud. In that case the producer and the mill owner are one and the same person, which involves a convergence of interests making more likely the artificial 'inflation' of oil quantities.

107 The Commission goes on to confirm its theory that the absence of a computerised database means that it is not possible to determine correctly the sample of mills which should be checked or to make effective preparations for the checks, since the only checks which can be referred to are those made previously by the AAO.

108 As regards the criteria for selecting the sample, the Commission points out that they are laid down in the programme of activities for the 1995/96 marketing year and cannot therefore be used to refute its arguments in respect of 1993. Moreover, it cannot be accepted that the size of the sample makes up for the defects in determining it. Although the Kingdom of Spain contends, without providing any evidence, that 40% to 60% of the oil mills are checked each year and infers from this that the checks therefore cover all the mills every two or three years, there is no guarantee that the checks are rotated. It is quite possible that the same oil mills are checked each year and that they are not necessarily the ones where there is the greatest risk of fraud for that particular year.

109 Lastly, the Commission contends that the alleged complexity of the plausibility check (verification that a payment is in order, using the following parameters at the same time and cross-checking data: plot — number of trees — crop declaration — oil obtained — application for aid) is due solely to the absence of a register of olive cultivation and a computerised database. The data which must be supplied by producers and oil mills under Article 13 of Regulation No 2261/84 and Article 9 of Regulation No 3061/84 provide the national authorities with all the information needed in order to carry out the cross-checks.

Such checks are essential since the use of an external source of evidence is a basic principle of auditing and checking in general. It is undeniable that the Kingdom of Spain did not provide the EAGGF with a list of on-the-spot cross-checks made by the AAO from the 1992/93 marketing year onwards and that therefore it did not provide the Commission with any evidence to show that such checks were actually carried out. The computer printouts submitted by that Member State show that nearly all the checks were carried out at packaging plants, which is not sufficient to meet the requirements of the Community regulations.

110 In the Commission's view, the Kingdom of Spain's reading of the report of 19 April 1996 is selective and incorrect, since the report states *inter alia* that on the basis of the data which oil mills must send to the autonomous communities, the Agency must coordinate and computerise all the information, setting up warning signals to help direct and prepare for certain checks. The report also states that it is necessary to improve and extend checks with regard to auditing the accounts, finances and tax position of oil mills, particularly those whose output exceeds 500 000 kg.

(ii) Findings of the Court

111 As paragraphs 73 to 97 of this judgment make clear, there was no fully operational register of olive cultivation and no computerised database complying with the relevant Community rules. Therefore the need to improve the checks on oil mills cannot be denied.

112 During marketing years 1992/93 and 1993/94 the number of checks on approved mills was very high with regard to the rule laid down in Article 10(1) of

Regulation No 3061/84, which states that such checks must relate to at least 10% of the approved mills operating during the marketing year concerned. However, the Kingdom of Spain has not established that the criteria adopted in order to determine the sample to be checked met the requirement of improving checks. It has not shown, in particular, that the criteria adopted following further discussion, contained in the programme of activities for the 1995/96 marketing year, were being applied during the 1992/93 and 1993/94 marketing years.

113 As for the argument that the large scale of the sample made determination of the sample less important, it should be noted, as Advocate General Léger did in point 174 of his Opinion, that despite the possibility of checking all mills every two or three years, there is a risk that the most flagrant irregularities, which would have been detected in the first marketing year using centralised data, will not, in the absence of such data, be identified from the outset.

114 As regards the cross-checks, the only documents produced by the Kingdom of Spain are the computer printouts attached as Annex 5 to the reply. They show that nearly all the checks of that type were carried out at packaging plants. A computerised database containing the basic data from the register of olive cultivation would have made it possible to carry out other cross-checks easily. The cross-checks carried out by the Spanish authorities cannot make up for this inadequacy which, moreover, was also mentioned in the report of 19 April 1996.

115 In view of this finding that the checks were of limited effectiveness, there is no need to consider the issue of whether, as the Commission contends, the cooperative structure of the majority of Spanish oil mills increases the risk of fraud.

116 It is clear from the foregoing that the Kingdom of Spain has not been able to refute the finding that the checks on the oil mills were inadequate.

(f) Flat-rate yields assigned to producers

117 The Commission states in point 4.7.2.2.6 of the Summary Report that 'the approach taken by the Spanish authorities of allowing the quantity of olive oil produced by each olive grower to be assigned on a flat-rate basis at the end of the marketing year gives rise to a situation in which it is impossible to check whether there has been systematic and effective checking of the sequence "plot — number of trees — crop declaration — oil obtained — application for aid" in the case of each producer, with cross-checking of actual data on land (register) and pressing (daily record-keeping by mills), with the attendant major risk of fraud'.

(i) Arguments of the parties

118 The Kingdom of Spain contends that most of the mills do not assign the same yield to every producer but establish a yield for each of them which is directly related to the oil yield from each of their batches. It adduces in evidence, first, the report of the inspection made by EAGGF officials between 30 January and 3 February 1995 at the Pedro Valera García mill, which showed that none of the certificates indicated the same yield. Secondly, it quotes the report of 19 April 1996, which states that 'in most of the mills the yield is obtained from the laboratory yield for each input, adjusted by a factor converting the quantity of oil thus determined to the quantity actually produced'. As that report was marked

'Confidential' it was not forwarded, but it was brought to the attention of the Member State concerned in the form of 'comments', which so far as the financial correction is concerned infringes the right to a fair hearing.

119 Furthermore, although for technical reasons the yield cannot be assigned in such a way that each batch of olives is taken individually and the oil produced from that batch weighed, it does not mean that the total yield obtained at the mill is assigned to all the producers. The 'theoretical or laboratory fat yield' is determined for each batch. At the end of the marketing year the industrial yield of the mill is established, which makes it possible to apply a reduction coefficient to the theoretical fat yields.

120 However, the Commission states that it found that some Spanish oil mills had assigned the same yield to all producers. The Kingdom of Spain did not produce, either during the *inter partes* proceedings or during the present action, the slightest evidence to the contrary establishing that it had been an isolated case and that it is therefore not the usual practice of all or most of the oil mills. The inspection by EAGGF officials of the Pedro Valera García mill related to the 1994/95 marketing year. As for the report of 19 April 1996, relied on by the Kingdom of Spain, the Commission states that it related to an inspection carried out at the offices of AAO and not at an oil mill. At any event, a reading of that report shows that the passage quoted by the Kingdom of Spain is taken out of context.

121 The Commission maintains that the financial correction made was not based on any item of information or finding contained in the reports by DG XX that was not officially and formally communicated to the Spanish authorities during the *inter partes* proceedings. In fact the most significant items in those reports were communicated to the Spanish authorities by letter No 23.271 of 15 June 1995. In that regard, the statement by the Kingdom of Spain that information it refers to as 'confidential' was used as the basis for a financial correction, information that

had allegedly not been communicated to it, is totally incorrect and cannot be accepted. Moreover the passage from the report of 19 April 1996 quoted by the Kingdom of Spain is taken out of context. In fact countless problems were identified during the inspections with regard to the checks on the oil mills.

(ii) Findings of the Court

122 Article 9(2)(a) and (e) of Regulation No 3061/84 provide that the quantities of olives entering an approved mill and the quantities of oil obtained from those olives must be precisely identified and accounted for so that each batch of olives can be associated with the corresponding batch of oil. It must thus be possible to calculate the yields for each of the producers concerned.

123 Article 9(2)(e) of Regulation No 3061/84 restricts exceptions to that principle to cases in which the quantity of olives crushed comprises several batches of less than the minimum quantity required to make up a pressing for both mills with a traditional production cycle and mills with a continuous production cycle. In such circumstances the stock records must include the total quantity of oil leaving the mill, broken down between the consignees in proportion to the quantities of olives crushed by each of them.

124 The Commission raised serious and reasonable doubt as to whether Article 9(2)(e) of Regulation No 3061/84 had been complied with. According to the report of 10 January 1995, drawn up following the on-the-spot investigation carried out between 20 and 24 June 1994, it was found that the pressing certificates of some mills had been issued at the end of the marketing year and that the average yield was the same for all producers (point 7.3.2 of that report). The report of

22 January 1995, drawn up following the on-the-spot investigation which took place between 30 January and 3 February 1995, states with regard to the La Rentilla SC mill: 'The pressing certificates, one for each producer for each marketing year, are issued after the end of the marketing year and give an average yield which is the same for most of the producers, namely 21% for the 1993/94 marketing year.'

125 It was therefore for the Kingdom of Spain to show that those were isolated incidents and not a widespread practice during the marketing year corresponding to the 1993 financial year. No such evidence has been adduced by that Member State, however.

126 The report on the inspection carried out at the Pedro Valera García mill contains only data relating to the 1994/95 marketing year. The report of 19 April 1996 described the AAO's checking methods in particular. It was in that context that the following sentence appeared: 'Verification of the mill's pressing certificate is generally done on the basis of the preceding marketing year because the certificates are issued at the end of the marketing year and in most of the producer mills the yield is calculated on the basis of the laboratory yield of each input adjusted by a coefficient designed to adjust the olive oil that has theoretically entered the mill to the olive oil produced.' That statement does not come from an inspection of the mills themselves, and it implies that there are other mills which do not act in the way described in the statement quoted. The question whether the method used in those other mills complies with the Community regulations is not dealt with in that particular report.

127 Although the Kingdom of Spain contends that the right to a fair hearing was infringed by the failure to communicate the report of 19 April 1996, it has itself used that report in its defence against the claim that it allowed flat-rate yields to be assigned to producers. It is unclear in what way it is affected by the report in this context. The right to a fair hearing was not infringed.

128 It is clear from the foregoing that the Kingdom of Spain has not been able to refute the finding that the Spanish authorities did not take adequate measures to ensure that flat-rate yields were not assigned to producers in breach of Article 9(2)(e) of Regulation No 3061/84.

(g) The production of table olives

129 The Commission states in point 4.7.2.2.7 of the Summary Report that the Autonomous Community of Andalucia is paying aid for table olives improperly, since it pays such aid without making any reduction in the case of small producers which have marketed part of their crop as table olives. The EAGGF's request that the amount of that aid should be recalculated was not acted upon.

(i) Arguments of the parties

130 According to the Kingdom of Spain, the EAGGF is raising the question of improper payments to small producers which have marketed some of their olives as 'table olives' as a result of failure to take account of Article 1(5) of Regulation No 3061/84, which provides that 'the aid shall be paid in proportion to the olives intended for the production of olive oil'. In its view, payment is based on the number of trees declared and the yield in the homogeneous zone (average over the last four marketing years). The EAGGF has, however, asked the Spanish authorities to make it a requirement to indicate the destination of products in the crop declaration and to recalculate the aid paid to small producers during financial years 1992, 1993 and 1994 on the basis of crop declarations and mill certificates.

131 According to the Kingdom of Spain, it is not possible to specify the intended use of a crop in the crop declaration. Each marketing year, depending on the market price, an olive grower decides, at that particular moment, to whom he will sell or deliver his olives. It is therefore impossible for him to state in a document of a permanent nature, such as the crop declaration, what the decision will be for future years.

132 Nor is it possible to re-calculate the aid paid to small producers, since, as the Community regulations provide, the payment records take into account only the number of trees and the estimated yield of the homogeneous zone, which makes the information contained in the mill certificate useless for calculating aid.

133 The Kingdom of Spain points out that it made a proposal that the Community regulations should be amended so that all olive growers could receive aid for the oil actually produced, because the small olive growers — generally and according to the regulations in force — receive 'flat-rate' aid which is independent of actual production on their holding.

134 Moreover, the Kingdom of Spain contends that the harvesting of green olives intended for the production of table olives takes place before the harvesting of those intended 'for the mill' and before the measurement of the representative plots in order to estimate the yields of homogeneous zones. 'Table olives' are not therefore taken into account in the application for aid, save in very exceptional circumstances.

135 Moreover, in Spain each olive grower must declare the intended use of olives harvested on his holding.

136 The Commission maintains that the amount of production aid for olive oil granted by the Spanish authorities infringes Article 2 of Regulation No 2261/84 and Article 1(5) of Regulation No 3061/84 since it includes that part of the crop which is marketed as table olives and which is therefore not intended for the production of olive oil. Although the Spanish authorities have recognised the presence of numerous irregularities in the context of aid granted to small olive growers by the Autonomous Community of Andalucia, they have not carried out any checks with regard to compliance with those regulations.

137 By arguing that there is a statutory obligation in Spain, imposed on all olive growers, to declare the use of the olive crop each marketing year and that table olives are harvested before the estimates are drawn up of the yields in homogeneous zones which are then used in order to determine the aid, the Kingdom of Spain shows that its authorities could have provided the EAGGF with the calculations of the aid paid, as it requested.

(ii) Findings of the Court

138 Article 2(1) of Regulation No 2261/84 provides that production aid is to be granted in respect of olive oil. It is clear from that provision and from Article 1(5) of Regulation No 3061/84 that such aid may not be granted in respect of the production of olives used for purposes other than the production of olive oil and that where some of the olives have been used for such purposes the aid must be paid in proportion to the olives intended only for the production of olive oil. Article 1(2)(d) of Regulation No 3061/84 provides that the first crop declaration

submitted by a grower must indicate the number of olive trees producing olives for the manufacture of olive oil.

139 Although the Kingdom of Spain contends that it is not possible to specify the intended use of products in the crop declaration, the reasoning relied on to support that contention is in fact purely opportunistic.

140 If the obligation to indicate not only the total number of olive trees in production but also the total number of olive trees in production whose olives are used for the production of oil has not been complied with, it is indeed difficult to re-calculate the amount of aid actually due. Even if such a calculation proves impossible, however, the Kingdom of Spain must bear the consequences.

141 The argument of the Kingdom of Spain based on the different times at which table olives and olives used for the production of olive oil are harvested does not justify that Member State's failure to comply with the Community regulations.

142 It is clear from the foregoing that the Kingdom of Spain has not been able to refute the EAGGF's findings with regard to infringement of the obligation not to grant production aid for olive oil for the production of olives used for other purposes, as laid down in Article 2(1) of Regulation No 2261/84 and Article 1(5) of Regulation No 3061/84.

(h) No loss for the Community budget

(i) Arguments of the parties

143 The Kingdom of Spain maintains that the alleged inadequacy of the checks in respect of production aid for olive oil did not lead to any loss for the Community budget. It contends that the total aid paid in respect of the marketing year concerned was for a quantity smaller than the total quantity of oil and marc produced, which, in its view, excludes all possibility of fraud in the sector, dispels any fear of risk for the Community budget and removes any justification for the financial correction imposed on that Member State.

144 All the figures given in that connection were set out in several letters. As regards the Commission's argument that the information produced by the Spanish authorities was supplied after 29 February 1996, that is to say after the time-limit for sending additional information concerning the clearance of EAGGF accounts had expired, the Kingdom of Spain contends that on numerous occasions throughout the proceedings the Commission rejected the explanations supplied by those authorities.

145 The Commission points out that it derived the basis for the financial correction it made from document VI/216/93. It states that the olive oil production figures supplied by the Kingdom of Spain do not constitute sufficient evidence that no loss occurred. It also has serious doubts as to the reliability of that data.

(ii) Findings of the Court

146 As is made clear in paragraph 45 of the present judgment, the EAGGF finances only intervention undertaken in accordance with the Community rules within the framework of the common organisation of agricultural markets. The Commission is not required to prove that there has been a loss but may simply adduce sound evidence of such loss. For those difficult cases where the extent of the losses cannot be ascertained precisely, the losses to the Community funds must be determined by an evaluation of the risk to which they are exposed by the deficiency in the controls (see to that effect Case C-238/96 *Ireland* v *Commission* [1998] ECR I-5801, paragraph 31).

147 Although it is for the Commission to prove that the rules of the common organisation of the agricultural markets have been infringed, once it has established such an infringement it is for the Member State to demonstrate, if appropriate, that the Commission made an error as to the financial consequences to be attached to that infringement. The Member State must then adduce the most detailed and comprehensive evidence possible that its figures are accurate and, if appropriate, that the Commission's calculations are incorrect.

148 The Spanish Government bases its denial of any loss to the Community budget on the details supplied to the Commission by FEGA in letter No 14973 of 29 May 1997, following the AAO's collection of information from the mills during the 1992/93 marketing year, and on the detailed data contained in FEGA's letter No 25002 of 30 September 1997.

149 The evidence which the Kingdom of Spain produced regarding production aid does not refute the Commission's conclusion that the Spanish authorities' checks were inadequate.

150 As the Commission rightly pointed out, the figures relied on by the Kingdom of Spain to establish that the total quantity of olive oil produced is greater than the quantity for which applications for aid were submitted by the producers relate to the oil which the oil mills declared they had certified during the 1992/93 marketing year, in response to a request from the AAO made four years later. In the absence of a computerised database, as was stated in paragraph 97 of the present judgment, those figures do not show that that oil is the oil which was 'actually produced'. The irregularities found at the various mills preclude acceptance that the quantity of olive oil produced according to the pressing certificates corresponds to the quantity that was actually produced. Since that is the doubtful basis relied on by both FEGA's letter No 14973 of 29 May 1997, received by the Commission after the time-limit it had imposed on the Spanish authorities had expired, and FEGA's letter No 25.002 of 30 September 1997, which relates to the clearance of accounts for financial years 1994 and 1995, but also contains data concerning the 1992/93 and 1993/94 marketing years, those letters cannot invalidate the finding that the inadequacies of the inspection system operated by the Spanish authorities with regard to production aid for olive oil prove the existence of a significant risk of loss for the Community budget.

151 It is therefore not necessary to rule on the consequences of the time-limit set by the Commission for the Spanish authorities to produce the information sought.

152 It is clear from all the above considerations that the plea alleging that the flat-rate financial correction of the production aid for olive oil was unlawful must be rejected.

2. The specific correction imposed on two RPGs as a result of improper financing

153 Point 4.7.2.4 of the Summary Report states that the withdrawal of recognition from RPGs resulted from an assessment carried out by the autonomous communities in which neither FEGA nor the AAO took part. Despite the repeated request for detailed information about the subsequent inspection activities which should have been undertaken, the national authorities merely sent the EAGGF a letter reaffirming the powers of the autonomous communities in that regard. In those circumstances the Commission refused to finance the aid paid to the RPGs OPROL and APROL-JJAA, and the aid paid through those RPGs.

(a) Arguments of the parties

154 The Kingdom of Spain admits that the AAO's letters of formal notice do not always result in automatic withdrawal of recognition from the RPG concerned. It relies however on the argument that, in fact, any proposal to withdraw recognition from an RPG submitted by the AAO to an autonomous community can be adopted only following the administrative procedure required by law, which includes an inquiry into the infringements established by the AAO, the collection of evidence, a hearing of the party concerned and the decision as to whether to withdraw recognition.

155 Moreover, withdrawal of recognition is quite a serious measure and should not be adopted where the infringement is minor, since it entails destruction of years of effort to introduce a framework of agricultural associations. In the present case, the AAO's inspections did not reveal any infringement and especially no serious infringement.

156 The Kingdom of Spain further points out that the only instance in which Community legislation has provided that sums are to be deducted from the expenditure financed by the EAGGF is where it has been confirmed that the sums received by an RPG have not been used, in whole or in part, for financing the activities for which it is responsible, in accordance with Article 11(3) of Regulation No 2261/84.

157 It also points out that the Community regulations, which form part of the national legal order, confer on RPGs and their members the right to receive sums of money, subject to certain conditions. Extending the consequences of an irregularity discovered within an RPG to the aid received by all its members would infringe the principle that punishment should be applied to the offender only and would also be disproportionate, and conflict with the provisions of Article 7 of Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests (OJ 1995 L 312, p. 1). It is all the more disproportionate where, as in the present case, the checks carried out by the AAO revealed that, out of a sample of 26 olive growers who were members of the APROL-JJAA RPG, 22 had not committed any irregularity resulting in the improper payment of aid. The Commission's approach was arbitrary because during the preceding financial year the correction made on the same grounds related to the amount received for the financing of RPGs in five cases, and was extended to the aid received by olive growers in only one case.

158 The Commission maintains first of all that the Community regulations do not give the competent authorities any discretion to withdraw recognition from RPGs where the conditions for such recognition are no longer met. In that context it stresses that a decision to withdraw recognition is not a penalty.

159 It points out that, as was clear from the inspections conducted by the AAO, the infringements and irregularities detected were particularly serious. Moreover, withdrawal does not depend on the significance of the requirement, condition or obligation which the RPG no longer fulfils.

160 In the case of APROL-JJAA, the irregularities were listed in letter No 23.271 of 15 June 1995 from the EAGGF. As regards OPROL, the Commission observes that the express recognition by the Kingdom of Spain of the existence of irregularities is sufficient to confirm that that RPG already failed to fulfil the conditions during financial year 1993 and that, for that reason, the aid received should never have been granted. In that context it describes as a matter of 'maximum seriousness' the fact that an unacceptable period of two years had elapsed between, on the one hand, the establishment of the infringements and the AAO's proposal to withdraw recognition and, on the other hand, the withdrawal itself, as ordered by the judgment of 25 April 1995.

161 The Commission points out secondly that the serious irregularities found within the two RPGs on which the financial correction was imposed show that the members could not have undergone in fact the checks which those groups were required to undergo under the Community regulations, which justifies the correction which was made being extended to cover the aid received by those members. So far as the checks carried out by the AAO on a sample of 26 olive growers who are members of APROL-JJAA are concerned, they took place in June or July 1995, which by no means proves that no irregularities took place during the marketing year corresponding to financial year 1993. Furthermore, irregularities were detected in four cases out of the sample selected, which necessarily involves financial consequences for the EAGGF.

(b) Findings of the Court

162 It must be remembered that under Article 20c(1)(b) of Regulation No 136/66, RPGs should be capable of verifying the olive and olive oil production of their members. Article 20c(3) provides that recognition will be withdrawn from a group or association where the conditions for recognition have not been fulfilled or are no longer fulfilled.

163 Article 5(3) of Regulation No 2261/84 lays down the rules for withdrawal, which is to take place according to the following procedure: RPGs are to declare annually to the competent authority any changes made in their structure since their recognition, and the results of any checks. The competent authority is to ascertain, on the basis of this statement and those results, whether the conditions for recognition continue to be met. If they are no longer met or if the structure of an organisation does not allow for its members' production to be verified, the competent authority must, without delay and at the latest before the beginning of the following marketing year, withdraw recognition and notify its decision to do so to the Commission.

164 It is clear from those provisions that, in order to carry out improved checks on olive growers' production and, hence, in order to ensure effective management of the system of aid, the finding that an RPG has inadequate capacity to check the production of olives and oil by its members is sufficient to justify withdrawal of recognition.

165 The Commission maintains that the Kingdom of Spain has failed to comply with Article 20c of Regulation No 136/66 and Article 5 of Regulation No 2261/84. In that regard, the Kingdom of Spain's argument that the Commission is not entitled to impose any correction except where it is shown that sums intended for RPGs have not been used for financing the activities for which they are responsible cannot be accepted. As was made clear in paragraph 45 above, the EAGGF finances only intervention undertaken in accordance with the Community rules within the framework of the common organisation of agricultural markets. Failure to withdraw recognition represents an infringement of the relevant Community rules in force.

166 As regards the irregularities, it is not denied in the present case that the checking operations incumbent on the RPGs in question were inadequate and that the irregularities found in the functioning and management of those operations

affected their tasks of inspecting members. As the Advocate General stated in points 74 to 83 of his Opinion, the fact that the complaints made against the said groups were genuine and of long standing, and hence that irregularities did exist, is amply demonstrated.

167 More specifically, the documents before the Court show that in the case of APROL-JJAA, at the time of the inspection by officers of the Autonomous Community of Extremadura (3 and 10 March 1994) certain shortcomings were revealed concerning in particular specific management records, the absence of copies of the title deeds and quarterly reports, and the fact that it was impossible to verify compliance with the time-limits laid down for the payment of aid to producers in respect of certain marketing years. Such discrepancies had already been discovered during an inspection carried out by the AAO on 23 September 1993, which on 24 January 1994 had proposed that recognition should be withdrawn. As regards APROL, the Spanish Government itself does not deny that recognition was not withdrawn by the competent authorities by 25 April 1995, after a year of monitoring had failed to produce any improvement. As the existence of irregularities pre-dating the withdrawal of recognition was expressly acknowledged by the Spanish authorities, the justification for the Commission's complaint cannot seriously be contested.

168 As regards the conditions for withdrawal of recognition, it should be pointed out first of all that, under Article 5(3) of Regulation No 2261/84, the competent authority must do this without delay and at the latest before the beginning of the following marketing year. The Kingdom of Spain admits that the competent authorities did not withdraw recognition immediately. Although, as the Kingdom of Spain submits, without being contradicted on this point by the Commission, withdrawal of recognition requires the implementation of an administrative procedure, the powers enjoyed by the Member States with regard to the procedure for withdrawing recognition are limited by the obligation contained in that article to order the withdrawal without delay. It is for the Member State to ascertain that that obligation as to the result to be achieved is met within the time-limit laid down and, where appropriate, to amend its domestic procedures to bring them into line with the abovementioned provision and so be able to apply them within the limit thus imposed.

169 Moreover, the Community regulations make no provision for any discretion whereby recognition may be withdrawn in a case in which one of the conditions to which it is subject is no longer met.

170 It is clear from the above that the recognition enjoyed by APROL-JJAA and OPROL should have been withdrawn before the 1994/95 marketing year.

171 As for the consequences of failure to withdraw recognition within the time-limit laid down in the third subparagraph of Article 5(3) of Regulation No 2261/84, the Kingdom of Spain contends that the financial correction should be limited, in any event, to the aid received by the RPG for its functioning and should not extend to all the olive growers which are members of it.

172 In that connection it should be stressed that the Member State concerned cannot refute the Commission's findings as regards the olive growers without supporting its own assertions with evidence that there was a reliable and operational inspection system. The Kingdom of Spain has not, however, been able to meet that requirement. It is true that the checks on a sample of 26 olive growers belonging to APROL-JJAA, which were carried out in June and July 1995 in relation to the 1993/94 marketing year, revealed the existence of irregularities in the case of only four olive growers. However, that fact is sufficient to justify the conclusion that the obligation to check had not been met.

173 The specific financial correction of the aid paid to RPGs is the consequence of the fact that their expenditure was not incurred in accordance with the Community rules. It is not a measure restricting individual rights within the relationship between the olive growers and the Community, as the Kingdom of Spain seems to allege.

174 The RPGs are responsible for checking production, so that the existence of serious deficiencies in carrying out those checks implies a high probability of significant dysfunctioning in the activities of the producers. Where checking is defective the Community is deprived of a way in which it can ascertain that the conditions justifying the financing of the agricultural sector in question are met. The most appropriate way of ensuring that aid is not used for purposes other than those for which it has been granted is to exclude offending RPGs from financing, unless it can be shown that the olive growers who are members of those RPGs are not the perpetrators of any irregularity that would affect all or part of the Community financing.

175 It is true that Article 7 of Regulation No 2988/95 provides that Community administrative measures and penalties may be applied to the natural or legal persons who have committed the irregularity, to those who have participated in committing the irregularity and to those who are under a duty to take responsibility for the irregularity or to ensure that it is not committed. However, the proceedings in respect of the clearance of Member States' accounts for the expenditure financed by the EAGGF are not designed to allocate liability among national economic operators except to the extent that they serve to identify the irregularities attributable to the competent national authorities. The financial measures ordered against a Member State do not prejudge that allocation of liability among the operators concerned which, in any event, must be in accordance with the principle set out in Article 7 to the extent that it applies at the date of the facts at issue.

176 Extending the financial correction to the olive growers does not therefore infringe the principle of proportionality.

177 It is also necessary to reject the Kingdom of Spain's argument that the corrections imposed by the Commission are arbitrary since in the preceding year, unlike the financial year in question, the financial corrections had not been extended to the

olive growers, except in one case. If the Commission does not take financial action in one year on deficiencies established, that does not preclude it from doing so in subsequent years, particularly if those deficiencies have persisted, and newly-established deficiencies can also be taken into account in determining the level of the flat-rate correction (see in particular Case C-44/97 *Germany* v *Commission* [1999] ECR I-7177, paragraph 14, and Case C-374/99 *Spain* v *Commission* [2001] ECR I-5943, paragraph 26). In the present case, extension of the correction to all the expenditure incurred through the two RPGs in question was justified in view of the seriousness and extent of the irregularities established.

178 It follows from the above that the plea alleging that the specific financial correction of the aid paid to OPROL and APRO-JJAA is unlawful should be rejected.

3. The specific correction of expenditure declared in respect of the register of olive cultivation

179 Point 4.7.2.5 of the Summary Report states, first of all, that the expenditure declared in respect of financial year 1993 includes a percentage of the profits equal to 10% of the contractual amount of the work on setting up the register of olive cultivation, a percentage which has not been accepted by the EAGGF.

180 Second, the total expenditure in respect of the register of olive cultivation includes a rate for 'overheads' equal to 15% of the total amount of that expenditure. As the percentage of such costs relating to other work performed on behalf of the Commission or under contract to it is 2%, the correction imposed was 13%.

181 Third, since the work was entrusted to Empresa de Transformación Agraria SA ('Tragsa') without an invitation to tender, the EAGGF imposed a flat-rate correction of 10% of the total eligible costs as there was no competitive tendering for the work.

(a) Refusal to finance profit of 10% of the total contractual amount of the work

(i) Arguments of the parties

182 The Kingdom of Spain disputes the view that the public undertakings carrying out the work are departments of the administration. Even if their capital is publicly owned, the undertakings which have taken part (Tragsa) or are taking part (Tecnologias y servicios agrarios SA, 'Tragsatec') in the work connected with setting up the register of olive cultivation are limited companies whose activities are governed by the rules of private law, in particular commercial law. They are therefore subject to the law applying to limited companies. It is clear that the criteria laid down in Article 3(5) of Regulation No 154/75 exclude only the management costs and the costs of supervising the work undertaken by the staff of units coming under the public authorities of a Member State. Those criteria can never be used to exclude expenditure linked to the substantive performance of any work or works entrusted to a commercial limited company having legal personality, whose operation is entirely financed out of its profits.

183 The Commission points out that the Community regulations do not provide for the financing of company profit equal to 10% of the contractual amount of the work and so that profit cannot be financed by the EAGGF. The existence of such profit and declaring it as expenditure are all the more improper in the case of a

public undertaking. Under the Spanish legal system Tragsa is a technical department belonging to the Spanish State and autonomous administrations and therefore constitutes a public administration. The work on the register of olive cultivation performed by that body or by its subsidiary Tragsatec should therefore be regarded as having been performed by the State departments themselves, so that Article 3(5) of Regulation No 154/75 is fully applicable in that regard.

(ii) Findings of the Court

184 The first subparagraph of Article 3(5) of Regulation No 154/75 defines what expenditure is regarded as eligible according to the legal classification of the operator responsible for carrying out the work of setting up the register of olive cultivation, which may be either a contractor of the administration or the administration itself. Financing is therefore available either for expenditure under contracts made with private operators or for the costs other than those of managing or supervising the work where the work is carried out by the administration's own departments.

185 Refusal to finance the profit of the company awarded the contract is therefore justified where it is shown that the latter is in fact acting as a department of the Spanish administration.

186 In that regard, it should be noted that Tragsa, although set up as a limited company subject to the rules of private law,

— is regarded, under Article 88(4) of Spanish Law No 66/97 of 30 December 1997 introducing fiscal, administrative and social measures (BOE No 313 of

31 December 1997, p. 39589), which confirms the special status enjoyed by that undertaking, as an 'instrument' ('medio proprio instrumental') and a 'technical service of the administration' ('servicio technico de la Administración');

— is, under the same provision of Spanish law, 'required to implement, itself or using its subsidiaries, only work entrusted to it by the general administration of the State, the Autonomous Communities or the public bodies subject to them...';

— is provided with public capital.

187 Such a body, which despite its financial and accounting autonomy is entirely subject to State control, must be regarded as one of the Spanish administration's own official departments, within the meaning of the first subparagraph of Article 3(5) of Regulation No 154/75.

188 Therefore only costs other than those of managing or supervising the work are eligible. Financing by the EAGGF of a company's profit of 10% of the contractual amount of that work does not fall within the eligible costs thus defined.

189 It is clear therefore that the plea based on refusal to finance profit of 10% of the total contractual amount of the work must be rejected.

(b) Refusal to finance overheads in excess of 2% of the total contractual amount of the work

(i) Arguments of the parties

190 The Kingdom of Spain points out first of all that under Article 3(5) of Regulation No 154/75 expenditure incurred under contracts between the competent authority of the producer Member State and natural or legal persons entrusted with the work of preparing the register of olive cultivation is eligible for financing by the Community. The normal procedure for the clearance of EAGGF accounts does not apply to such expenditure. It goes on to state that all the required information (contracts, tender specifications and unit costs) was supplied to the Commission for purposes of authorisation of the work and of the necessary expenditure before the work was carried out. When it issued its authorisation the Commission considered that the expenditure envisaged by the Ministry of Agriculture (including overheads) met the criteria laid down in Article 3(5) of Regulation No 154/75. The Kingdom of Spain submits, finally, that a percentage of 15% for overheads is generally accepted for this type of work and that the absence of separate accounts for each project cannot justify rejecting that percentage for such overheads.

191 The Commission considers that the procedure laid down in Article 3(5) of Regulation No 154/75 does not introduce special accounting and financial arrangements for expenditure connected with setting up the register of olive cultivation. That expenditure is therefore cleared under the normal procedure for the clearance of EAGGF accounts. The Commission's agreement with the information supplied by the Member State under that regulation concerns only the 'technical' conformity with the criteria laid down in Article 5(3) of Regulation No 154/75 and cannot be interpreted as approval of the amount of expenditure declared in order for it to be charged to the EAGGF.

192 The Commission considers that the overheads declared were excessive since they are much higher than those provided for in respect of other similar work carried out on behalf of the Commission or under contract to it. The Kingdom of Spain did not supply any supporting evidence. The Commission points out in that regard that according to its findings the undertaking responsible for carrying out the work, Tragsatec, does not keep separate cost accounts for each project, which means that it is not possible to ascertain how the expenditure declared was allocated. The Spanish authorities did not inspect the invoices submitted by Tragsatec (and other undertakings to which minor work was entrusted) to Tragsa, the undertaking which was awarded the contract for the work and which owns 100% of Tragsatec, in order to ensure there were no additional charges relating to the sub-contracted work.

(ii) Findings of the Court

193 Under Article 3(1) and (3) of Regulation No 154/75, part of the production aid is intended for financing the setting up of the register of olive cultivation. Under the second subparagraph of Article 3(3), the procedure to be used is as specified for the expenditure referred to in Articles 2 and 3 of Regulation No 729/70.

194 As stated in Document VI/216/93, expenditure met by the payment bodies on behalf of the EAGGF must derive from real transactions and the payments must have been received by the lawful beneficiaries or their assignees.

195 The fact that Tragsa is one of the Spanish Administration's own departments means that costs incurred other than costs for the management and supervision of the work, together with overheads incurred in carrying out the project of setting up the register of olive cultivation, can be charged to the EAGGF. However, the

financing of expenditure incurred by way of such overheads must be duly substantiated where they are higher than overheads normally approved.

196 The Kingdom of Spain has not shown that the high level of the overheads involved in setting up the register of olive cultivation was plausible. Nor does it deny that Tragsatec, an undertaking managing some 200 projects, failed to keep separate cost accounts for each project.

197 Even though the EAGGF's letter No 3478 of 18 October 1993, relied on by the Kingdom of Spain, which informed the Spanish authorities that the expenditure proposed complied with the criteria laid down in Article 3(5) of Regulation No 154/75, was regarded as general prior authorisation, the letter did not mean that the Member State was not required to demonstrate subsequently, and provide details of, the nature of the expenditure incurred and that it was genuine, especially as the letter from the Ministerio de Agricultura, Pesca y Alimentation of 8 September 1993 and the annexes thereto placed in the file, and to which the EAGGF's letter refers, did not expressly mention overheads.

198 The plea concerning the refusal to finance overheads in excess of 2% of the total contractual amount of the work must therefore be rejected.

(c) The flat-rate correction of 10% of total eligible expenditure due to the fact that the work was awarded without a tendering procedure

(i) Arguments of the parties

199 The Kingdom of Spain contends that the direct award of the contract for the work took place under the Spanish legislation in force with regard to public

works contracts, which provides that such an award procedure may be decided upon by the competent authority (the Council of Ministers) for technical reasons or in exceptional circumstances. In the present case, the competent body considered that the confidential nature of the information submitted in respect of setting up the register of olive cultivation constituted exceptional circumstances which justified not calling for tenders. At any event, the Kingdom of Spain contends that even if the Member State concerned is in breach of the provisions of Community law applying to public works contracts, those provisions do not provide for any penalty with regard to the clearance of EAGGF accounts.

200 The Commission contends that the fact that Tragsa is a department of the administration does not mean that there has been no breach of the Community regulations relating to public works contracts.

201 It considers that Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1) applies in the present case and, in particular, that the Kingdom of Spain did not comply with the provisions of Article 9 of that directive, which must be read in conjunction with Article 3(5) of Regulation No 154/75.

202 In this instance the Kingdom of Spain did not send the Commission either the information provided for in Article 3(5) of Regulation No 154/75 or any notice under Article 9 of Directive 77/62. The direct award of work on the register of olive cultivation to Tragsa owing particularly to the confidential nature of the data involved is not justified, either. The Commission considers that it is at least permissible to doubt whether the explanation supplied by the Kingdom of Spain is in compliance with the Community regulations.

(ii) Findings of the Court

203 It should be remembered that the EAGGF finances only intervention undertaken in accordance with the Community rules within the framework of the common organisation of agricultural markets. Although infringement of provisions other than those relating to the common organisation of agricultural markets does not automatically incur a financial correction under the EAGGF clearance of accounts, as the Spanish Government maintains, the fact remains that, under Article 8(1) of Regulation No 729/70, Member States must satisfy themselves that transactions financed by the Fund are executed correctly. Transactions carried out in breach of the provisions of the Community regulations on public works contracts cannot be regarded as having been executed correctly in that regard. Infringement of those regulations would in principle justify a financial correction.

204 As regards the consequences of the fact that Tragsa should be regarded as part of the Spanish administration, the Court has allowed an exception to the application of the directives on the award of public works contracts, the so-called 'in-house providing' exception, which relates to contracts made by a contracting authority with certain public organisations that are linked to itself. The limits on that exception were clarified in particular in Case C-107/98 *Teckal* [1999] ECR I-8121, paragraph 50, and Case C-94/99 *ARGE Gewässerschutz* [2000] ECR I-11037, paragraph 40. It is clear from those judgments that in the absence of an express exception it is sufficient in principle, for a public works contract to exist, that the contract has been concluded between a local authority on the one hand and a person legally separate from the latter on the other hand. The only case where it is otherwise is where, at the same time, the local authority exercises over that person control similar to that which it exercises over its own departments and where the person carries out most of its activity with the authority or authorities which own it.

205 That is so in the present case. Under Article 88(4) of Law No 66/97 of 30 December 1997 Tragsa, being an instrument and a technical service of the Spanish administration, is required to implement, itself or using its subsidiaries,

only work entrusted to it by the general administration of the State, the autonomous communities or the public bodies subject to them. Under Article 88(1) and (2), Tragsa is a State company and the autonomous communities may invest in it by acquiring shares in its capital.

206 The Spanish authorities were therefore entitled to entrust the work of drawing up the register of olive cultivation to Tragsa without using the tendering procedure.

207 The contested decision should therefore be annulled in so far as it concerns the flat-rate correction of 10% of the total eligible expenditure for the preparation of the register of olive cultivation.

B — *Consumption aid for olive oil*

1. Refusal by the EAGGF to finance all or part of the aid for the consumption of olive oil granted to two packaging plants

208 The first paragraph of point 4.7.3.2 of the Summary Report states that, in accordance with the position it had adopted for financial year 1992 and according to what had been notified to the Spanish authorities in respect of that financial year, the EAGGF imposed specific financial corrections on two packaging plants. These were J. S. Fernandez and N. R. Sevillano.

(a) J. S. Fernandez

209 Since the inspections carried out by the EAGGF had revealed errors in the cost accounting of J. S. Fernandez ('Fernandez'), a financial correction of 10% was imposed on that ground.

(i) Arguments of the parties

210 The Kingdom of Spain points out that there is only one irregularity, namely that the physical stock of empty containers did not correspond with the stock records. The biggest discrepancy found related to the empty 25-litre containers (11 358 kg). However, those containers are not used for olive oil on which aid is received, and that was why the undertaking had not shown them in the records and had explained that they were left over from its activity prior to its participation in the system of consumption aid. The other discrepancies concerning consumption aid involved 202 litres in the case of empty 1 litre and 0.5 litre containers and 26 litres in the case of containers for packaged oil. The fact that the discrepancies in the stocks concerned only 202 litres of oil receiving aid cannot be regarded as such a serious irregularity that it justifies excluding the undertaking from the aid system. That quantity represented only 0.01% of the aid paid to Fernandez for the 1992/93 marketing year.

211 The Commission notes that the Kingdom of Spain acknowledges the existence of irregularities. It points out that the financial correction in question is an extension of the correction which had been imposed in respect of 1992. The grounds and arguments on the basis of which it considered it necessary to make such a correction continued to apply throughout 1993. The size of the discrepancy detected during the inspection should be considered in the light of all the stocks inspected during that visit and not all the stocks throughout the marketing year

concerned. A relatively minor discrepancy during an inspection carried out on a specific date might mean that the discrepancies were large and very serious over the whole marketing year.

(ii) Findings of the Court

212 The first paragraph of Article 7 of Regulation No 3089/78 requires Member States to institute a system of supervision to ensure that the product for which aid has been sought qualifies for such aid.

213 The first subparagraph of Article 12(1) of Regulation No 2677/85, as amended by Regulation No 571/91, provides that for the purposes of the checks referred to in Article 7 of Regulation No 3089/78, the Member States must systematically inspect the stock records of approved packaging plants. They must also carry out random checks on the financial supporting documents relating to the transactions carried out by those plants.

214 The third and fourth subparagraphs of the same provision require Member States to check in the course of the inspections referred to in the first subparagraph that the total quantities of oil stored in bulk and in containers and the empty containers physically present at the undertaking and the storage place referred to in Article 7 of that regulation correspond with the data contained in the stock records. If any doubt arises as to the accuracy of the information given in the application for aid, Member States must also check the accounts of approved undertakings.

215 Furthermore, under Article 3, first paragraph, (a), (b) and (f) of Regulation No 2677/85, as amended by Regulation No 571/91, each packaging plant is required to keep daily stock records giving stocks of olive oil, by origin and packaging, existing at the date on which it was approved and at the beginning of each marketing year, the quantity and quality of each consignment of olive oil entering the plant, by origin and packaging, and the quantity and quality of olive oil packaged. The first paragraph of Article 3, under (d) and (e), provides that the daily stock records must also give the number of immediate containers entering the plant, by capacity, and the number of immediate containers used, by capacity.

216 In the present case, the Kingdom of Spain does not deny the existence of a discrepancy between the physical stocks of empty containers and those shown in the records.

217 The stock records did not therefore comply with Community regulations. Although the discrepancy in the case of empty 1 litre, 0.5 litre and 26 litre containers for packaged oil may be regarded as minimal, the main discrepancy was found in respect of empty 25 litre containers, which, according to the Kingdom of Spain, were not used for olive oil covered by the aid.

218 The Community legislature did not exclude containers with a content of over 5 litres from the requirement that they should be shown in the stock records, as is apparent from Article 3, under (d) and (e), of Regulation No 2677/85.

219 It is clear from the foregoing that the anomalies found during the comparison of the physical stocks of empty containers and the stocks shown in the records justify a financial correction of 10% of the amount of aid paid to Fernandez.

220 The plea based on the financial correction of 10% of the amount of aid paid to Fernandez must therefore be rejected.

(b) N. R. Sevillano

221 Since the inspections carried out by the EAGGF revealed that the application for aid made by N. R. Sevillano ('Sevillano') related to a quantity greater than that for which entitlement to aid had been recognised, a financial correction of 100% was imposed.

(i) Arguments of the parties

222 The Kingdom of Spain contends that in this case the AAO informed the SENPA that it was deducting 274 kg in respect of sales prior to Sevillano's approval and 4 kg in respect of an error in the latter's stock records. It denies that approval was withdrawn because the quantity of oil that was the subject of an application for aid was greater than that giving entitlement to such aid. It points out in particular that Article 12(6) of Regulation No 2677/85, which was amended in March 1993, provides that the penalty imposed on the packaging plant is to be equal to between three and eight times the aid improperly applied for and that, where the quantity for which aid has been improperly applied for exceeds the checked quantity for which entitlement to aid has been recognised by at least 20%, the Member State, in addition to imposing a financial penalty, is to withdraw approval for a period of from one to three years. In February 1992 Sevillano applied for aid in respect of 15 371 kg and the AAO recognised that it was entitled to aid in respect of 15 097 kg, which means an excess of 274 kg, only 1.81% of the quantity authorised to receive aid. The Kingdom of Spain concludes that the financial correction blatantly infringes the principle of proportionality.

223 The Commission contends that the application for aid in respect of a quantity of oil greater than that to which Sevillano was entitled should have led to the immediate withdrawal of that undertaking's approval. In fact, at the time the irregularity in the application for aid was detected the amendment of Article 12(6) by Regulation No 643/93 had not yet entered into force.

224 The Commission contends that countless irregularities had been found during an inspection besides those mentioned by the Kingdom of Spain.

(ii) Findings of the Court

225 It is common ground that the quantity in respect of which consumption aid had been improperly applied for was 278 kg.

226 It is clear from paragraph 52 of the judgment in Case C-45/97 *Spain* v *Commission* [2000] ECR I-5333, which refers to Article 12(6) in its original version, that the competent authority is required to take into consideration the seriousness of the infringement concerned and is thus obliged to comply with the principle of proportionality. In paragraph 54 of the same judgment the Court held that Article 12(6) as amended by Regulation No 643/93 merely lays down the criteria which, in the Commission's view, should guide application of the principle of proportionality in the event of the prescribed penalties being imposed. In the new version of that provision the penalty of withdrawal of approval applies only where the quantity in respect of which consumption aid had been improperly applied for exceeds the checked quantity for which entitlement to aid has been recognised by at least 20%.

227 It is clear from the foregoing that exceeding the quantity for which entitlement to aid has been recognised by 1.81% does not, in any event, justify withdrawal of approval.

228 The financial correction of 100% of the aid declared is essentially based on the incorrect view that the irregularity of the application for aid, due to exceeding the quantity for which entitlement to aid had been recognised by 278 kg, should have resulted in withdrawal of the approval granted to Sevillano. The Commission has not, however, provided details to show the existence of other irregularities justifying a correction of 100%.

229 It is therefore necessary to annul the contested decision in so far as it imposes a flat-rate correction of 100% of the aid declared in respect of Sevillano.

2. The flat-rate correction of 2% of total expenditure declared by the Kingdom of Spain by way of consumption aid for olive oil

230 The Commission states in point 4.7.3.2 of the Summary Report that an inspection conducted between 22 and 26 January 1996 concerning the correct application of Regulation No 4045/89 discovered several infringements, which were set out in Letter No 14826 of 3 April 1996, in particular the absence of accounts, incomplete recording of stock and too few cross-checks.

231 More specifically, verification of a sample of business papers mentioned in the stock records amounted merely to recording their existence, whereas in order for

the verification to be effective that sample should also have been recorded in the accounts, which is a principle of international auditing. The fact that the absence of accounts could elude the AAO's checks indicates the need to make those checks more effective.

232 In the report on the inspection carried out by the AAO on 27 January 1994 at the premises of Corporaciòn Industrial Andalusa SA ('Andalusa'), the AAO inspectors merely noted where the accounts were located. It should be a requirement that the accounts of the undertaking concerned be available during inspections by the AAO.

233 It is also clear from point 4.7.3.2.4 of the Summary Report that the number and quality of cross checks made by the AAO were abnormally low. In one specific case the AAO concluded that the theoretical capacity for pressing and for storage at the undertaking being inspected 'appeared to be compatible with the monthly production shown in the stock records... assuming that the undertaking had operated with more than one eight-hour shift a day'. A statement like this should by systematically checked and confirmed by the AAO, by looking at workers' pay sheets for example, in order to meet the inspection requirements laid down in Article 7 of Regulation No 3089/78.

234 The urgent need to improve the inspection system had already been highlighted in EAGGF's Letter No 22.798 of 13 June 1995 in respect of the 1992 financial year. EAGGF's Letter No 18759 of 13 June 1996 contained a list of improvements made in respect of financial year 1995 and those which followed. However, the Kingdom of Spain incurred and declared expenditure by way of aid for olive oil consumption in respect of financial year 1993 under an inspection system which was defective as regards a number of aspects that were important for determining the propriety of the expenditure. The deficiencies discovered during earlier clearance of accounts operations and those detected during the inspection conducted between 22 and 26 January 1996 concerning the correct application of Regulation No 4045/89 give reason to conclude that there is a genuine risk of loss for the EAGGF.

(a) Arguments of the parties

235 The Kingdom of Spain contends first of all that the EAGGF imposed the financial correction without conducting an on-the-spot inspection in connection with the clearance of accounts for 1993 under Article 9 of Regulation No 729/70, which means that there is no legal basis for the penalty imposed. In particular, the EAGGF did not carry out any inspection in 1993. The penalty was therefore based on inspections made in connection with clearance of the accounts for 1992.

236 The Kingdom of Spain goes on to state that the scope of the inspections conducted by the AAO in order to verify the accuracy of the data contained in the applications for consumption aid submitted by the packaging plants is in no case comparable to that of the inspections carried out by other national and Community bodies under Regulation No 4045/89. The AAO should carry out the necessary checks in order to verify the data and comply with the general time-limits laid down in Article 9(1) of Regulation No 2677/85 and the requirements laid down by Article 12(1) of that regulation in respect of the number of inspections of packaging plants and the content of the programme of work for each marketing year. In view of the variety of the items to be checked, during its inspections the AAO should concentrate on the most significant aspects. It cannot therefore conduct a full audit of the accounts of packaging plants in order to check each of the aid applications submitted. The relative extent of the checks is arranged on a random basis in cases where no abnormal conduct has been found in the undertaking being inspected.

237 The Kingdom of Spain adds that the correction is based mainly on irregularities found at Andalusa, which did not receive consumption aid charged to financial year 1993.

238 Up until 1996 the stock records of packaging plants needed to be inspected only in cases of doubt. The results of the checks carried out at Andalusa were always regarded as sufficient — in view of the fact that it was the first inspection made since the undertaking had been approved for operating under the consumption aid system — to establish that the quantity of oil in respect of which aid had been applied for corresponded to the quantities that entered and left the plant, in accordance with the provisions of the second paragraph of Article 7 of Regulation No 3089/78.

239 Lastly, as regards the plant's packaging and storage capacity, referred to in point 4.7.3.2.4 of the Summary Report, the Kingdom of Spain contends that doubt was cast on it by the pay sheets provided by the undertaking's manager. In the region concerned, however, it is easy to take on temporary staff for packaging work due to the high level of unemployment among workers. It is quite understandable for the owner, in order to avoid problems of social liability linked to such temporary jobs, not to acknowledge that he had employed such staff and not to produce the pay sheets corresponding to the wages actually paid; but that is not evidence sufficient to show that the packing work was not done during overtime, on top of the eight-hour day.

240 As regards the improvements in the AAO's inspection system which were called for by the EAGGF, the Kingdom of Spain states that the recommendations contained in the Fund's letter No 22.798 of 13 June 1995 were included in the AAO's inspection procedures following receipt of that letter in June 1995.

241 The Commission contends that the EAGGF found that the Spanish authorities had not made any changes to their inspection methods after serious discrepancies had been found in the context of clearance of accounts for 1992. It is clear from

EAGGF letter No 14826 of 3 April 1996 that the Fund 'also' inspected two undertakings during the inspection which took place between 22 and 26 January 1996, namely Andalusa and Olior Porcuna SA ('Porcuna'). That letter set out the very serious and numerous irregularities detected at both those undertakings.

242 Those two inspections also enabled the EAGGF to obtain confirmation of the fact that the checks conducted by the AAO were seriously ineffective and inadequate. The inspection reports drawn up by the AAO following the inspections carried out at those undertakings show that most of the irregularities committed had not even been detected.

243 The Commission contends in that regard that the serious irregularities which were found in the inspection system set up by the Spanish authorities constitute a comprehensive infringement of the relevant regulations, which can be checked at any undertaking which has the necessary approval and is therefore subject to the inspection system, whether or not it receives aid during a particular marketing year. At any event, there is still an interval between the time aid is applied for and the time it is paid, similar to the one which exists between the marketing year and the financial year.

244 As regards packaging and storage capacity, the Commission contends that the Kingdom of Spain is using in defence of the undertaking inspected arguments and justifications which the latter has not put forward for itself. If undertaking's packaging capacity appears impossible in the light of the pay sheets produced by the manager, it is for the latter to explain that irregularity if need be. There is nothing to indicate or to prove that the argument regarding temporary recruitment reflects the true position. It is not possible therefore to ensure that that irregularity is not due to fraud relating to the packaging capacity declared.

(b) Findings of the Court

245 As stated in paragraphs 46 and 47 of this judgment, although it is for the Commission to prove the existence of an infringement of the rules on the common organisation of agricultural markets it is not required to demonstrate exhaustively the inadequacy of the checks carried out by the national administrations or the irregularity of the figures they send, but it is up to the Commission to submit evidence capable of establishing the existence of serious and reasonable doubt with regard to such checks or such figures.

246 In letter No 22.798 of 13 June 1995 concerning financial year 1992, the Fund set out irregularities in the inspection system used during the procedure for clearing the accounts for that financial year and made recommendations designed to improve the inspections. It announced that if no such improvement took place flat-rate financial corrections should be applied in future financial years. However, it did not find any improvements until financial year 1995 and thereafter.

247 The Kingdom of Spain did not refute that finding. In its reply it stated that the recommendations contained in that letter were included in the AAO's inspection procedures so that they would comply with the EAGGF requirements following receipt of the letter in June 1995. However, it does not state that those recommendations were applied to the checks carried out in respect of financial year 1993. It therefore appears that the serious deficiencies in the inspection system found during the period of clearing the accounts for 1992 were not rectified as regards the marketing year corresponding to financial year 1993.

248 That is so irrespective of the assessment of the effectiveness of the checks made by AAO officials at Andalusa and Porcuna.

249 The complaint of the Kingdom of Spain that the flat-rate correction of 2% of the total expenditure declared by that Member State in respect of aid for the consumption of olive oil was unfair must therefore be rejected.

C — *Production aid for dried fodder*

250 In point 4.7.5.1 of the Summary Report the EAGGF found that there had been a spectacular increase in the quantities of dried fodder produced and in applications for aid during the recent marketing years, although there had not been a similar increase in Spanish livestock. That finding, together with the rapid disappearance of sun-dried fodder in favour of artificially dried products and the appearance of new and particularly prosperous drying plants in recent years, revealed the need to verify whether the Community regulations were being properly applied in Spain.

251 Following that verification the EAGGF found that checking of the operation giving entitlement to the aid, namely the fact of the fodder leaving the undertaking, was restricted to the existence of the sales invoice and to the weighing note issued by the undertaking itself.

252 The EAGGF also found, during several on-the-spot inspections, that a moisture content on entry of between 20% and 25% was current practice in Spain (the minimum level observed was 16%). Such products had the characteristics of sun-dried fodder. The Spanish authorities should therefore have regarded such

products as being sun-dried and have paid the corresponding aid. Those authorities were required to take effective measures to counter the risk to Community funds caused by declaring sun-dried fodder as artificially-dried fodder (the rate of aid doubles).

1. Arguments of the parties

253 The Kingdom of Spain maintains that the main argument, that due to the moisture content of the fodder entering the plant the Spanish authorities should have considered such products in the same way as sun-dried, is irrelevant. Since Community legislation has not laid down a minimum percentage of moisture when the product enters the drying process, such a requirement cannot be imposed unilaterally by the FEGA. Community legislation does not lay down any conditions with regard to dried fodder apart from the protein content and the moisture content on leaving. Thus, no correction based on different requirements is justified.

254 The Commission replies that the failure by the Spanish authorities to lay down a minimum moisture content for fodder as a measure of checking on the aid in question constitutes an infringement of the Community regulations, as is shown by the objective and purpose of the production aid for such fodder.

2. Findings of the Court

255 Article 1 of Regulation No 1117/78 distinguishes between fodder which has been dried artificially and that dried in other ways, that is to say sun-dried, the latter

being referred to in the second and fourth indents of Article 1(b). The aid granted for sun-dried products is the same as that granted for products that have been dried artificially, less an amount that takes into account the difference between the cost of producing the latter and the cost of producing sun-dried fodder (Article 5(2), second subparagraph, of that regulation).

256 The Kingdom of Spain does not deny that there has been a considerable increase in the quantities produced for which aid has been applied although there has not been a parallel increase in livestock, nor the rapid disappearance of sun-dried fodder in favour of artificially dried products, nor the appearance of new and particularly prosperous drying plants over recent years. As regards those findings, it is likely that in fact some of the fodder allegedly dried artificially has been marketed without actually having undergone artificial drying.

257 Under Article 8(1) of Regulation No 729/70, Member States are to take the measures necessary to satisfy themselves that transactions financed by the Fund are actually carried out and are executed correctly, to prevent and deal with irregularities and to recover sums lost as a result of irregularities or negligence.

258 As the Advocate General rightly states in point 360 of his Opinion, the inspection systems introduced by the Member States must therefore be able to detect fraud where processing undertakings receive production aid for artificially-dried fodder but the fodder produced has been dried in the sun and the artificial-drying operation was symbolic or non-existent, like the costs generated by that operation.

259 To prescribe a minimum moisture content in order to facilitate the identification of such fraudulent practices by setting an objective and physically measurable criterion would be a way of combating the risk of aid being awarded improperly for the production of dried fodder when it is not provided for in the Community regulations.

260 However, contrary to what the Commission contends, such a measure is not the only possible way of preventing fraud. The absence of such a threshold is therefore not sufficient to justify the conclusion that Article 8(1) of Regulation No 729/70 has been infringed.

261 Nevertheless, it is the responsibility of the Member State concerned to satisfy itself that transactions financed by the Fund are actually carried out and are executed correctly.

262 The Kingdom of Spain has not shown that its inspection system, which is based merely on weighing notes and invoices issued by the processing undertaking, has in fact reduced the risk of bringing products that are already practically dry into artificial drying plants.

263 In that regard it should be stressed that fraud prevention is of major importance. It is necessary to ensure that transactions financed by the Fund are actually carried out and are executed correctly, even in circumstances in which Community regulations do not provide precise means for so doing.

264 Consequently, the complaint alleging infringement of the Community regulations on production aid for dried fodder must be rejected.

D — *Infringement of general principles of Community law*

265 The Kingdom of Spain contends generally that the contested decision is based on incorrect subjective considerations and infringes in particular the *audi alteram partem* rule and the principles of good administration, foreseeability of the penalty and, in the alternative, the principle of proportionality. It also finds that there is no evidence for the complaints made.

1. The lack of evidence

266 As regards the plea alleging lack of evidence for the complaints made by the Commission, suffice it to say that the Court exercises its power of review as regards the evidence substantiating a financial correction by apportioning the burden of proof in the context of an action for annulment brought by a Member State against a Commission decision with regard to the clearance of EAGGF accounts. In that context, the matter of whether or not evidence was adduced has already been covered in the consideration of the pleas on which the Kingdom of Spain bases its case and which were assessed above; the lack of evidence cannot be put forward as a specific plea without any connection with a specific situation.

2. The *audi alteram partem* rule and the principle of good administration

267 The Kingdom of Spain complains in essence that the Commission has failed to take its arguments into account and has neither challenged nor refuted them.

268 However, whilst the Commission must consider scrupulously the arguments and evidence put forward by the Member State concerned in order to satisfy itself of the merits of the decision to intervene, in the light of the evidence adduced, it is under no obligation to challenge or refute them expressly.

3. The principle of *nulla poena sine lege*

269 In this regard, suffice it to say that, as is clear from paragraph 45 above, the Commission is permitted under Articles 2 and 3 of Regulation No 729/70 to charge to the EAGGF only sums paid in accordance with the Community rules. The corrections imposed in the present case cannot therefore be regarded as penalties but are rather the necessary consequence of the illegality of the payments made by the Kingdom of Spain.

270 As regards the prior requirement to show that the Community budget might incur a serious loss, it should be noted that, as is clear from paragraph 146 above, the Commission is not required to prove that there has been a loss but may simply adduce sound evidence of such loss (*Ireland* v *Commission*, cited above, paragraph 29).

4. The principle of proportionality

271 The principle of proportionality must be observed when imposing financial corrections in order that they may be limited to what is actually necessary in the light of the seriousness of the infringements concerned. Compliance with the

principle of proportionality in connection with production aid paid to two RPGs and consumption aid paid to one packaging plant has already been considered as part of the analysis of the complaints made in that regard by the Kingdom of Spain.

272 As regards more generally the system of aid for the production and consumption of olive oil or the production of dried fodder, the Spanish Government contends that it has shown that there are no deficiencies in the inspection system in Spain as significant as is maintained by the Commission.

273 The Court has consistently held that so far as the amount of the financial correction is concerned, the Commission may refuse to charge to the EAGGF even the whole of the expenditure in question if it finds that there are no adequate control procedures (see Case C-242/97 *Belgium* v *Commission* [2000] ECR I-3421, paragraph 122).

274 It follows from the above that the plea alleging infringement of general principles of Community law must be rejected.

Costs

275 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Kingdom of Spain has been largely unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. **Annuls Commission Decision 97/608/EC of 30 July 1997 amending Decision 97/333/EC on the clearance of the accounts presented by the Member States in respect of the expenditure for 1993 of the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) as regards both the flat-rate correction of 100% of the aid declared concerning N. R. Sevillano and the flat-rate correction of 10% of the total eligible expenditure for setting up the register of olive cultivation;**

2. **Dismisses the remainder of the application;**

3. **Orders the Kingdom of Spain to pay the costs.**

Puissochet Gulmann Skouris

Macken Colneric

Delivered in open court in Luxembourg on 8 May 2003.

R. Grass J.-P. Puissochet

Registrar President of the Sixth Chamber