# OPINION OF ADVOCATE GENERAL JACOBS
## delivered on 12 July 2001 [1]

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1. In these proceedings Spain seeks the partial annulment of Commission Decision 1999/186/EC of 3 February 1999 excluding from Community financing certain expenditure incurred by the Member States under the Guarantee Section of the European Agricultural Guidance and Guarantee Fund [2] and Commission Decision 1999/187/EC of 3 February 1999 on the clearance of the accounts presented by the Member States in respect of the expenditure for 1995 of the Guarantee Section of the European Agricultural Guidance and Guarantee Fund. [3] Its action relates to the refusal of reimbursement of in total ESP 16 015 560 464.

2 — OJ 1999 L 61, p. 34.

3 — OJ 1999 L 61, p. 37.

## Introduction

2. It appears from Article 1 of and the annex to Decision 1999/187 that the expenditure which the applicant wished to charge to the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (hereinafter: 'the Fund') as falling under the clearance of accounts for 1995 amounted to ESP 858 256 394 837. Of this, the Commission recognised ESP 833 321 278 217 as chargeable to the Fund, leaving ESP 24 935 116 620 to be borne by the applicant. According to the applicant, that sum comprises a number of amounts which the Commission should have recognised as chargeable to the Fund:

— ESP 1 471 398 749 by way of compensatory aid in the arable crops sector

— ESP 215 011 390 by way of compensatory aid for setting aside of land

— ESP 1 393 983 000 by way of special premiums for beef and premiums for suckler cows

— ESP 4 484 785 615 in relation to the additional levy payable by producers or purchasers of cows' milk

— ESP 4 317 179 696 by way of production aid for olive oil

— ESP 730 638 679 in relation to wine

— ESP 42 616 276 by way of aid for fibre flax and hemp

— ESP 3 362 203 596 in relation to delayed payments in various sectors.

3. The applicant was informed of the corrections which the Commission intended to make to the applicant's accounts in the course of bilateral discussions which took place prior to the adoption of Decision 1999/187. The grounds for the corrections imposed are set out in Summary Report No VI/6462/98 of 12 January 1998 on the results of inspections concerning the clearance of the EAGGF Guarantee Section accounts for 1995 ('the Summary Report'), extracts from which are annexed to the Commission's defence.

4. By Decision 1999/186, the Commission excluded from financing under the Fund certain expenditure of the Member States. As regards Spain, the Commission excluded ESP 5 754 750 215, falling under the clearance of accounts for 1996, corresponding to production aid granted in the olive oil sector. The applicant contests the lawfulness of that exclusion.

5. Before examining in turn the Spanish Government's claims and detailed arguments as they apply to the eight sectors in issue, it may be helpful to set out the salient features of the legislative framework governing the financing of the Common Agricultural Policy and the clearance of accounts under the Fund.

## The legal framework

### *Legislative provisions*

6. The basic rules on the financing of the Common Agricultural Policy are laid down in Regulation No 729/70 [4] which provides that the Fund shall finance common measures adopted in order to achieve the objectives set out in Article 39(1)(a) of the EC Treaty (now, after amendment, Article 33(1)(a) EC), including refunds on exports to third countries [5] and intervention intended to stabilise the agricultural markets, [6] granted or undertaken in accordance with Community rules within the framework of the common organisation of agricultural markets.

7. Article 5 of Regulation No 729/70 provides for the clearance of the accounts submitted by the national bodies empowered to effect expenditure on those activities ('paying agencies'). Paragraph 2(c) of that provision, as amended by Regulation No 1287/95, [7] explicitly grants the Commission the power to exclude from Community financing expenditure which has not been effected in compliance with Community rules. Such expenditure may be excluded by the Commission either in the annual clearance of accounts decisions — which the Commission adopts before 30 April of the year following the financial year concerned [8] — or by separate 'com-

4 — Regulation (EEC) No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy, OJ English Special Edition 1970 (I), p. 218 amended on several occasions, most recently by Council Regulation (EC) No 1287/95 of 22 May 1995, OJ 1995 L 125, p. 1. Regulation No 729/70 was replaced, with effect for expenditure from 1 January 2000, by Council Regulation (EC) No 1258/1999 of 17 May 1999 on the financing of the common agricultural policy, OJ 1999 L 160, p. 103.

5 — Article 2(1).

6 — Article 3(1).

7 — Council Regulation (EC) No 1287/95 of 22 May 1995 amending Regulation (EEC) No 729/70 on the financing of the common agricultural policy, OJ 1995 L 125, p. 1. Under Article 2(2), the amendments made by this regulation to Article 5(2)(c) of Regulation No 729/70 apply to expenditure claimed against a financial year after the year which commenced on 16 October 1992.

8 — Article 5(2)(b) of Regulation No 729/70 as amended. The financial year of the Fund runs from 16 October to 15 October of the following year.

pliance decisions' covering specific amounts and relating to one or more financial years. [9] The Commission evaluates the amounts to be excluded having regard to the degree of non-compliance found and, more specifically, to the nature and gravity of the infringement and the financial loss suffered by the Community.

8. Article 8(1) of Regulation No 729/70 requires Member States to take measures to ensure correct execution of transactions financed by the Fund, to prevent irregularities and to recover sums lost thereby. In most agricultural sectors, specific Community measures set out in detail what measures the Member States must adopt in order to fulfil their general obligations under Article 8(1). In that context, Regulation No 3508/92, [10] which establishes an Integrated Administration and Control System (hereinafter: 'IACS'), is of particular importance. That system, which applies in several agricultural sectors, requires the Member States to carry out administrative checks, on-the-spot checks and, if appropriate, verification by aerial or satellite remote sensing. [11] However, even where Regulation No 3508/92 or more specific Community rules do not expressly provide for the adoption of particular supervisory measures, Article 8(1) — which constitutes an expression of the obligations imposed on the Member States by Article 5 of the EC Treaty (now, after amendment, Article 10 EC) [12] — imposes on the Member States a general obligation to take all the measures necessary to satisfy themselves that the 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. [13]

9. Article 8(2) of Regulation No 729/70 provides that, in the absence of total recovery, the financial consequences of irregularities or negligence shall 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'. According to the case-law of the Court, Regulation No 729/70 therefore 'permit[s] the Commission to charge to the EAGGF only sums paid in accordance with the rules laid down in the various sectors of agricultural production while leaving the Member States the burden of any other sum paid'. [14] Where a Member State fails, contrary to Article 8(1) of the

9 — Article 5(2)(c) of Regulation No 729/70 as amended.

10 — Council Regulation (EEC) No 3508/92 of 27 November 1992 establishing an integrated administration and control system for certain Community aid schemes, OJ 1992 L 355 p. 1.

11 — See, in particular, Article 7 of the Regulation.

12 — Case C-209/96 *United Kingdom* v *Commission* [1998] ECR I-5655, paragraph 43 of the judgment.

13 — See Case C-8/88 *Germany* v *Commission* [1990] ECR I-2321, paragraphs 16 and 17 of the judgment.

14 — Case 11/76 *Netherlands* v *Commission* [1979] ECR 245, paragraphs 8 and 9 of the judgment and, most recently, judgment of 6 March 2001 in Case C-278/98 *Netherlands* v *Commission*, paragraph 38.

Regulation or more specific provisions, to take the measures necessary to ensure that transactions financed by the Fund are actually carried out and are executed correctly, the Commission may therefore refuse to charge to the Fund the expenditure incurred in connection with those transactions either wholly or in part. [15]

10. The Commission is empowered, under Article 9 of Regulation No 729/70, to take a number of measures to verify and supplement the information and documents furnished by the Member State authorities. It may, for example, carry out inspections on the spot and is entitled to access to all books and documents relating to expenditure financed by the Fund and to conduct or arrange with the Member States for the conduct of inquiries and inspections.

*The Commission's guidelines*

11. In 1993 the Commission established guidelines for the calculation of the financial adjustments, or corrections, which it applies where a Member State fails to comply with the general provision in Article 8(1) of Regulation No 729/70 or with more specific rules such as those laid down in Regulation No 3508/92. Those guidelines, set out in a document known as the Belle Group Report, [16] take as their central principle that any financial adjustment should be based on a failure by the Member State to respect Community rules so as to affect Community expenditure. The choice of the rate of adjustment to be applied flows from an estimation of risk. Where possible, the Commission will calculate the reductions by extrapolation from reliable sample inspections. Where insufficient information is available to support a process of extrapolation, the Commission will apply flat-rate reductions in proportion to the seriousness of the failings of the Member State and the degree of financial risk posed to the Fund. There are three levels of flat-rate reductions: a reduction of 10% is applied 'where the deficiency relates to the whole of or fundamental elements of the control system or to the operation of controls essential to assuring the regularity of the expenditure, such that it can reasonably be concluded that there was a high risk of widespread loss to the EAGGF'; a reduction of 5% 'where the deficiency relates to important elements of the control system or to the operation of controls which play an important part in the assurance of the regularity of the expenditure, such that it can reasonably be concluded that the risk of loss to the EAGGF was significant'; and a reduction of 2% 'where the deficiency is limited to parts of the control system of lesser importance, or to the operation of controls which are not essential to the assurance of the regularity of the expenditure, such that it can reason-

15 — Case 347/85 *United Kingdom* v *Commission* [1988] ECR 1749, paragraph 13 of the judgment; Case C-238/96 *Ireland* v *Commission* [1998] ECR I-5801, paragraph 36.

16 — Document No VI/216/93 of 3 June 1993.

ably be concluded that the risk of loss to the EAGGF was minor'. [17]

12. The Commission's guidelines were revised in 1997. [18] While the new guidelines maintain the basic principles, the definition of the circumstances in which the 2%, 5% and 10% rates of reductions apply has been refined, and the guidelines now explicitly provide for a 25% rate of reduction where a Member State's control system is completely absent or gravely deficient.

13. The criteria for application of flat-rate adjustments laid down in the Commission's guidelines have been examined by the Court of Justice on a number of occasions. It is clear from that case-law that the Court considers those criteria to be valid, and it also appears that the Commission cannot depart from the guidelines in a particular instance unless, perhaps, it is able to show that such a departure is justified by the specific circumstances of the case. [19]

17 — As translated from the French version of the Belle Group Report in Case C-242/97 *Belgium* v *Commission* [2000] ECR I-3421, paragraph 21 of the judgment.

18 — Document No VI/5330/97 of 23 December 1997.

19 — See Case C-61/95 *Greece* v *Commission* [1998] ECR I-207, paragraph 21 of the judgment; Case C-242/96 *Italy* v *Commission* [1998] ECR I-5863, paragraphs 43 to 44 and 66; Case C-242/97, cited in note 17, paragraphs 19 to 21, 113, 120 and 121. See also the Opinion of Advocate General Fennelly in Case C-50/94 *Greece* v *Commission* [1996] ECR I-3331, paragraphs 39 to 42 and the Opinion of 6 March 2001 of Advocate General Geelhoed in Case C-375/99 *Spain* v *Commission*, paragraphs 17 to 25.

## Aid in the arable crops sector

### *Legislative provisions*

14. Regulation No 3887/92, [20] which lays down detailed rules for applying the IACS, sets out the criteria and technical procedures for administrative and on-the-spot checks which must be carried out by the Member States in respect of 'livestock' aid and 'area' aid. Article 6 of that regulation provides:

'1. Administrative and on-the-spot checks shall be made in such a way as to ensure effective verification of compliance with the terms under which aids and premiums are granted.

2. The administrative checks referred to in Article 8(1) of Regulation (EEC) No 3508/92 shall include cross-checks on parcels and animals declared in order to ensure that aid is not granted twice in respect of the same calendar year without justification.

20 — Commission Regulation (EEC) No 3887/92 of 23 December 1992 laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes, OJ 1992 L 391, p. 36.

3. On-the-spot checks shall cover at least a significant percentage of applications. The significant percentage shall represent at least:

— 10% of "livestock" aid applications or participation declarations,

— 5% of "area" aid applications. However, this percentage shall be reduced to 3% for area aid applications numbering more than 700 000 per Member State in the calendar year.

Should on-the-spot checks reveal significant irregularities in a region or part of a region the competent authority shall make additional checks during the current year in that area and shall increase the percentage of applications to be checked in the following year.

4. Applications subjected to on-the-spot checking shall be selected by the competent authority on the basis of a risk analysis and an element of representativeness of the aid applications submitted. The risk analysis shall take account of:

— the amount of aid involved,

— the number of parcels and the area or number of animals for which aid is requested,

— changes from the previous year,

— the findings of checks made in past years,

— other factors to be defined by the Member State.

5. On-the-spot checks shall be unannounced and cover all the agricultural parcels and animals covered by one or more applications. Advance warning limited to the strict minimum necessary may however be given, although as a general rule, this should not exceed 48 hours.

At least 50% of the minimal checks on animals shall be made during the retention period. Checks may be effected outside that period only if the register provided for in

Article 4 of Council Directive 92/102/EEC [21] is available.

...'

15. Under Article 12 of Regulation No 3887/92:

'Every inspection visit must be the subject of a report setting out, in particular, the reasons for the visit, the persons present, the number of parcels visited, those measured, the measuring methods used, the number of animals of each species found and, where applicable, their identity numbers.

It will be open to the farmer or his representative to sign the report. He may either merely attest his presence at the inspection or also add his observations.'

21 — Council Directive 92/102/EEC of 27 November 1992 on the identification and registration of animals, OJ 1992 L 355, p. 32.

*Summary of the arguments*

16. The Spanish Government seeks the annulment of Decision 1999/187 in so far as it excluded from financing under the Fund ESP 1 471 398 749. That sum corresponds to a 5% flat-rate reduction in the aid paid by the autonomous region of Aragón in respect of arable crops. It appears from the Summary Report that the Commission imposed that correction on the grounds that 'while in Andalusia the situation was satisfactory, the checks carried out in Aragón in relation to the harvest of 1994, and which related only to the quality of on-the-spot checks, have revealed serious problems'. More specifically, the Commission found the application of the IACS in Aragón to be incorrect in four respects. First, most of the holdings selected for on-the-spot checks were in areas where the cadastral register had been updated recently and where the risk of fraud and errors was therefore lower than in areas with old and/or deficient registers. Thus the selection process was not based on a risk analysis as required by Article 6(4) of Regulation No 3887/92, nor was it representative within the meaning of that provision. Second, contrary to Article 6(5) of Regulation No 3887/92, the on-the-spot checks carried out did not include all of the agricultural parcels covered by aid applications, and that was the case even where inspections of certain parcels had revealed irregularities. Third, the authorities did not draw up inspection reports in instances where no irregularities had been found. That practice was at variance with

Article 12 of Regulation No 3887/92. Finally, a visit by the Commission's inspectors had revealed irregularities on 2 out of 12 holdings which had previously been checked by the authorities of Aragón, casting doubt on the general quality of on-site checks.

17. The Spanish Government considers those grounds to be unfounded. First, Article 6(4) provides, in the Spanish language version, that the selection of applications subjected to on-the-spot checks shall be selected *in particular* ('principalmente') on the basis of a risk analysis and an element of representativeness, and it explicitly allows 'other factors to be defined by the Member State' to be taken into account. The selection in Aragón, which took into account the number of applications and the amounts of aid granted, as well as practical considerations related to the greater ease and efficiency of carrying out checks in areas with up-to-date cadastral registers, thus complied with Article 6(4) of the Regulation. In any event, the Spanish Government considers that the risk of irregularities is not greater in areas with old or deficient cadastral registers. Moreover, the cadastral registers in 32% of the municipalities (*términos municipales*) selected for on-the-spot checks dated from before 1960; the Commission's allegation is also for that reason unfounded. Second, while it is true that the inspectors in Aragón did not systematically draw up individual reports of all on-the-spot checks carried out in 1994, records do exist of each of the checks carried out. The fact that the farmers were not given the possibility of signing those records is irrelevant since signature by the farmer is optional under Article 12 of Regulation No 3887/92. Instructions have moreover been given for individual reports to be drawn up with effect for checks carried out from the beginning of the agricultural year of 1995. Third, although the visit by the Commission's inspectors revealed irregularities in 2 out of 12 cases, those irregularities were of minor significance.

18. The Spanish Government adds to those arguments that the autonomous region of Aragón complied fully with the requirement of checks in 5% of all area aid applications under Article 6(3) of Regulation No 3887/92, and that the Commission itself accepted [22] that the system of controls as a whole provided good cover of areas and aid applications in 1994. That system therefore ensured effective verification of compliance with the terms under which aids and premiums are granted as required by Article 6(1) of Regulation No 3887/92. Finally, it points out that the Conciliation Body, seised by the Spanish Government, recommended that the Commission should reconsider the adjustment of 5% in the light of the Government's explanations. [23] Contrary to that recommendation, the Commission maintained its decision.

22 — The Spanish Government refers to Letter No 10/199 of 3 March 1995, annexed to the application.

23 — Recommendation notified to the Spanish Government by letter of 19 January 1999, annexed to the application.

*Analysis*

19. In my view, the submissions of the Spanish Government should not be upheld.

20. It is clear from the wording of Article 6(4) of Regulation No 3887/92 that the selection of holdings for on-the-spot checks must be based on two criteria: a risk analysis and an element of representativeness. In my view — and here I agree with the Spanish Government — those are not the only criteria which the Member States may apply. That view cannot, I consider, be based on the fact that Article 6(4) mentions 'other factors to be defined by the Member State', since it is clear from the wording that those 'other factors' must be of direct relevance to the risk analysis to be carried out. The possibility of taking into account criteria other than risk and representativeness is however supported by the wording of the Danish, Dutch, Finnish, French, Greek, Italian, Portuguese and Spanish versions of the Regulation which provide that the selection must be based *in particular* ('navnlig', 'met name', 'erityisesti', 'notamment', 'κυρίως', 'in particolare', 'designadamente', 'principalmente') on a risk analysis and an element of representativeness. The fact that the English, German and Swedish versions do not contain an equivalent word is not, I consider, decisive. However, the criteria used to select holdings must not be contrary to the purpose of the Regulation. Criteria which have the effect of reducing the likelihood that the controls carried out will reveal irregularities are therefore in any event unlawful.

21. By taking into account the administrative convenience of controls in areas with up-to-date cadastral registers, where the risk of errors in the allocation of aid is undoubtedly smaller than in areas with old and/or defective registers, the authorities of Aragón applied a selection criterion reducing the likelihood that irregularities would be detected. The fact that concentrating on those areas may have enabled the authorities of Aragón to increase the total number of checks is, as the Commission emphasises, irrelevant. What matters is not the quantity but the quality of the checks carried out and thus the ability of the control system to disclose irregularities.

22. The failure to draw up individual reports of on-the-spot checks also constitutes, I consider, a violation of Article 12 of Regulation No 3887/92. The establishment of purely internal records is insufficient since those records do not offer farmers any opportunity to read and to sign the document, nor do they enable the Commission to verify the effectiveness of the controls carried out.

23. Moreover, the Spanish Government does not deny that the on-the-spot checks carried out did not in all instances cover all the relevant parcels or that the Commission's inspectors found irregularities on 2 out of 12 holdings which had previously been controlled by the authorities of Aragón.

24. In my view therefore the applicant has failed to show that the control system operated in Aragón in 1994 complied with Articles 6(4) and 12 of Regulation No 3887/92, and that the Commission was therefore not entitled to adjust the amount of funding chargeable to the Fund. It cannot, contrary to what the applicant maintains, affect the Commission's right to make that adjustment that the authorities of Aragón may have fulfilled their obligations under other provisions — such as Article 6(1) and 6(3) — of that Regulation. With regard to the Commission's alleged failure to follow the Conciliation Body's recommendations, suffice it to say that under Article 1(2)(a) of Decision 94/442/EEC, [24] the Commission is not bound by the recommendations of that Body. [25]

25. Given that the Commission was entitled to make an adjustment, the question arises whether the flat-rate adjustment of 5% which it applied was, as the Spanish Government suggests, excessive. According to the Commission's defence, the errors found in the application of IACS taken together show that there was a significant risk of loss to the Community budget, and the reduction was therefore fully justified. That assessment of the facts might appear to be strict in the light of the Conciliation Body's recommendation and the fact that the irregularities found by the Fund's inspectors on 2 out of 12 holdings were, according to the Spanish Government's detailed explanations, of minor importance.

26. I do not consider, however, that the Court should annul the Commission's adjustment. While it is, according to the Court's settled case-law, for the Commission to prove that the rules of the common organisation of the agricultural markets have been infringed, it is for the Member State to demonstrate that the Commission committed an error as to the financial consequences to be drawn from that infringement. [26] As Advocate General Fen-

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

25 — Case C-44/97 *Germany* v *Commission* [1999] ECR I-7177, paragraph 18 of the judgment.

26 — See, in particular, Case 347/85, cited in note 15, paragraphs 16 to 18 of the Judgment. See also Case C-281/89 *Italy* v *Commission* [1991] ECR I-347, paragraph 19; Case C-48/91 *Netherlands* v *Commission* [1993] ECR I-5611, paragraph 18; and most recently Case C-278/98, cited in note 14, paragraph 41.

nelly explained in *Greece* v *Commission*,[27] 'the aggrieved Member State must, pursuant to the principle *actori incumbit probatio*,[28] prove with at least a reasonable degree of certainty[29] that the Commission has erred'.

27. In this case, the applicant has not provided any evidence that the Commission relied on incorrect facts, nor has it shown that the irregularities identified in the region of Aragón did not affect the Community budget or that they did so to an appreciably lesser extent than estimated by the Commission. The applicant has therefore, in my view, failed to establish that by applying an adjustment of 5% to aids for arable crops the Commission erred in law.

28. I conclude that the Spanish Government's claim in relation to the disallowance of expenditure related to aid for arable crops should be rejected.

27 — Case C-50/94, cited in note 19, paragraph 16 of the Opinion.

28 — This principle was cited by Advocate General Mischo in his Opinion in Case C-281/89, cited in note 26, paragraph 18.

29 — See the Opinion of Advocate General Gand in Case 8/65 *Acciaierie e Ferriere Pugliesi* [1966] ECR 1, p. 12.

**Aid for setting aside of land**

*Legislative provisions*

29. Regulation No 1765/92[30] establishes a system of compensatory payments, or aid, for producers of arable crops. Producers may apply for such payments in respect of areas which are subject to set-aside in accordance with Article 7 of the Regulation.[31] Areas subject to set-aside normally lie fallow. Article 7(4) provides however that:

'The land set aside may be used for the provision of materials for the manufacture within the Community of products not primarily intended for human or animal consumption, provided that effective control systems are applied.'

30. Regulation No 334/93 lays down detailed rules implementing that provision.[32] The fifth recital in the preamble to

30 — Council Regulation (EEC) No 1765/92 of 30 June 1992 establishing a support system for producers of certain arable crops, OJ 1992 L 181, p. 12.

31 — See Title 1 of the Regulation, especially Article 2(2).

32 — Commission Regulation (EEC) No 334/93 of 15 February 1993 laying down detailed implementing rules for the use of land set aside for the provision of materials for the manufacture within the Community of products not primarily intended for human or animal consumption, OJ 1993 L 38, p. 12.

that regulation states that 'for reasons of control, it is necessary to require that the raw material cultivated shall be the subject of a contract between the agricultural producer designated as the claimant and either a first processor or a collector, before the sowing of the raw material concerned' and that 'this contract shall serve as a significant instrument in contributing to a balanced market'.

31. In accordance with that statement in the preamble, Article 3(3) of Regulation No 334/93 provides:

'The claimant must deliver all of the raw material harvested, and the collector or first processor must take delivery of it and guarantee that an equivalent quantity of this raw material be used within the Community in the manufacture of one or more of the end products specified in Annex II.'

32. Under Article 6(1) of Regulation No 334/93, in support of an application for compensation, the claimant must 'submit to his competent [national] authority a contract, signed before the first sowing of the raw material concerned, concluded between himself and either the collector or the first processor'. That contract must contain certain specified information including, under point (e), 'the forecast quantity for each species and variety, and any conditions which may apply to its delivery. That quantity shall at least accord with the yield considered representative by the competent authority for the raw material in question. The yield shall take account of, *inter alia*, the stated average yield, if any, for the region concerned'.

33. Article 7(2) and (3) provide, so far as relevant:

'2. If the claimant is unable to provide the raw material specified in his contract, the contract may be adjusted or annulled. In that event, the competent authorities of both parties shall receive prior notice, in order to allow all necessary controls to be carried out....

3. The claimant shall declare to his competent authority the total quantity of raw material which has been harvested, by species and variety, and shall confirm the party to whom he has delivered this raw material.'

*Summary of the arguments*

34. The applicant's claim for annulment of Decision 1999/187 relates to the exclusion

from Community funding of ESP 215 011 390, equivalent to a 5% flat-rate correction in expenditure relating to compensatory aid for setting aside of land awarded to large producers in certain Spanish regions. [33] According to the Summary Report, the Commission applied that correction because it had found numerous deficiencies in the control system operated in Spain. The competent authorities had not established representative yields for the raw materials produced on land subject to set-aside, nor had they checked that the forecast quantities in the contracts between claimants and collectors/processors were realistic and in accordance with representative yields. Moreover, the authorities had failed to verify by on-site checks whether claimants in fact delivered the forecast quantities to the collectors/processors. The Commission took the view, as explained in its defence, that Spain had for those reasons failed to implement 'effective control systems' as required by Article 7(4) of Regulation No 1765/92 and to comply with its more specific obligations under Articles 6 and 7 of Regulation No 334/93. As a result of those failures, large amounts of raw materials produced on land subject to set-aside had — contrary to the purpose of Regulation No 1765/92 — been diverted towards the market in materials for human or animal consumption. That finding was confirmed, in particular, by a control visit of the inspectors of the Fund to a processing undertaking in the region of Andalusia and by data — provided in part by the Spanish Government — concerning the quantities of materials delivered pursuant to set-aside contracts in other parts of Spain.

35. The applicant contests those reasons on, essentially, four grounds. First, Article 6(1)(e) of Regulation No 334/93 does not impose an obligation to establish representative yields; the Member States are required to control the plausibility of forecast quantities laid down in contracts between claimants and collectors/processors on a case-by-case basis only. Second, Regulation No 334/93 does not explicitly require on-the-spot checks aimed at verifying the quantities delivered to be carried out in areas subject to set-aside. Control measures have to be carried out, under Article 7(2) of the Regulation, only where a contract is either annulled or amended. Third, the Commission's adjustment was based solely on a visit by the Fund's inspectors to a single processing undertaking, and it failed to take account of the drought in 1994 which led to a reduction in the harvest from areas subject to set-aside. Finally, the Spanish Government insists that even if certain Spanish farmers had failed to deliver the forecast quantities to the collectors/processors, that would not have caused any financial loss for the Fund.

33 — Regions where yields from farm land subject to set-aside were found by the Commission to have been less than 70% of yields from similar land not subject to set-aside.

36. Relying on those arguments, the applicant considers that the adjustment applied

by the Commission to aid for set-aside is unlawful and, in any event, excessive.

*Analysis*

37. I find the applicant's arguments unconvincing.

38. It appears from the Summary Report that the Commission based its adjustment on a number of grounds. One of those grounds was, contrary to the applicant's assertions, that the competent authorities in Spain had not controlled on a case-by-case basis the plausibility of the forecasts inserted into the contracts between claimants and collectors/processors. The applicant has adduced no evidence that such checks actually took place. It may therefore be concluded, without its being necessary to decide whether the alleged failure to establish general representative yields constitutes a violation of Community law, that the applicant failed to comply with its obligations under Article 6(1)(e) of Regulation No 334/93.

39. The applicant's argument based on the absence of a specific obligation in Regulation No 334/93 to carry out on-the-spot checks should not be upheld either. Article 3(3) of the Regulation provides that the claimant must deliver all of the raw material harvested to the collector/processor and, in order to ensure that that condition is met, submit a declaration to the competent authorities. [34] The effectiveness of those rules, which aim to ensure compliance with the condition laid down in Article 7(4) of Regulation No 1765/92, would be undermined if the competent authorities did not carry out on-the-spot checks where the declarations submitted by farmers create a suspicion of fraud or irregularities. I therefore agree with the Commission that the scheme of Regulation No 334/93 as a whole envisages that on-the-spot checks be carried out. Moreover, the Court has consistently held that the Member States are under a general obligation, under Article 8(1) of Regulation No 729/70 and Article 10 of the Treaty, to take the measures necessary to satisfy themselves that the transactions financed by the EAGGF are actually carried out and are executed correctly, even if the specific Community act does not expressly provide for the adoption of particular supervisory measures. [35] In my view, the applicant has not shown that the competent authorities in Spain fulfilled that general obligation.

40. With regard to the allegation that the Commission's decision was based on a visit

34 — See also the sixth recital in the preamble to Regulation No 334/93.

35 — See in particular Case C-8/88, cited in note 13, paragraphs 16 and 17 of the judgment; Case C-242/96, cited in note 19, paragraph 114.

to a single processing undertaking in the region of Andalusia, it may be recalled that what counts according to the case-law is not the number of random inspections carried out by the Commission but the frequency and effectiveness of the inspections for which the Member State is responsible. [36] In any event, it appears from the Summary Report and the Commission's defence that the decision to apply an adjustment of 5% was not based on an extrapolation of the results of the inspection in Andalusia, and that the Commission took account of data concerning deliveries of raw materials in several Spanish regions and referred to the inspection only by way of example. Nor is the Commission's decision affected by the fact that a drought occurred in parts of Spain in the agricultural year of 1994. It is apparent from the detailed reasoning in the Summary Report that the Commission took that circumstance into account and, as the Commission points out, the existence of drought cannot in any event explain the occurrence of considerable differences between the average yields from land subject to set-aside and yields from other land.

41. Finally, the applicant's argument that the absence of adequate controls in Spain did not expose the Fund to any risk of financial loss cannot be accepted either. The failure to implement adequate controls enabled farmers, as the Commission has argued, to divert raw materials produced on land subject to set-aside towards the more lucrative market in materials for human consumption. That in turn weakened the ability of the Community rules to regulate the market as intended, created distortions of competition between farmers and, perhaps more importantly, led to payment of aid for set-aside in circumstances where such aid should not have been granted because the condition as to the use of raw materials laid down in Article 7(4) of Regulation No 1765/92 had not been respected.

42. I conclude that the Spanish Government has failed to show that the adjustment of 5% applied by the Commission to aid for set-aside of land was unfounded or excessive, and that its claim should be rejected.

**Special premiums for beef and premiums for suckler cows**

*Legislative provisions*

43. Aid in the bovine animals sector is subject to the provisions of Regulation

36 — Case C-242/96, cited in note 19, paragraph 66 of the judgment.

No 3887/92 set out above.[37] The following provisions are also relevant.

44. Regulation No 3508/92[38] provides in Article 2 that the IACS shall comprise, *inter alia*, a computerised database and an alphanumeric system for the identification and registration of animals. Article 8(1) of the regulation provides that the Member States shall carry out administrative checks on aid applications, supplemented by on-the-spot checks covering a sample of agricultural holdings.

45. Directive 92/102[39] on the identification and registration of animals provides in Article 4(1) for the establishment of a register stating the number of animals present on each agricultural holding which must include an up-to-date record of all births, deaths and movement of animals. Under Article 5 of the Directive, ear tags — which must be approved by the authorities, tamper-proof and easily readable — are to be applied before animals leave their holding of birth, and no mark is to be removed or replaced without the permission of the competent authority. The deadline for implementation of the provisions of Directive 92/102 applicable to bovine animals expired before the financial year of 1994.[40]

*Summary of the arguments*

46. The applicant challenges the Commission's refusal of reimbursement, in respect of the financial years 1994 and 1995, of ESP 1 393 983 000 by way of special premiums for beef and premiums for suckler cows. That amount corresponds to flat-rate reductions of 2%, 5% and 10% applied in accordance with the frequency of controls carried out in each of the Spanish provinces. According to the Summary Report, the Commission applied those reductions because the control system operated by the competent Spanish authorities fell short in several respects of the requirements imposed by Community law. First, the computerised database provided for in Article 2 of Regulation No 3508/92 was not fully operational. Annual and regional cross-checks on animals had therefore not taken place as required by Article 8(1) of that regulation and Article 6(2) of Regulation No 3887/92. Second, the selection of applications for on-the-spot checks relied on information contained in applications made in previous years rather than on up-to-date information, and was thus not based on a risk analysis within the meaning of Article 6(4) of Regulation No 3887/92. Third, the registration of animals had, at least until 1996,[41] been inadequate, with many animals appearing in the registry without any date of birth and/or precise indication of place of origin. Fourth, a large proportion

37 — See paragraphs 14 and 15 above.
38 — Cited in note 10.
39 — Cited in note 21.
40 — Article 11(1) of the Directive.
41 — At which time Spain took steps to comply with the provisions of Directive 92/102.

of the on-the-spot checks carried out by the Spanish authorities had taken place outside the period of retention although, under Article 6(5) of Regulation No 3887/92, checks may be carried out outside that period only if the register provided for in Article 4 of Directive 92/102 is available. [42] Fifth, bovine animals did not carry easily readable and tamper-free ear tags as envisaged by Articles 4 and 5 of Directive 92/102. Sixth, inspectors carrying out on-the-spot checks had certified the correctness of information submitted by farmers without controlling that animals were actually present on the holdings. Seventh, compliance with the age limits which apply to animals subject to Community aid [43] had not been adequately controlled. Finally, in certain Spanish provinces the authorities had failed to check 10% of all applications as required by Article 6(3) of Regulation No 3887/92.

47. The Spanish Government contests most, but not all, of those findings. First, while accepting that the database created by the competent authorities did not in 1994 and 1995 enable them to carry out annual and regional cross-checks on applications for aid, the applicant maintains that the authorities had developed and applied an equally effective 'animal identification system' (*sistema de identificación animal: controles administrativos cruzados y creación de una base de datos sobre identificación*). Second, without contesting the fact that the selection of applications for on-the-spot checks relied on information which was not up-to-date, the applicant insists that a risk analysis has none the less taken place in each of the Spanish autonomous regions since 1993. Third, with regard to checks carried out outside the period of retention, the applicant asserts — again without contesting the Commission's finding of fact — that those checks were no less effective than checks carried out inside that period. Finally, the applicant contends that compliance with the requirement of checks of 10% of all applications laid down in Article 6(3) of Regulation No 3887/92 should be measured by reference to the checks carried out in the Member State as a whole or, perhaps, in each of the autonomous regions of Spain responsible for the application of Community agricultural law. The fact that certain provinces, viewed on their own, may not have met the 10% target does not therefore constitute a violation of Community law.

48. In addition to those arguments, the applicant maintains, on the one hand, that the Commission based its findings on the results of visits by the Fund's inspectors to a few of the 17 Spanish autonomous regions, and that it effected an unjustified extrapolation of the results of those visits to the whole of Spain and, on the other hand, that

42 — It is common ground that that register was not available in Spain in 1994 and 1995.

43 — Those age limits are laid down in Article 4b(2) of Regulation (EEC) No 805/68 of the Council of 27 June 1968 on the common organisation of the market in beef and veal, OJ English Special Edition 1968 (I), p. 187.

the Commission gave an assurance — during or after the completion of the conciliation procedure — that it would recalculate the adjustment.

*Analysis*

49. It should be noted, first of all, that the applicant does not contest the Commission's findings concerning inadequate registration of animals, problems in respect of earmarking and unreliability of inspection certificates. An adjustment to the claim for reimbursement presented by the applicant in respect of aid in the bovine animals sector would, as the Commission points out, have been justified on those grounds alone.

50. I am moreover unconvinced by the applicant's challenge to the reasons set out in the Summary Report. The applicant has not provided any detailed information about the nature and effectiveness of the 'animal identification system' and it appears from the Commission's reply — which was not contested in the applicant's rejoinder — that that system was not operational in 1994 and 1995. With regard to the application of a risk analysis for selection of applications, I accept the Commission's view that a risk analysis based on information which dates from previous agricultural years does not ensure effective verification of compliance with the terms under which aids are granted and therefore does not satisfy the requirements laid down in Article 6(1) and (4) of Regulation No 3887/92. The Spanish Government's allegation that on-the-spot checks carried out outside the period of retention are as effective as, or more effective than, checks within that period must also be dismissed. The wording of Article 6(5) of Regulation No 3887/92 is clear in providing for checks within the period of retention, and the Court has consistently held that where a regulation lays down specific measures of supervision it is unnecessary to examine the merits of arguments put forward by Member States that another system of supervision is more effective. [44]

51. Finally, the allegation that the contested adjustment was based on an extrapolation of the results of certain control visits is unfounded. It is clear from the Summary Report and the Commission's defence in this case that while the Commission took the control visits into account, it did not extrapolate from particular facts or figures obtained during those visits in order to calculate the loss suffered by the Fund. The contested adjustment was based

44 — See Case 819/79 *Germany* v *Commission* [1981] ECR 21, paragraph 21 of the judgment; Case C-28/89 *Germany* v *Commission* [1991] ECR I-581, paragraph 9; Case C-54/91 *Germany* v *Commission* [1993] ECR I-3399, paragraph 38.

on an estimate of the loss suffered calculated in accordance with the system of flat-rate reductions laid down in the Belle Report. As for the Commission's alleged promise to carry out a recalculation, it is sufficient to note that the Spanish Government never submitted any figures to the Commission which would have enabled it to carry out such a recalculation.

52. I would, for all of those reasons, reject the Spanish Government's claim in relation to special premiums for beef and premiums for suckler cows.

53. In the light of that conclusion, it is not necessary for me to express an opinion on whether, as the applicant contends, the requirement laid down in Article 6(3) of Regulation No 3887/92 is fulfilled where the number of checks carried out in a Member State *as a whole* is equivalent to 10% of all aid applications or, as the Commission argues, compliance with Article 6(3) must be achieved not only by the Member State as a whole but also by each of the regions, provinces or other geographical units which are responsible under national law for controlling aid applications.

**Additional levy payable by producers or purchasers of cows' milk**

*Legislative provisions*

54. Article 5c of Regulation No 804/68,[45] which was inserted by Regulation No 856/84,[46] establishes an additional levy payable by producers or purchasers of cows' milk aimed at curbing the increase in milk production within the Community.[47]

55. Under that provision, the additional levy is to be imposed in each of the regions of a Member State under one of two specific formulas. In Member States which opt for 'Formula A', the levy is payable by every milk producer on the quantities of milk (and/or milk equivalent) which he has delivered to a purchaser and which for the 12 months concerned exceed a reference quantity to be determined. In Member States which opt for 'Formula B', the levy is in principle payable by every purchaser

45 — Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organisation of the market in milk and milk products, OJ English Special Edition 1968 (I), p. 176.

46 — Council Regulation (EEC) No 856/84 of 31 March 1984 amending Regulation (EEC) No 804/68 on the common organisation of the market in milk and milk products, OJ 1984 L 90, p. 10.

47 — The scheme established by Regulation No 856/84 was due to expire on 31 March 1993, but its validity was extended for a period of seven years with effect from 1 April 1993 by Council Regulation (EEC) No 3950/92, of 28 December 1992, establishing an additional levy in the milk and milk products sector, OJ 1992 L 405, p. 1.

on the quantities of milk (or milk equivalent) which have been delivered to him by a producer and which — during the 12 months concerned — exceed the reference quantity. Under that formula, the purchaser is however under a duty to recover the levy through the price paid by him to the producers.

56. Regulation No 536/93[48] lays down detailed rules on the application of the additional levy on milk and milk products. Article 3(4) of that regulation provides:

'Before 1 September each year, the purchaser liable for levies shall pay the competent body the amount due in accordance with rules laid down by the Member State.

Where the time limit for payment is not met, the sums due shall bear interest at a rate per annum fixed by the Member State and which shall not be lower than the rate of interest which the latter applies for the recovery of wrongly paid amounts.'

48 — Commission Regulation (EEC) No 536/93 of 9 March 1993 laying down detailed rules on the application of the additional levy on milk and milk products, OJ 1993 L 57, p. 12. That regulation — which replaced Commission Regulation (EEC) No 1546/88 of 3 June 1988 laying down detailed rules for the application of the additional levy referred to in Article 5c of Regulation (EEC) No 804/68, OJ 1988 L 139, p. 12 — has been applicable from the 12-month period commencing on 1 April 1993.

57. According to Article 5(2) of Regulation No 536/93, interest paid pursuant to Article 3(4) is to be deducted from claims presented by the Member States to the Fund for reimbursement of expenditure in the milk products sector.

*The applicant's claim*

58. The applicant asks the Court of Justice to annul Decision 1999/187 in so far as it excluded from Community financing an amount of ESP 4 484 785 615 relating to the additional levy payable by producers or purchasers of cows' milk. According to the Summary Reports for 1994 and 1995, the Commission excluded that amount for two reasons. First, it excluded a sum of ESP 3 129 240 958 owing to the fact that the Spanish authorities had omitted to collect from producers and purchasers the additional levy payable under Regulation No 804/68 as amended in respect of 55 707 tonnes of milk delivered in excess of the national reference quota. Second, the Commission excluded a sum of ESP 1 355 544 657 by way of interest payable by the purchasers on that levy under Article 3(4) of Regulation No 536/93. Those sums related to the financial year 1994, but they had been excluded from the clearance decision for that year to afford the Spanish Government the opportunity to bring the matter before the Conciliation Body.

59. It is useful to consider those two aspects of the contested decision separately.

(a) The additional levy

— Summary of the arguments

60. The applicant does not contest that the Commission has the power, in principle, to apply an adjustment where a Member State fails to collect the additional levy due under Article 5c of Regulation No 804/68 as amended. It none the less considers the adjustment applied by the Commission in Decision 1999/187 to be unlawful for two reasons. First, the producers and purchasers of milk products in Spain did not, contrary to what the Commission maintains, exceed the reference quantity allocated to Spain. While it is true that there was an excess in the context of deliveries to commercial purchasers, the Spanish producers did not use up the specific reference quantity allocated for sales of milk products for direct consumption.[49] It would have been possible under Community law to transfer the latter quantity to commercial deliveries, thus bringing the total Spanish milk deliveries within the national reference quantity, and it was only owing to practical difficulties that that transfer had not been effected within the relevant period. Second, the applicant contends that the Commission agreed, in the course of negotiations with the Spanish authorities and in a letter sent to those authorities, that the additional levy payable by Spain in the financial year of 1994 would be calculated on the basis of an excess of no more than 30 000 tonnes of milk. By applying a correction based on an excess of 55 707 tonnes contrary to that agreement, the Commission violated the principle of legitimate expectations.

— Analysis

61. The applicant's first argument should not, in my view, be upheld. While it is true that it would have been possible to transfer reference quantities from direct sales to commercial sales, the Spanish Government never submitted an application to that effect. The Commission was therefore not in a position to carry out the transfer, since that would have violated the applicable procedural rules and time-limits and endangered the equal treatment of Member States in the context of the closure of accounts procedure. It appears, moreover, to be agreed between the parties that the Commission does not have the power to transfer quotas with retroactive effect.

62. With regard to the applicant's second argument — alleging that the Commission breached an agreement with the applicant

49 — According to the applicant, 131 574 tonnes of that quantity remained unused.

concerning the amount of additional levy which was to be collected in Spain — it may be recalled that the Court of Justice held in *Italy* v *Commission* [50] that a clearance of accounts decision may be declared invalid on the grounds of a breach of legitimate expectations where it can be established that the decision departs from a statement or position which the Commission has communicated to a Member State and on which that State was reasonably entitled to rely.

63. In the present case, the applicant seeks to rely on negotiations between the Commission and the Spanish Government in the course of which, it is alleged, the Commission accepted that the Spanish authorities were obliged to collect additional levy only in respect of an excess of 30 000 tonnes of milk products. The Commission does not deny that those negotiations took place or that it sought to strike a compromise with the Spanish authorities concerning the collection of additional levies, but it stresses that in so far as any understanding was reached in those negotiations at all, that understanding was conditional upon the Spanish authorities actively seeking to collect all of the additional levies payable by Spanish milk producers for the excess quantity of 30 000 tonnes. However, the Spanish authorities collected only a small fraction (less than 3.5%) of those levies and the Commission therefore never entered into any final agreement.

50 — Case 14/88 [1989] ECR 3677, paragraphs 28 to 30 of the judgment.

64. It is difficult, in the absence of witness statements from the parties involved, to establish precisely what was agreed in the course of those negotiations. To my mind, the Commission's explanations appear plausible; I have difficulty believing that the applicant was given a clear and unconditional assurance that the excess quantity would be calculated on the basis of 30 000 tonnes, as it was clearly not in the Commission's interest to grant such an assurance at that stage in the procedure.

65. That understanding of the facts is consistent with the letter from the Commission, dated 18 January 1995 and signed by the Director-General of Directorate-General VI of the Commission, on which the applicant also seeks to rely. In the Spanish original version of the letter invoked by the applicant, the Director-General stated: 'Para la campaña 1993/1994, la percepción de la tasa será exigida sobre la próducción excedentaria respecto a la cantidad nacional garantizada, que se cifra en unas 30.000 toneladas. No se prevé ninguna corrección a este respecto'. That formulation does not, I consider, constitute a precise and specific assurance capable of creating a legitimate expectation that no additional correction would be applied if the national reference quantity was exceeded by more than 30 000 tonnes. On the one hand, the opening sentence of the quoted passage clearly restates the Spanish State's obligation, pursuant to the applicable Community rules, to collect the additional levy corresponding to the quantity of milk delivered in excess of the guaranteed national reference quantity. On the other

hand, by stating that the Spanish excess quantity amounted to 'unas 30 000 toneladas' (some 30 000 tonnes), the Commission indicated that the figure given was not final. That interpretation accords with the fact that the Commission did not know the final figure in January 1995. The formulation 'No se prevé ninguna corrección a este respecto' adds, in my view, to the preliminary nature of the statement, as it implies that while the Commission did not at that time — in view of the continuing negotiations with the Spanish Government — envisage any correction, a final decision on that issue had not yet been made.

66. I conclude, for those reasons, that the applicant's claim in relation to payment of additional levy in respect of an excess of 55 707 tonnes of milk products is unfounded.

(b) Interest on the additional levy

— Summary of the arguments

67. In the Summary Report, the Commission stated that its decision to deny reimbursement of an amount equal to that part of the interest owed by the Spanish purchasers in respect of the excess deliveries of 55 707 tonnes which had not been collected by the competent authorities was justified under Article 3(4) of Regulation No 536/93. In its view — set out more fully in its pleadings before this Court than in the Summary Report — that provision not only obliges the purchasers to pay interest to the competent authorities, it also obliges the Member States to ensure that all of the sums owed are collected each year by 1 September. By collecting — according to the Commission's calculations — only 3.13% of all the levy due by 1 September 1994, and by failing to collect any interest in respect of the levy which remained unpaid after that date, the Spanish authorities clearly failed in that duty. The Commission was therefore entitled to reduce the Spanish Government's claim for funding by an amount equivalent to the interest which should have been collected. [51] In that context, the Commission emphasises that the effectiveness of the system of additional levies would be undermined if the Member States were not under an obligation to collect the levies and the interest due under Regulation No 804/64 as amended and Regulation No 536/93. Moreover, by failing to collect sums due, the Member States expose the Fund to a financial risk since, under Article 5(2) of Regulation No 536/93, sums collected are deducted from the expenditure reimbursed by the Fund in the milk sector.

68. The applicant contests the Commission's interpretation of Article 3(4) of

51 — It will be recalled that Article 3(4) of the Regulation (set out in paragraph 56) provides for the payment of interest from 1 September in the case of delayed payment of additional levy.

Regulation No 536/93. It argues, essentially, that that provision imposes an obligation on purchasers to pay interest, but not an obligation on the Member States to guarantee that the sums due are collected. Consequently, the fact that a Member State fails to recover the sums due by purchasers does not *of itself* entitle the Commission to deny reimbursement of those sums. Refusal of reimbursement is justified only if the conditions laid down in the general provision in Article 8(2) of Regulation No 729/70 are fulfilled; that is if the Commission can show that non-collection of particular sums was attributable to the negligence of the administrative authorities or other bodies of the Member State. Referring to the Court's judgment in *Deutsche Milchkontor*,[52] the applicant argues that the Spanish authorities were not negligent, since the collection of sums due under the additional levy scheme takes place according to the same administrative and judicial rules and procedures as other tax-related claims falling under Spanish law. The fact that the process of collection may be lengthy in practice does not, according to the applicant, reveal any negligence on the part of the Spanish authorities.

— Analysis

69. Article 3(4) of Regulation No 536/93 does not explicitly provide that the Member States must take steps to ensure that purchasers comply with their duty to pay additional levies on milk products and interest on those levies. In my view — and here I agree with the Spanish Government — it follows that the Commission cannot refuse reimbursement solely on the ground that certain sums due have not been paid or collected. The fact that certain sums due remain unpaid, or have been paid belatedly, does not *of itself* constitute a violation of the obligations laid upon the Member States by Community law. I am encouraged in that view by the detailed reasons given by Advocate General Alber in his Opinion in *France* v *Commission*.[53] While that Opinion was concerned with Article 15(4) of Regulation No 1546/88,[54] the reasons given by the Advocate General are in my view applicable also in the context of Regulation No 536/93. The Commission is therefore empowered to apply an adjustment only where it is able to show, pursuant to Article 8(2) of Regulation No 729/70, that the Fund suffered a loss as a result of a negligent failure by the national authorities to recover the sums in question.

70. In order to assess the validity of the adjustment applied by the Commission in this case, it is thus necessary to examine

52 — Joined Cases 205/82 to 215/82 [1983] ECR 2633.

53 — Case C-277/98, paragraphs 66 to 81 of the Opinion delivered on 29 March 2001.

54 — Commission Regulation (EEC) No 1546/88 of 3 June 1988 laying down detailed rules for the application of the additional levy referred to in Article 5c of Regulation (EEC) No 804/68, OJ 1988 L 139, p. 12; repealed by Regulation No 536/93, cited in note 48. Article 15(4) provided:
'The purchasers referred to in paragraphs 1, 2 and 3 shall pay any levy amount due to the competent agency within three months following the end of each 12-month period. However, in the cases specified in paragraph 3, payments shall be made, within the same three months, by producers' groups and their associations.'

whether there is evidence of negligence within the meaning of Article 8(2) and, if so, what financial consequences the Commission was entitled to draw from it.

71. According to the Commission's calculations, the Spanish authorities collected only 3.13% of the additional levy due in respect of the excess deliveries of 55 707 tonnes of milk products in the agricultural year 1993/94. Moreover, the Commission has stated — without being contradicted by the Spanish Government — that the competent Spanish authorities failed to collect any interest on the outstanding levy, thus leaving unpaid ESP 1 355 544 657 of interest. I agree with the Commission that those figures appear to suggest that the Spanish authorities negligently failed to collect the sums in question. However, mere suggestions are not enough. The question is whether the Commission has demonstrated to the required standard of proof that there was negligence within the meaning of Article 8(2). I do not propose to examine or to express an opinion on that issue since, in my view, the Commission's decision is in any event invalid for the following reasons.

72. As is clear from the facts set out above, the Commission refused reimbursement of the full amount of outstanding interest (ESP 1 355 544 657). It thus appears that the Commission did not seek to determine *what portion* of the outstanding interest was attributable to the absence of effective procedures for collection of sums due. The Commission did not, for example, take into account that it might have been objectively impossible for the Spanish authorities to recover certain sums owing to circumstances unrelated to any negligence or failures on their part. I consider that by omitting to take into account that possibility, the Commission exceeded its powers under Article 8 of Regulation No 729/70.

73. For those reasons, I conclude that the applicant's claim seeking the annulment of the Commission's refusal of reimbursement of ESP 1 355 544 657 in relation to interest due under the additional levy on milk products scheme should be upheld.

**Production aid for olive oil**

*Legislative provisions*

74. By Regulation No 136/66, [55] the Community legislator established the common

55 — Regulation No 136/66/EEC of the Council of 22 September 1966 on the establishment of a common organisation of the market in oils and fats, OJ English Special Edition 1965-1966 (I), p. 221, subsequently amended on several occasions, most recently by Council Regulation (EC) No 2826/2000 of 19 December 2000 on information and promotion actions for agricultural products on the internal market, OJ 2000 L 328, p. 2.

organisation of the market in oils and fats. Article 5 of that regulation, as amended, provides that production aid shall be granted for olive oil for the purpose of contributing towards establishing a fair income for producers. A percentage of the production aid is, under Article 20d, to be withheld and used to finance the activities of recognised producer groups.

75. Regulation No 154/75 provides for the establishment of a register of olive cultivation in the Member States producing olive oil. [56] According to Article 1 of that regulation, the register must cover all olive-growing holdings and furnish certain specified information which is to be brought up to date at regular intervals.

76. Article 2(2) of Regulation No 2261/84, [57] laying down general rules on the granting of aid for the production of olive oil and of aid to olive oil producer organisations, provides:

'The aid shall be granted to olive growers established in the Member States. For the purposes of this Regulation an olive grower shall be any grower of olives which are used to produce oil.'

56 — Regulation (EEC) No 154/75 of the Council 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.

57 — 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.

77. According to Article 11(2) of that regulation:

'Member States in which olive oil is produced shall ensure that the sums made over to the associations and to producer organisations in application of paragraph 1 are used by them only for financing the activities for which they are responsible under this Regulation.'

78. Article 14 lays down rules concerning control and checks of aid:

'1. Each producer Member State shall apply a system of checks to ensure that the product in respect of which aid is granted is eligible for such aid.

2. Producer Member States shall verify the activities of each producer organisation and association and, in particular, that the checking operations have been carried out by these bodies.

3. In the course of each marketing year and during the oil-pressing period in particular, producer Member States shall carry out on-the-spot checks on the activities and the stock records of a percentage of approved mills to be determined. The mills selected must be representative of the pressing capacity of a production zone.

4. In the case of the olive oil defined at point 1 of the Annex to Regulation No 136/66/EEC and produced by growers who are not members of a producer organisation, checking shall be by sampling on the spot and must verify:

— that the crop declarations are accurate,

— that the olives harvested are to be used to produce oil and, if possible, that they have actually been processed into oil.

The checks shall be carried out on a percentage of growers to be determined on the basis of holding sizes in particular.

5. For these checks and verifications Member States shall use inter alia the computerised data files provided for in Article 16.

These files shall be used to guide the checking operations to be carried out pursuant to paragraphs 1 to 4.'

79. Finally, Article 16(1) of Regulation No 2261/84 stipulates that the Member States shall draw up and keep up-to-date permanent computerised files of olive and olive-oil production data. The information which those files must contain is listed in Article 16(2).

80. The second recital in the preamble to Regulation No 3061/84, laying down detailed rules for the application of the system of production aid for olive oil,[58] states that the checks to be carried out by the Member States 'must cover a sufficiently representative number of the crop declarations made by olive growers who are members of producer organisations'.

81. Article 1(5) of that regulation reads as follows:

'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.'

58 — Commission Regulation (EEC) No 3061/84 of 31 October 1984, OJ 1984 L 288, p. 52.

82. According to Article 5(1):

'The application for aid to be submitted by each olive grower shall include at least the following:

(a) the surname, forenames and address of the olive grower;

(b) the quantity of virgin oil produced;

(c) the location of the holdings on which the olives were harvested, together with a reference to the crop declaration;

(d) the approved mill(s) 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 said application must be accompanied by a declaration from the mill, the form and content of which shall be decided by the Member States, to corroborate the particulars referred to under (d).'

83. It follows from Article 8 that where a producer group or association, having discharged all its responsibilities under Community rules, has not used the entire sum raised by the financing arrangements referred to in Article 20d of Regulation No 136/66 and Article 11(1) of Regulation No 2261/84, it must distribute the balance among the producer organisations of which it is composed.

84. Article 9(2), as amended by Regulation No 828/90,[59] provides:

'The standardised daily stock records referred to in Article 13(1)(d) of Regulation (EEC) No 2261/84 must show:

(a) the quantities of olives entering the mill, batch by batch, stating the producer and the owner of each batch;

(b) the quantities of olives pressed;

(c) the quantities of oil obtained;

59 — Commission Regulation (EEC) No 828/90 of 30 March 1990 amending Regulation (EEC) No 3061/84 laying down detailed rules for the application of the system of production aid for olive oil, OJ 1990 L 86, p. 18.

(d) the quantities of olive residues obtained, determined on a flat-rate basis;

— weighed batch by batch where the mill has a weighbridge.

...'

(e) 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;

*Summary of the arguments*

85. By Decision 1999/186, the Commission excluded from financing under the Fund an amount of ESP 5 754 750 215, corresponding to a 5% flat rate reduction in the expenditure declared by Spain in the closure accounts procedure for 1996 in respect of production aid for olive oil and expenses related to the establishment of the register for olive cultivation. Decision 1999/187 denied reimbursement of an amount of ESP 4 317 179 696, corresponding to a 10% flat-rate reduction in the expenditure declared for the period prior to and including the agricultural year of 1992/93 and a 5% reduction in expenditure declared for subsequent agricultural years.

(f) the quantities of olive residues leaving the mill:

— determined batch by batch, stating the consignee, in the case of sale to an extraction establishment,

— determined on a flat-rate basis, stating the consignee, in other cases,

86. It appears from the Summary Reports for 1994 and 1995, and from other documents in the file, that Decision 1999/186 and Decision 1999/187 were based on essentially the same grounds. Following two visits by the Fund's inspectors to Spain in 1996 and 1997, the Commission found that supervision of expenditure in the olive

oil sector was inadequate. In particular, the register of olive cultivation provided for in Regulation No 154/75 and the permanent computerised files of olive and olive-oil production data envisaged by Regulation No 2261/84 had remained incomplete and inoperational at least until the end of 1998. The controls carried out by the Spanish authorities to compensate for the absence of the register and the computerised files were inadequate. Thus the Commission's investigations had revealed a number of problems, including unexplained double payments of aid, inadequate on-the-spot checks of oil mills, a failure to respond adequately to instances of fraud, insignificant numbers of on-the-spot checks of olive oil producers, and grant of production aid for olives which had been sold as table olives. On that basis the Commission considered that the deficiencies found related to fundamental elements of the control system and controls essential to ensuring the regularity of the expenditure, and that the Fund had been exposed to a significant risk of widespread loss. Accepting however that the Spanish authorities had improved the system over the years, the Commission applied a lower flat-rate reduction to the agricultural years after 1992/93.

87. The applicant contends that the exclusions and reductions adopted by the Commission should be annulled, and it puts forward a number of arguments in favour of that contention. Those arguments may for the sake of analysis be divided into two categories.

*Analysis*

(a) The first set of arguments

88. By its first set of arguments, the applicant seeks to demonstrate that the Commission violated certain general principles and provisions of Community law.

89. In its application, the applicant refers to a letter addressed to the Spanish authorities, in which the Commission allegedly stated that the situation in Spain had improved, and that its control system was superior to that existing in certain other Member States. Despite those differences, the Commission applied the same flat-rate adjustment to Spain as it did to those Member States. The applicant thus appears to suggest that the Commission violated the principle of equal treatment. However, since the Spanish Government has not submitted any information concerning the situation which prevailed in the other Member States or any evidence of the content of the Commission's letter, that argument must be rejected.

90. The applicant also contends that the Commission violated Articles 5 and 190 of the EC Treaty (now, after amendment, Articles 10 and 253 EC), since it failed, in

the Summary Report for 1994, to reply to, and refute in a convincing manner, all of the arguments and facts submitted by the Spanish authorities during the procedure which preceded that Report and the adoption of Decision 1999/187. When considering that contention, it must be kept in mind that the Spanish Government was closely involved in the process of drawing up the contested decisions, and that it was well aware of the reasons which led the Commission to take the view that the amounts at issue should not be charged to the Fund. [60] In those circumstances, by omitting to reply to certain arguments, and to refute certain factual allegations, the Commission did not violate the Treaty provisions invoked by the applicant.

91. Referring to *Greece* v *Commission*, [61] the applicant maintains moreover that the contested decisions are unlawful because it was impossible to comply with the time-limits laid down for the establishment of the register of olive cultivation and the computerised files of production data. Since the applicant has not submitted any information concerning the alleged difficulties encountered by the Spanish authorities, that argument must in any event be rejected.

92. Finally, with regard to Decision 1999/186, excluding certain expenditure for the financial year of 1996, the applicant argues that the Commission violated Article 5(2)(c) of Regulation No 729/70 as amended by Regulation No 1287/95. [62] That provision lays down that, '[b]efore a decision to refuse financing is taken, the results of the Commission's checks... shall be notified in writing' and that '[a] refusal to finance may not involve expenditure effected prior to twenty-four months preceding the Commission's written communication of the results of those checks'. [63] The applicant refers to the Commission's letter, dated 10 March 1998 and received at the Spanish representation to the European Union on 12 March 1998, by which it notified the Spanish authorities of the final conclusions of its investigations into the control system operated in Spain in 1994 and the following years. That letter should, in the applicant's view, be considered to be a 'written communication' within the meaning of Article 5(2) with the result that the Commission could not refuse to charge to the Fund expenditure incurred before 12 March 1996.

93. The Commission rejects that argument. It stresses that the problems affecting the Spanish control system in the olive oil sector, which had existed since 1990, were well known to the Spanish authorities, and

60 — See Case C-22/89 *Netherlands* v *Commission* [1990] ECR I-4799, paragraph 18 of the judgment.

61 — Case C-50/94, cited in note 19, paragraph 39 of the judgment.

62 — Council Regulation (EC) No 1287/95 of 22 May 1995 amending Regulation (EEC) No 729/70 on the financing of the common agricultural policy, OJ 1995 L 125, p. 1.

63 — However, that rule does not apply to the financial consequences of: 'irregularities as referred to in Article 8(2)' and 'concerning national aids, or infringements, for which the procedures referred to in Articles 93 and 169 of the Treaty have been initiated'.

that they had been the subject of discussions and letters exchanged between the Commission and the authorities. In those circumstances, the Spanish authorities cannot rely on Article 5(2)(c).

94. Article 5(2)(c) was inserted into Regulation No 729/70 by Regulation No 1287/95 which established the clearance of accounts procedure currently in force. Under that procedure, the Commission adopts annual clearance of accounts decisions and, where necessary, multi-annual compliance decisions excluding from Community funding expenditure which according to its checks has not been effected in compliance with Community rules. [64] By introducing that procedure, the Community legislator aimed to reduce the delays which had occurred in the clearance of accounts procedure previously in force. [65] However, given that compliance clearance decisions are not linked to the implementation of the budget in a particular financial year, the Community legislator considered that 'the maximum period to which the consequences to be drawn from the [Commission's] checks on conformity may be applied must be determined'. [66] It appears from that statement, and from the Commission's explanations in this case, that the purpose of the temporal limitation in Article 5(2)(c) is to protect the Member States against the legal uncertainty which might arise if the Commission were in a position to call into question expenditure incurred several years before the adoption of a compliance decision.

95. The Commission's interpretation of Article 5(2)(c) — according to which the temporal limitation does not apply where the Member State concerned is aware that the Commission considers its control system to be deficient — is in my view inconsistent with that purpose. Article 5(2)(c) can provide effective legal certainty for the Member States only if they are able to ascertain precisely the date from which the temporal limitation is to be calculated. It is moreover clear from the wording of Article 5(2)(c) that the relevant date is that on which the Commission notifies by a formal 'written communication' the results of its checks as regards the financial years in issue. Thus to comply with Article 5(2)(c), the Commission is required only to carry out checks and notify the results thereof within a period of 24 months after the expenditure has been incurred by the affected Member State; it is not required to complete the clearance of accounts procedure within that period. In my view, that system does not impose an unreasonable burden on the Commission, but strikes a reasonable balance between, on the one hand, the need of the Member States for legal certainty and, on the other hand, the financial interests of the Community. The interpretation favoured by the Commission is also, I consider, problematic, in so far as it presupposes an assessment — in every case where the time-limit in Article 5(2)(c) is relevant — of whether the affected Member State knew that its control system was deficient. That assess-

64 — See above, paragraph 7.

65 — See the fourth and fifth recital in the preamble to Regulation No 1287/95.

66 — See the sixth recital in the preamble to Regulation No 1287/95.

ment might give rise to evidential difficulties, and it raises a number of difficult questions about, for example, the level of required knowledge.

96. In this case, I agree with the applicant that notification took place on 12 March 1998. It was in the document received on that day that the Commission set out the final conclusions which it had drawn, as regards the financial years covered by Decision 1999/186, from the checks carried out in 1996 and 1997. Whether or not the Spanish authorities were, as the Commission alleges, in a position to deduce from previous decisions on clearance of accounts and the informal exchanges of information which took place before March 1998 what those conclusions would be is in my view irrelevant.

97. I consider therefore that Decision 1999/186 is contrary to Article 5(2)(c) of Regulation No 729/70 as amended in so far as that decision excluded expenditure incurred by Spain before 12 March 1996. That conclusion is not affected by the Commission's argument that the deficiencies in the Spanish control system were established by checks which were carried out — and the results of which were communicated to the Spanish authorities — in financial years prior to 1994, and that no new checks, apart from certain visits of minor importance and bilateral meetings, had taken place since then. In my view, that argument rests on an unduly narrow interpretation of the word 'checks'. In the context of Article 5(2)(c) that term must be interpreted as referring not only to control visits but also to financial and statistical checks carried out by the Commission. In any event, it is clear from the documents submitted by the Commission that a team of inspectors from the Fund carried out control visits in Spain in 1996 and 1997, and that Decision 1999/186 was based to a large extent on the findings set out in the reports of those visits.

(b) The second set of arguments

98. The applicant's second set of arguments seeks, in substance, to refute the allegation made in the Summary Report that the control system operated in Spain was deficient. While the applicant concedes that there was delay in establishing the register of olive cultivation and in making progress with the work of creating and updating the computerised files of production data, it contends that the controls carried out in Spain were none the less effective and that the Fund therefore did not suffer any loss. The adjustments applied by the Commission should therefore be annulled.

99. It is not, in my view, necessary to examine the merits of those detailed arguments. A really effective control system simply cannot, I consider, be taken to exist until the olive oil register and the computerised files provided for by Community law are completed and used for the purpose

of carrying out cross-checks of aid at all levels. I am reinforced in that view by the Commission's explanations and by the judgment in *Greece* v *Commission*,[67] where the Court held that a Member State's failure to establish computerised data files in the olive oil sector 'cannot, on any view, be justified by a general reference to supplementary checks, the scope and thoroughness of which have not been specified and the effectiveness of which is, moreover, disputed by the Commission'.

100. In the light of those observations, I conclude that Decision 1999/186 should be annulled in so far as it excluded from Community financing expenditure in relation to production aid for olive oil incurred by the applicant before 12 March 1996.

## Wine

### *Legislative provisions*

101. Articles 6, 7 and 8 of Regulation No 822/87 on the common organisation of the market in wine prohibit the planting of new vines and provides for an administrative authorisation procedure for the grubbing and replanting of vines.[68] Under Articles 6(3) and 7(4), grapes obtained from vines planted in violation of those rules may not be used for producing table wine, and products made from such grapes may be put into circulation only for the purpose of distillation.

### *Summary of the arguments*

102. The applicant seeks the annulment of the Commission's refusal of reimbursement of in total ESP 730 638 679 in respect of aid for the permanent abandonment of areas under vines (ESP 424 652 236) and aid for preventive distillation of wine (ESP 305 986 443).[69] According to the Summary Report, the Commission applied that adjustment because the competent national authorities had failed to carry out sufficient controls and to apply the sanctions required to ensure compliance with Articles 6, 7 and 8 of Regulation No 822/87. Owing to those failures, which had been confirmed when the Fund's inspectors visited Spain in 1996, the authorities had been unable to halt unlawful planting and replanting of vines and to prevent the sale of products of grapes obtained from such vines for purposes other than distillation. The fact that a number of Spanish regions had taken legis-

67 — Case C-61/95 [1998] ECR I-207, paragraph 13 of the judgment.

68 — Council Regulation (EEC) No 822/87 of 16 March 1987 on the common organisation of the market in wine, OJ 1987 L 84, p. 1.

69 — The basic provision concerning that aid is Article 38 of Regulation No 822/87.

lative and practical steps to regularise unlawful plantations bore witness to the seriousness of those problems.

103. While the applicant does not contest the findings of fact on which the Commission's adjustment was based, it none the less asks the Court to annul that adjustment. It relies, in substance, on three arguments.

104. First, the applicant maintains that the Commission's decision is inequitable, since the Spanish regional authorities could not be blamed for carrying out a process of regularisation of unlawful plantations. That process was a legal and social necessity given the large number of unlawful plantations in Spain, and it had the effect of reducing to some extent the wine production capacity of Spanish farmers. According to the applicant, it adds weight to those arguments that recent proposals for reform of Community regulations in the wine sector envisage a system of regularisation resembling closely the scheme already adopted in certain Spanish regions. Second, whilst the Commission had been aware of the process of regularisation since 1992, it did not take any action until — after the inspection carried out in 1996 — it formally called upon Spain to stop that process and to annul the specific decisions adopted pursuant to it. Third, even assuming that the regularisation of unlawful plantations was contrary to Community law, that process did not affect the grant of Community aid and thus did not expose the Fund to any risk of financial loss.

*Analysis*

105. The applicant's criticism of the contested adjustment is, in my view, unfounded.

106. The decision to apply an adjustment was, as the Commission points out, based on the failure of the Spanish authorities to control compliance with the prohibition and procedures laid down in Articles 6, 7 and 8 of Regulation No 822/87. Thus the fact that the Spanish authorities had felt compelled to regularise unlawful plantations revealed the extent and seriousness of those failures; it did not constitute the basis of the decision. The applicant's arguments, which are concerned only with the regularisation of unlawful plantations, are therefore unable to call into question the lawfulness of the contested adjustment.

107. In any event, I am not convinced by those arguments. The legal and social problems flowing from the existence of vast numbers of unlawful plantations are, as the Commission states, to a large extent the result of the Spanish authorities' own failure to adopt the control and enforce-

ment mechanisms necessary to ensure compliance with the provisions of Regulation No 822/87. The Commission's decision was thus not, in my opinion, inequitable. With regard to the Commission's alleged passivity, the applicant has not explained by reference to established legal principles how that might affect the lawfulness of the contested decision. Finally, it is true — as the Commission itself stated in the Summary Report — that there is no Community system of aid for the production of wine. The absence of controls and enforcement in Spain therefore did not lead to unlawful grant of production aid. I am, however, convinced by the Commission's reasoning set out in the Summary Report and in its defence: the widespread planting and replanting of vines contrary to the rules of Regulation No 822/87, which resulted from the failures of the Spanish authorities, undermined the effectiveness of the schemes concerned with aid for the permanent abandonment of areas under vines and aid for preventive distillation of wine. Since those schemes are financed by the Fund, the Commission was entitled to apply an adjustment on the basis of Article 8(2) of Regulation No 729/70.

Fibre flax and hemp

*Legislative provisions*

108. Regulation No 619/71 lays down general rules for granting aid for fibre flax and hemp. [70] Article 4 of that regulation provides:

'1. Member States shall ensure by administrative supervision that the product for which aid has been requested qualifies for that aid.

2. For the purposes of that supervision, Member States shall require areas sown and harvested to be declared.'

109. The Member States are required, by Article 5 of Regulation No 619/71, to verify the accuracy of the declarations of areas sown and harvested and applications for aid submitted by the producers by means of spot checks.

110. Regulation No 1164/89 contains detailed rules concerning aid for fibre flax and hemp. [71] Under Article 4(a) of that regulation, aid is to be granted only in respect of areas which have been completely sown and harvested and on which

70 — Regulation (EEC) No 619/71 of the Council of 22 March 1971 laying down general rules for granting aid for flax and hemp, OJ English Special Edition 1971 (I), p. 169.

71 — Commission Regulation (EEC) No 1164/89 of 28 April 1989 laying down detailed rules concerning the aid for fibre flax and hemp, OJ 1989 L 121, p. 4.

normal cultivation work has been carried out. [72] Article 6(1) provides that the checks mentioned in Article 5 of Regulation No 619/71 shall be carried out on at least 5% of the declarations of areas sown and on a representative percentage of the aid applications. Where significant irregularities arise relating to 6% or more of the checks carried out, the Member States must — under Article 6(2) — notify the Commission stating what measures have been adopted. Finally, Article 7(b) of Regulation No 1164/89 provides for administrative sanctions in instances where on-the-spot checks reveal that a producer has declared an area which is greater than that actually sown. In such cases, aid is calculated on the basis of the area actually sown, as ascertained by the authorities, minus the difference between the area originally declared and that ascertained. However, where the difference between the area declared and that sown is considered to be justified by the Member State concerned, aid is calculated on the basis of the area sown without a further reduction.

*Summary and analysis of the arguments*

111. The Spanish Government challenges the Commission's decision to apply a 10% flat rate adjustment to its claim for reimbursement of aid granted in the fibre flax and hemp sector during the financial years of 1994 and 1995, thus excluding ESP 42 616 276 from Community financing. According to the Summary Report, that decision was based on the fact that the Spanish authorities had failed to carry out the controls provided for by Community law: [73] contrary to Article 4(1) of Regulation No 619/71, the authorities had failed to carry out administrative controls of declarations of areas and applications; on-the-spot checks which had been carried out did not comply with Article 5 of Regulation No 619/71 because the reports drawn up by the local inspectors were imprecise and since no attempts had been made to control the quantities of fibre flax and hemp harvested and sold; the mechanism provided for in Article 7(b) of Regulation No 1164/89 had not been applied correctly; there had been a general absence of controls aimed at verifying whether the delivery contracts submitted by applicants for aid were actually carried out; and the central authorities had failed to coordinate and control the efforts of the different autonomous regions thus increasing the risk of loss to the Fund. The Commission also expressed regret that the Spanish authorities had not used data collected for the purpose of the IACS to carry out administrative cross-checks of declarations of areas sown. While it accepted that the specific rules concerning fibre flax and hemp did not provide for such checks, it considered that by failing to use available and effective means of control, the Spanish authorities had violated their general obligations under Article 8(2) of Regulation No 729/70. Finally, the Commission stated in a letter to the Spanish authorities and in its defence before the Court, albeit not in

72 — Article 4(a) has been amended on several occasions. While none of those amendments are of direct relevance to the present case, it may be mentioned that Article 4(a) was amended in particular — and with effect for products harvested from 1994 onwards — by Commission Regulation (EC) No 1469/94 of 27 June 1994 amending Regulation (EEC) No 1164/89 laying down detailed rules concerning the aid for fibre flax and hemp, OJ 1994 L 159, p. 12. As amended by that Regulation, Article 4(a) provides that to be considered as having been harvested, areas must have undergone an operation carried out after seed formation, aimed at terminating the growing cycle of the plant, and carried out with the aim of valorising the stalk, with or without seed.

73 — The Commission's reasons are set out in greater detail in the Summary Report for 1994, annexed in relevant part to the Commission's defence.

the Summary Report, that by failing to detect and react to the use of unusually low amounts of seed and very low yields, there was reason to think that the authorities had granted aid, contrary to Article 4(a) of Regulation No 1164/89, in respect of areas which had not been completely sown and harvested and on which normal cultivation work had not been carried out.

112. The applicant's challenge to the Commission's decision is based, essentially, on three arguments. First, it stresses that Article 4(a) of Regulation No 1164/89 does not define what is to be understood by normal cultivation work. [74] The use of low amounts of seed and allegedly inappropriate cultivation methods was therefore irrelevant. Second, it insists that there was no obligation to carry out cross-checks by reference to information collected for the IACS, since that possibility is mentioned only in Regulation No 154/97 [75] which had not taken effect at the material time. Third, the applicant points out that it complied fully with the obligation, laid down in Article 6(1) of Regulation No 1164/89, to check more than 5% of all applications.

113. It is clear from those arguments that the applicant does not contest the essential findings of fact on which the Commission's decision was based.

114. The three arguments put forward by the applicant are, moreover, unconvincing in my view. First, I agree entirely with the Commission that the use of low amounts of seed and low yield is capable of creating a suspicion that aid has been granted in respect of areas which have not been properly cultivated. Second, the absence of any specific provision imposing a duty to carry out cross-checks does not affect the

74 — In that context, the applicant asserts that Commission Regulation (EC) No 624/97 of 8 April 1997 amending Regulation (EEC) No 1164/89 laying down detailed rules concerning the aid for fibre flax and hemp, OJ 1997 L 95, p. 8 laid down requirements which must be fulfilled for areas to be considered as having been harvested. Those requirements, which are in any event immaterial for the present case, were in fact introduced with effect for products harvested from 1994 onwards by Commission Regulation (EC) No 1469/94, cited in note 72.

75 — Council Regulation (EC) No 154/97 of 20 January 1997 amending Regulation (EEC) No 619/71 laying down general rules for granting aid for flax and hemp, OJ 1997 L 27, p. 1 replaced, with effect from the agricultural year of 1997/98, Article 5 of Regulation No 619/71 by the following provision:
'1. Member States shall verify the accuracy of the declarations of areas sown and harvested and applications for aid submitted by the producers and also the execution of contracts and fulfilment of processing obligations and of conditions of approval by means of spot checks.
2. Detailed rules for the application of checks shall be adopted in accordance with the procedure laid down in Article 12 of Regulation (EEC) No 1308/70, such measures being able to provide for the use of certain elements of the integrated administration and control system.'
The third recital in the preamble to Regulation No 154/97 states moreover that 'the effectiveness of... checks can be increased by using certain elements of the integrated administration and control system and..., therefore, provision should be made for that possibility'.

validity of the contested adjustment, since the Commission's decision is in any event amply justified by the numerous other grounds set out in the Summary Report. Finally, the fact that the authorities carried out a sufficient number of spot checks is irrelevant given that the Commission's complaint relates to the quality and not the quantity of those checks.

115. I would therefore reject the applicant's claim in respect of aid for fibre flax and hemp.

## Delayed payments in various sectors

116. It appears from the Summary Report that the Commission refused reimbursement of ESP 3 362 203 596 on the grounds of delayed payments of aid in certain sectors. In accordance with Article 4(2) of Regulation No 296/96,[76] part of that amount (ESP 1 951 844 235) was deducted from the advances paid by the Commission to the Spanish authorities for the months of November to August of the relevant financial year.[77] The remaining amount (ESP 1 410 359 361) had not been deducted from the advances for September and October of that year, but in the clearance of accounts decision for 1995 as provided for by Article 4(3) of Regulation No 296/96.[78] Owing to the fact that the Spanish Government had challenged some of the reductions applied by the Commission before the Conciliation Body, which had not completed its work when Decision 1999/187 was adopted, the Commission inserted a 'negative reserve' in that decision, thereby reserving to itself the right to review the reductions in the light of the outcome of the conciliation procedure.

117. The Spanish Government accepts that the Commission may apply reductions on grounds of late payments, and that it may insert 'negative reserves' in clearance of accounts decisions.[79] However, it submits that since the conciliation procedure had not been completed, the Commission should not have deducted in the context of the clearance procedure for 1995 the amounts which had not been deducted from the monthly advances

76 — Commission Regulation (EC) No 296/96 of 16 February 1996 on data to be forwarded by the Member States and the monthly booking of expenditure financed under the Guarantee Section of the Agricultural Guidance and Guarantee Fund (EAGGF) and repealing Regulation (EEC) No 2776/88, OJ 1996 L 39, p. 5.

77 — Monthly payments have — since the clearance of accounts procedure was amended in 1987 — been made by the Commission only in respect of sums already paid by the Member States. However, since the Commission retains the power to refuse eventual financing of those sums in the clearance of accounts decision adopted after the end of the financial year or in a subsequent compliance decision, the monthly payments are still referred to as 'advances' rather than as reimbursements.

78 — As explained in note 8, the financial year of the Fund runs from 16 October to 15 October of the following year.

79 — The use of negative reserves has been approved by the Court of Justice. See Case C-61/95, cited in note 19, paragraph 30 of the judgment. See also the Opinion of Advocate General La Pergola in that case, paragraphs 53 to 55 and the Opinion of Advocate General Alber in Case C-238/96, cited in note 15, paragraph 44.

(ESP 1 410 359 361). The decision on reimbursement of that amount should, it contends, have been postponed awaiting the outcome of the conciliation procedure and dealt with in a later clearance of accounts decision. The Commission's decision, which excluded the amount subject to a possible reassessment, was thus unlawful.

118. In its reply, the Commission explains that if it had not excluded the amount in issue in the clearance decision for 1995, it would have been required to reimburse that amount to the Spanish authorities immediately. If the Conciliation Body had upheld the Commission's view that the amount was not refundable, the Spanish Government would then have been required to return the amount to the Commission. It was to avoid that complication, and to ensure that all the reductions based on lateness of payments were dealt with in the same clearance decision, that the Commission excluded the amount subject to a negative reserve.

119. I am convinced by the Commission's explanation. It must be kept in mind that — as the Commission has pointed out without being contradicted by the applicant — suggested adjustments are in most instances upheld by the Conciliation Body. The procedure followed by the Commission in this case is therefore more practical than the one suggested by the applicant. Moreover, the former procedure does not prejudice the position of the Member State, since a clearance decision subject to a negative reserve is not final; the Commission is not only entitled but also, I consider, obliged to review such a decision where the relevant event specified in that reserve materialises. [80]

120. That view is not affected by the applicant's assertion that it is normal practice for the Commission to await the outcome of the conciliation procedure before claims are decided upon in clearance of account decisions. While it appears that the Commission does generally follow such a practice, it has not been shown that it has ever been applied to adjustments based on delayed payments. In any event, I agree with the Commission that there are cogent reasons not to await the outcome of the conciliation procedure in that specific context.

121. I would therefore reject the applicant's claim in respect of delayed payments.

## Final comments

122. The Spanish Government claims, by way of conclusion, that it has shown that the Commission has violated a number of

80 — See also to that effect Case 129/84 *Italy* v *Commission* [1986] ECR 309, paragraph 42 of the judgment.

general principles such as the right of defence, the principles of good administration, the principle that penalties must have a legal basis, and the principle of proportionality. It is, in my view, unnecessary to examine those claims which merely restate the applicant's more detailed arguments without adding new elements capable of affecting the lawfulness of Decision 1999/186 and Decision 1999/187.

## Conclusion

123. In the present case I have reached the conclusion that the application should be allowed only on two points. Since the application has, in my view, failed under the other heads, the applicant should be ordered to pay the costs.

124. In the light of all the foregoing observations, I am of the opinion that the Court of Justice should:

(1) declare void Commission Decision 1999/186/EC of 3 February 1999 excluding from Community financing certain expenditure incurred by the Member States under the Guarantee Section of the European Agricultural Guidance and Guarantee Fund in so far as the Commission has not charged to the Fund expenditure incurred by Spain before 12 March 1996 in the context of production aid for olive oil;

(2) declare void Commission Decision 1999/187/EC of 3 February 1999 on the clearance of the accounts presented by the Member States in respect of the expenditure for 1995 of the Guarantee Section of the European Agricultural Guidance and Guarantee Fund in so far as the Commission has not charged to the Fund the amount of ESP 1 355 544 657 representing interest due under the additional levy on milk products scheme;

(3) for the rest, dismiss the application;

(4) order the applicant to pay the costs.