JUDGMENT OF THE COURT (Sixth Chamber)
21 January 1999 *

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* Language of the case: German.

In Case C-54/95,

Federal Republic of Germany, represented by Ernst Röder, Ministerialrat in the Federal Ministry of Economic Affairs, and Gereon Thiele, Assessor in the same ministry, acting as Agents, D-53107 Bonn,

applicant,

v

Commission of the European Communities, represented by Klaus-Dieter Borchardt, of its Legal Service, acting as Agent, with an address for service at the office of Carlos Gómez de la Cruz, also of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of Commission Decision 94/871/EC of 21 December 1994 on the clearance of the accounts presented by the Member States in respect of the expenditure for 1991 of the European Agricultural Guidance and Guarantee Fund (EAGGF) Guarantee Section (OJ 1994 L 352, p. 82) in so far as it refused to charge to the EAGGF the sum of DEM 116 633 582.10,

THE COURT (Sixth Chamber),

composed of: P. J. G. Kapteyn, President of the Chamber, G. Hirsch, H. Ragnemalm, R. Schintgen and K. M. Ioannou (Rapporteur), Judges,

Advocate General: A. La Pergola,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 5 February 1998, at which the German Government was represented by Claus-Dieter Quassowski, Regierungsdirektor in the Federal Ministry of Economic Affairs, acting as Agent, and the Commission by Klaus-Dieter Borchardt,

after hearing the Opinion of the Advocate General at the sitting on 2 April 1998,

gives the following

Judgment

1 By application lodged at the Court Registry on 2 March 1995, the Federal Republic of Germany brought an action under the first paragraph of Article 173 of the EC Treaty for the annulment of Commission Decision 94/871/EC of 21 December 1994 on the clearance of the accounts presented by the Member States in respect of the expenditure for 1991 of the European Agricultural Guidance and Guarantee Fund (EAGGF) Guarantee Section (OJ 1994 L 352, p. 82) (hereinafter: the 'contested decision') in so far as it refused to charge to the EAGGF the sum of DEM 116 633 582.10.

2 More specifically, in the summary report concerning the clearance of the EAGGF Guarantee Section accounts for 1991, annexed to the application, the Commission found that the following sums had to be borne by the Federal Republic of Germany:

I — DEM 1 031 451.17 by way of a 10% increase on the amount of the correction made by the Commission to the expenditure on export refunds for the use of starch-and sugar-based products;

II — Correction of DEM 54 275 090.69 relating to irregularities concerning the export of livestock to Poland;

III — Correction of DEM 56 692 508.70 relating to irregularities concerning the export of livestock to the Near and Middle East (Imex affair);

IV — Correction of DEM 997 814 relating to irregularities concerning the export of beef and veal to Lebanon (Südfleisch affair);

V — Correction of DEM 518 181 relating to the export of beef and veal to Zimbabwe (Barfuß affair);

VI — Correction of DEM 3 118 563.54 relating to irregularities linked to the grant of the special premium for beef and veal producers.

3 At the hearing, the Federal Republic of Germany stated that it was withdrawing that part of its application pertaining to the sum of DEM 3 118 563.54 relating to the irregularities linked to the grant of the special premium for beef and veal producers, the dispute between Germany and the Commission on that issue having been resolved following the judgment of 3 October 1996 in Case C-41/94 *Germany* v *Commission* [1996] ECR I-4733.

I — The 10% increase on the correction made by the Commission to the expenditure on export refunds for the use of starch-and sugar-based products (points 4.4.2.1 and 4.5.1 of the summary report)

4 In the summary report, the Commission states that during the clearance of accounts procedures for the 1988 to 1990 financial years, financial corrections were made to the expenditure declared by the German authorities for export refunds for the use of starch-and sugar-based products. The corrections were made because the German authorities had allowed certain firms to submit applications for refund certificates after, instead of before, processing commenced, as the Community regulations require, to the advantage of the beneficiaries concerned.

5 The Federal Republic of Germany brought an action before the Court of Justice challenging the corrections made for 1988. By judgment of 22 June 1993 in Case C-54/91 *Germany* v *Commission* [1993] ECR I-3399, the Court dismissed its application.

6 By telex of 6 October 1993, the Commission asked the German authorities to modify their procedures so as to conform with Community rules and to inform the EAGGF services of the changes as well as the date of their entry into force, by

31 January 1994 at the latest, the deadline for transmission to the Commission by the Member States of additional information relating to the 1991 clearance of accounts.

7 According to the summary report:

'The German authorities only submitted copies of the national instructions for implementation of the requested changes well after the deadline of 31 January 1994 for the submission of additional information.

As for previous financial years, a forfeitary correction of 5% is proposed, increased by 10% in view of the delay in amending the procedures'.

8 In its application, the German Government does not challenge the correction made but only the 10% increase applied to it. It contends that there is no legal basis authorising the Commission to impose, as part of the clearance procedure, an 'additional penalty' of that kind penalising late communication of the measures taken by a Member State to comply with a judgment of the Court of Justice. If the Commission wished to penalise a Member State for failing to comply with a decision of the Court of Justice, it ought to observe the procedure laid down in Article 171(2) of the EC Treaty.

9 It should be pointed out in this connection that, under the procedure for the clearance of accounts, the Commission is required to audit the accounts submitted by a Member State for a given financial year. That procedure is governed by the principle according to which only expenditure incurred in conformity with the Community rules is to be charged to the Community budget (Case C-55/91 *Italy* v *Commission* [1993] ECR I-4813, paragraph 67).

10 In this case, it is common ground that during the 1991 financial year, the controls carried out by the Federal Republic of Germany for the grant of the export refunds concerned were not in conformity with the Community rules and that the German authorities failed to inform the Commission, within the period fixed by the latter for the transmission of additional information relating to the 1991 accounts, of any measure taken to make the controls consistent with the relevant Community rules.

11 Consequently, as soon as the deadline that had been set expired, the Commission was entitled to make a financial correction, which could in fact have amounted to 100%, in respect of the expenditure on those refunds.

12 It cannot be objected in this regard that, because of the dispute that had been referred to the Court of Justice, during the 1988 to 1990 financial years the Commission had confined itself, in similar circumstances, to making a 5% correction in respect of expenditure on such refunds. In point of fact, according to the case-law of the Court of Justice, where the Commission has tolerated irregularities on grounds of fairness, the Member State concerned does not acquire any right to demand that the same position be taken with regard to irregularities with respect to the following financial year by virtue of the principle of legal certainty or the principle of protection of legitimate expectations (Case C-55/91 *Italy* v *Commission*, cited above, paragraph 67).

13 In those circumstances, the fact that the Commission increased the rate of the correction by 10% because information on the measures taken by the German authorities had not been transmitted within the period fixed, constitutes neither a sanction nor a penalty, as the German Government claims, but a measure in the process of determining the overall rate of correction to be borne by that Member State.

14 The German Government maintains, however, that in this case, its failure to communicate, within the period fixed, the measures it had taken to make the supervisory procedures compatible with the Community rules cannot justify the increase

that was applied because the adoption of those measures in 1993 did not, in any case, affect the controls carried out in 1991, the financial year which is the subject of this clearance procedure.

15 Furthermore, that increase is in breach of the guidelines established by the Commission in its communication to the EAGGF Committee of 3 June 1993 (Doc. No VI/216/93) on calculation of the financial consequences when preparing the decision on the clearance of EAGGF (Guarantee Section) accounts. The guidelines, applicable from the time the summary report for the 1990 financial year was drafted, make it clear that the criterion to be employed when applying a financial correction and fixing the level of that correction is 'the assessment of the degree of risk of losses to Community funds having occurred as a consequence of the control deficiency'. However, the measures taken by the applicant in 1993 cannot affect retroactively the regularity of the controls carried out in 1991 and thus influence the losses pertaining to that financial year.

16 It should first be pointed out that, in putting these arguments, the German Government is not challenging the Commission's right to take account of the corrective measures adopted by a Member State after the financial year encompassed by the clearance of accounts for the purpose of reducing the financial correction it makes to the expenditure covered by that financial year, even if the measures adopted have no impact on the risk of losses to the Community funds during that financial year. Quite the reverse, by maintaining that the Commission ought to have further abated the amount of the overall correction, the German Government is implicitly recognising that the Commission does have that right.

17 In those circumstances, the argument based on the Commission guidelines has to be considered irrelevant.

18 Moreover, the fact that the measures adopted in 1993 do not affect the scale of the losses incurred during 1991 cannot transform into an obligation the Commission's

right to reduce the amount of the correction, particularly since the State in question failed to communicate within the period fixed the corrective measures it had adopted. In addition, to accept the opposite approach could encourage Member States that had belatedly adopted corrective measures not to communicate them to the Commission.

19 Consequently, the plea put forward against this head of the contested decision must be rejected.

II — The correction relating to irregularities concerning the export of livestock to Poland (point 6.1.2 of the summary report)

20 The irregularities alleged in respect of the Federal Republic of Germany relate to the export to Poland of cattle declared to be pure-bred breeding animals of the bovine species. The export refund applicable to such breeding animals at the material time amounted to ECU 98/100 kg whereas the rate applicable to other cattle was ECU 55.5/100 kg.

21 The summary report states the following in this connection:

'The spectacular increase in exports of pure-bred breeding cattle from Germany ... to Poland prompted the EAGGF to make inquiries ... in November 1991 and April 1992.

In the light of the findings ... it was concluded that the exports concerned cattle fraudulently declared as pure-bred breeding animals.

...

The main finding in this connection is that the classification of the cattle under the heading of "pure-bred breeding animals" carried absolutely no guarantee that the animals could be assumed to be breeding animals (intended for breeding purposes):

— no indication of parentage, genetic merit, performance

— no veterinary analysis for breeding purposes (or veterinary checks for slaughter purposes)

— commercial and other information which should have given cause for serious doubt (age of animals, very low selling price, purchasers unknown etc).

Furthermore, information readily obtained from Poland confirmed that the animals had been slaughtered immediately on arrival in that country. ...

In the case of Germany, the export figures to Poland of pure-bred breeding animals show that before 1991 the trade flow was virtually non-existent (1989: 374 animals, 1990: 166 animals). But in 1991 more than 57 000 head were exported. After the national legislation was tightened up (18 October 1991) the number dropped almost instantly to 9 300 head in 1992 (of which 7 500 before April 1992).

For this reason Germany's request (that expenditure up to the level of the rate set for slaughter animals should be charged to the EAGGF) cannot be allowed because all the exports in question were of a speculative nature.

The Commission staff's conclusions are that:

...

(ii) Germany recognised the scale of the problem and tightened up its legislation with effect from 18 October 1991. Additional checks on the expenditure after that date showed that the problem ceased to exist almost immediately.

(iii) Taking account of the foregoing, the financial corrections are as follows:

— Germany: 1991 financial year: DEM 56 542 011.69
1992 financial year:

expenditure concerned: DEM 15 694 754.87

expenditure allowed, taking account of the amendment of the national law on 18 October 1991:

DEM 12 974 820.87

DEM 2 719 934.00

TOTAL DEM 59 261 945.69

— irregularities detected and notified to EAGGF (Art 3 DE/92/001/B and DE/92/002/B) DEM – 4 986 855

Item ... amount of correction DEM 54 275 090.69'

22 Moreover, the file shows that the Commission explained, by letter of 24 June 1992 addressed to the German Government and to which that Government replied by letter of 23 October 1992, that instead of requiring only the submission of the T 5 control copies and the certificates issued by breeders' associations by way of breeding and reproduction certificates, which contained no reference to performance and assessment of the animals' genetic value or pedigree (except, in some instances, data concerning the parents only), the German authorities ought to have checked that the animals exported were actually going to be used as breeding animals and to have required the submission of breeding and reproduction certificates that provided detailed information, that is to say information covering two generations, on the animals' pedigree and performance and an assessment of their genetic value.

23 Those requirements arise because the animals are designated 'breeding animals', in accordance with the classification system used for refunds, under Articles 5(1) and 13 of Commission Regulation (EEC) No 3665/87 of 27 November 1987 laying down common detailed rules for the application of the system of export refunds on agricultural products (OJ 1987 L 351, p. 1) and Article 1 of Commission Regulation (EEC) No 1544/79 of 24 July 1979 on the granting of export refunds for pure-bred breeding bovine animals (OJ 1979 L 187, p. 8) in conjunction with Articles 1 and 6 of Council Directive 77/504/EEC of 25 July 1977 on pure-bred breeding animals of the bovine species (OJ 1977 L 206, p. 8).

24 In its abovementioned letter of 24 June 1992, the Commission further pointed out that its assertion that the animals exported were not intended to be used for breeding purposes was also confirmed by the fact that they were infected with bovine enzootic leucosis.

25 The pleas and arguments of the parties turn on three issues concerning: the inclusion in the clearance of accounts for the 1991 financial year of sums relating to the 1992 financial year; the scope of and compliance with the obligations incumbent

on the national authorities in granting the export refunds in question; and, finally, the refusal to charge to the EAGGF expenditure incurred up to the level of the rate set for export refunds for cattle for slaughter.

Inclusion in the clearance of accounts for the 1991 financial year of sums relating to the 1992 financial year

26 In its reply, the German Government contends that the correction made by the Commission is unlawful in so far as it includes in the clearance of accounts for the 1991 financial year sums relating to the 1992 financial year. Sums relating to subsequent financial years can in fact be corrected only during the clearance of the accounts for the following years, since early payment is not provided for by Council Regulation (EEC) No 729/70 of 21 April 1970 on the financing of the common agricultural policy (OJ, English Special Edition 1970 (I), p. 218). Moreover, the sums charged in relation to each financial year are inaccurate.

27 The Commission maintains that this plea was put forward out of time and ought therefore to be rejected as inadmissible.

28 It should first be pointed out that, in accordance with the first subparagraph of Article 42(2) of the Rules of Procedure of the Court of Justice, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

29 It should further be pointed out that it was already clear from the summary report that the sums relating to the 1992 financial year would be included in the clearance of accounts for 1991.

30 The German Government could therefore have put forward that plea in its application but failed to do so.

31 In those circumstances, the plea must be rejected as inadmissible.

Scope of and compliance with the obligations incumbent on the national authorities in granting the export refunds in question

32 The German Government claims, first, that the Commission's assertion that the bulk of the animals exported were immediately slaughtered in Poland, proving that they were in reality animals for slaughter, is not supported by serious and reasonable doubt, as the case-law of the Court of Justice requires. Similarly, the Commission, it is alleged, failed to provide proof of its claim that the animals were infected with bovine enzootic leucosis. More particularly, the Commission failed to submit any documentation to show that the strict health checks applicable to the import of pure-bred breeding cattle into Poland, which include the submission of a certificate issued by an approved veterinary surgeon, were not carried out in the case of the imports in question.

33 The Commission refutes those allegations and cites, among other things: (a) the spectacular increase, in 1991, of German exports to Poland of pure-bred breeding cattle; (b) the inability of the Polish market to absorb such large numbers of breeding cattle because of the difficulties Polish agriculture was experiencing at the time, a factor confirmed by the statements made by Mr Maleszewski, Poland's Director of Veterinary Services, to the effect that, with a very few exceptions, Poland was importing slaughter animals only during that period; and (c) a letter of 12 November 1991 from the Federal Ministry of Food, Agriculture and Forests

stating *inter alia*: 'In fact, since the cattle were not free of leucosis, they met the veterinary requirements for slaughter animals only and not the more stringent requirements placed on breeding stock.'

34 The German Government's response is that the increase in exports was largely a result of the exceptional circumstances in the new *Länder* following reunification of the Federal Republic of Germany, which had caused the break-up of many agricultural cooperatives, in consequence of which animals were sold or exported.

35 It should be borne in mind here that where the Commission refuses to charge certain expenditure to the EAGGF on the ground that it was incurred as a result of breaches of Community rules for which a Member State can be held responsible, the Commission is required not to demonstrate exhaustively that there are irregularities in the data submitted by the Member States but to adduce evidence of serious and reasonable doubt on its part regarding the figures submitted by the national authorities. The reason for this mitigation of the burden of proof on the Commission is that it is the State which is best placed to collect and verify the data required for the clearance of EAGGF accounts; consequently, it is for the State to adduce the most detailed and comprehensive evidence that its figures are accurate and, if appropriate, that the Commission's calculations are incorrect (Case C-48/91 *Netherlands* v *Commission* [1993] ECR I-5611, paragraphs 16 and 17).

36 It should then be observed that the spectacular increase in German exports to Poland of breeding cattle, the volume of which increased from 166 head in 1990 to 57 366 head in 1991, only to fall sharply after the German legislation had been tightened up to 9 300 in 1992 (7 500 of which were exported before April 1992), is a factor capable, failing any convincing explanation, of justifying serious and reasonable doubt as to the quality of the cattle exported. The German Government's claim that the increase was a result of the break-up of numerous agricultural coop-

eratives in the new *Länder* following reunification has not been supported by specific quantitative statistics. Furthermore, the German Government has failed to demonstrate that, at the time in question, there were sufficient commercial outlets in Poland to cope with such large numbers of breeding cattle, despite the problems Polish agriculture was experiencing.

37 In addition, the German Government has rebutted neither the content of the abovementioned letter of 12 November 1991 from the Federal Ministry of Food, Agriculture and Forests nor the abovementioned statements by Poland's Director of Veterinary Services, from which it is apparent that the animals exported fulfilled the veterinary requirements for slaughter animals only, that they were not free of leucosis and that, with just a very few exceptions, they were imported into Poland as animals for slaughter.

38 Accordingly, that plea must be rejected.

39 The German Government then challenges the Commission's finding that, under the Community rules, it was incumbent on the national authorities to require documentary evidence that the cattle in question were to be used specifically for breeding purposes before disbursing the export refunds applied for. According to the German Government, Community law did not, at the material time, include a requirement of that nature.

40 More specifically, Article 5(1) of Regulation No 3665/87 was not applicable because neither of the situations set out in the provision's definitive list pertained. Indeed, there was no doubt as to the true destination of the product, since the cattle destined for Poland were actually imported into and placed on the market in that country, nor, because of the strict controls applied by the Federal Republic of Ger-

many, was there any risk of their being re-introduced into the Community, despite the fact that, in 1991, import duties for such animals into the Community were set at ECU 0.

41 It should be noted that, contrary to what is claimed by the German Government, the requirement that it is contesting flows from a number of Community provisions.

42 Firstly, the sole factor distinguishing an animal classified as 'a pure-bred breeding animal of the bovine species', in accordance with the classification for refund purposes, for which the rate of export refund was ECU 98/100 kg at the material time, from other animals of the bovine species for which the refund provided for was ECU 55.5/100 kg, is that it is used specifically for breeding purposes. It follows that this specific use is the only factor justifying the grant of the highest level of refund. The existence of this factor has therefore of necessity to be verified in order for the appropriate refund to be granted.

43 Furthermore, Article 5(1) of Regulation No 3665/87 provides:

'1. Payment of the differentiated or non-differentiated refund shall be conditional not only on the product having left the customs territory of the Community but also — save where it has perished in transit as a result of force majeure — on its having been imported into a non-member country and, where appropriate, into a specific non-member country ...:

(a) where there is serious doubt as to the true destination of the product,

or

(b)where, by reason of the difference between the amount of the refund on the exported product and the amount of the import duties applicable to an identical product on the date of acceptance of the export declaration, it is possible that the product may be re-introduced into the Community.

...'

44 As regards the situation described in Article 5(1)(a), it is true that, because of the way in which the provision is worded, the term 'destination' could, on first sight, be construed in an exclusively geographical sense, with the result that the provision would apply only in the event of fraud concerning the territorial destination of the product.

45 An interpretation of that nature would, however, run counter to the objective of Article 5(1) of Regulation No 3665/87 which, according to the fourth recital, is specifically to prevent abuses in relation to refunds. The refunds are designed to cover the difference between the higher Community price for the product in question and the lower price on the market of the third country to which it is exported. In the case of a product whose price, and therefore rate of refund, depends on the qualitative nature of its use, abuses could also occur where its actual use, that is to say its true destination in functional terms, is not the same as the specific product use for which the refund is requested. It follows that the term 'destination' in Article 5(1)(a) of Regulation No 3665/87 must be construed in not only a geographical but also a functional sense.

46 As regards the situation addressed by Article 5(1)(b) of Regulation No 3665/87, it should be emphasised that this concerns the risk that the exported product may be re-introduced into the Community but does not further require that this risk should have in fact materialised.

47 In the light of the foregoing, it has to be noted that, in the instant case, both the situation described in Article 5(1)(a) of Regulation No 3665/87 and that described in Article 5(1)(b) applied. Indeed, bearing in mind the spectacular increase in German exports to Poland of pure-bred breeding animals of the bovine species, serious doubts existed as to the true destination of the animals exported. Furthermore, because of the difference between the amount of the export refund applicable to pure-bred breeding animals of the bovine species in 1991 (ECU 98/100 kg) and the rate of import duty applicable to the product at the time (ECU 0), there was a risk that the animals exported might be re-introduced into the Community, notwithstanding the strict controls applied by the Federal Republic of Germany to imports of such animals.

48 It follows that the German authorities were under an obligation, pursuant to Article 5(1) of Regulation No 3665/87, to verify that the animals in question were imported into Poland as pure-bred breeding animals. The authorities ought therefore to have required proof, on export, of the specific use to which they were to be put.

49 Finally, the duty of the German authorities to verify that the animals in question were actually being used for breeding purposes also derives from Article 13 of Regulation No 3665/87, according to which: 'No refund shall be granted on products which are not of sound and fair marketable quality'. An animal described as a 'pure-bred breeding animal' cannot be considered to be of sound and fair marketable quality if it does not possess the qualities that enable it to be used specifically for breeding purposes.

50 The German Government maintains, however, that it was for the Commission to intervene and take the appropriate measures to resolve the problem of the exports of pure-bred breeding cattle. More particularly, the Commission failed to request the Federal Republic to apply Article 5(1) of Regulation No 3665/87, as provided for by the second subparagraph of Article 5(2), according to which: 'Where there are serious doubts as to the real destination of products, the Commission may request Member States to apply the provisions of paragraph 1'.

51 It should be pointed out here that, according to Article 8(1) of Regulation No 729/70, it is for the Member States to take, in accordance with national provisions laid down by law, regulation or administrative action, the measures necessary to satisfy themselves that transactions financed by the EAGGF are actually carried out and are executed correctly. According to the eighth recital of Regulation No 729/70, 'in addition to supervision carried out by Member States on their own initiative, which remains essential, provision should be made for verification by officials of the Commission and for it to have the right to enlist the help of Member States'. It follows that the Member States' obligations to ensure that transactions financed by the EAGGF are carried out correctly exist independently of the measures taken by the Commission.

52 That division of responsibilities is also conveyed by the wording of the second subparagraph of Article 5(2) of Regulation No 3665/87 which, moreover, does not lay down an obligation but merely opens up a possibility for the Commission. The fact that this possibility is not used cannot therefore justify a Member State's failure to fulfil its own obligations under Article 5(1) of Regulation No 3665/87.

53 Accordingly, that contention on the part of the applicant must be dismissed.

54 Lastly, the German Government challenges the Commission finding that, when verifying that the exported animals were specifically suited for use as breeding ani-

mals, and thus satisfying themselves that they were of sound and fair merchantable quality, the German authorities failed to observe their obligation to require the submission of breeding and reproduction certificates covering two generations, as well as the animals' performance and an assessment of their genetic value.

55 The German Government claims in this respect that, during the period in issue, there were no Community rules stipulating that supervision by the national authorities of the quality of the animals exported required submission of the certificates cited by the Commission, as the latter had not yet used the possibility it was afforded by Article 6 of Directive 77/504 to impose on the Member States specific and uniform criteria concerning the presentation and content of those certificates. Not until Commission Regulation (EEC) No 2342/92 of 7 August 1992 on imports of pure-bred breeding animals of the bovine species from third countries and the granting of export refunds thereon and repealing Regulation (EEC) No 1544/79 (OJ 1992 L 227, p. 12) was adopted, post-dating the material events, were such measures taken.

56 In those circumstances, the Federal Republic of Germany cannot be criticised for having recognised national breeding and reproduction certificates as proof that the animal fell into the category of a pure-bred breeding animal. In any event, given that, under Article 1 of Directive 77/504, an animal is considered to be 'a pure-bred breeding animal of the bovine species' provided it is eligible for entry in a herd-book but does not have actually to be entered therein, it is sufficient for breeding and reproduction certificates to be drawn up or submitted *a posteriori* for the animal to be recognised as an animal of breeding quality.

57 The Commission counters that argument by stating that the obligation to require the submission of breeding and reproduction certificates indicating the pedigree, the performance and an assessment of the genetic value of the animals flows from Article 1 of Regulation No 1544/79, in conjunction with Articles 1 and 6 of Directive 77/504. Regulation No 2342/92, adopted in August 1992, merely clarified the legal position that already existed on the basis of Regulation No 1544/79 and Direc-

tive 77/504, in order to dispel, within the Member States, any doubts there might be as to the scope and substance of the controls to be carried out on exports of pure-bred breeding cattle.

58 According to the Commission, assessment by the national authorities of the fair marketable quality of the animals exported comprises two stages. In the first, the national authorities have to verify that the animals actually exported correspond to the information contained in the export declaration; and, in the second stage, they have to ascertain whether, on the basis of the characteristics that give a pure-bred breeding animal of the bovine species its economic value, the animals actually exported are of fair marketable quality. The fact that Article 1 of Directive 77/504 merely requires that the animal be eligible for entry in a herd-book is relevant only for the purpose of establishing that the animals referred to in the export declaration and those actually exported are the same, during the first stage of the verification procedure. Once it has been established that they are the same, the second stage in the procedure necessarily includes checking their performance and the data on their genetic value, since their value for use as breeding cattle, and thus their economic value, can be ascertained only on the basis of that information.

59 In that context, it should be pointed out that, according to Article 1 of Regulation No 1544/79: 'for the purposes of granting export refunds, bovine animals are considered as pure-bred breeding animals falling within subheading 01.02 A I of the Common Customs Tariff where they comply with the definition given in Article 1 of Directive 77/504/EEC.'

60 Article 1(a) of Directive 77/504 provides that a pure-bred breeding animal of the bovine species is: 'any bovine animal the parents and grandparents of which are entered or registered in a herd-book of the same breed, and which itself is either entered or registered and eligible for entry in such a herd-book'.

61 Article 6(1) of the same directive further provides that the following are to be determined by the Community authorities:

'— performance monitoring methods and methods for assessing cattle's genetic value,

...

— the criteria governing entry in herd-books,

— the particulars to be shown on the pedigree certificate.'

62 It is clear from Articles 1(a) and 6(1) of Directive 77/504 that parentage over two generations, performance monitoring and assessment of genetic value, together with the issue of a pedigree certificate, are all factors designed to guarantee that the animal in question has the characteristics of a pure-bred breeding animal of the bovine species.

63 It should be added that, as regards trade between the Member States, the Commission adopted, on the basis of Article 6(1) of Directive 77/504, Decision 86/130/EEC of 11 March 1986 laying down performance monitoring methods and methods for assessing cattle's genetic value for pure-bred breeding animals of the bovine species (OJ 1986 L 101, p. 37) as well as Decision 86/404/EEC of 29 July 1986 laying down the specimen and the particulars to be shown on the pedigree certificate of pure-bred breeding animals of the bovine species (OJ 1986 L 233, p. 19).

64 Article 1(2) of Decision 86/404/EEC lists among the data to be included in the pedigree certificate: 'the results of performance tests and the results with origin of the assessment of the genetic value, on the animal itself and its parents and grandparents.' Although use of the specimen pedigree certificate is not compulsory, it may only be dispensed with, according to the third recital of Decision 86/404/EEC: 'provided that the particulars mentioned in this Decision are already present in reference documentation referring to the pure-bred breeding animal of the bovine species that enters into intra-Community trade.'

65 It is clear from the foregoing that the Community law in force at the material time provided the German authorities with sufficient information as to the manner in which they were to verify that the animals exported to Poland were genuinely intended to be used for breeding purposes, even though the Community institutions had not, at the time, adopted an act setting out formally and specifically the evidentiary requirements to be met when those checks on pure-bred breeding cattle destined for export to third countries were made.

66 Indeed, according to the case-law of the Court of Justice, Article 8(1) of Regulation No 729/70, which expressly lays down the obligations incumbent on Member States pursuant to Article 5 of the EC Treaty, imposes on the latter the general obligation 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 (Case C-2/93 *Exportslachterijen van Oordegem BVBA* v *Belgische Dienst voor Bedrijfsleven en Landbouw and Generale Bank NV* [1994] ECR I-2283, paragraphs 17 and 18).

67 Therefore the German Government's plea alleging that there were no Community rules making supervision of the quality of exported animals subject to the submission of the evidence cited by the Commission must be rejected.

68 In the light of the above considerations, the German Government's objection that, by failing to take any measure to tackle the problem of exports of breeding cattle to Poland, the Commission failed to fulfil its supplementary role under Regulation No 729/70, in breach of its duty of genuine cooperation with the Member States resulting from Article 5 of the Treaty, has also to be rejected.

Failure to charge to the EAGGF expenditure incurred up to the level of the rate set for export refunds for cattle for slaughter

69 In the alternative, the German Government disputes the Commission finding that the EAGGF should not bear the expenditure incurred by Germany for the payment of refunds up to the level of the rate set for the export of slaughter cattle on the ground that all of the exports in question were of a speculative nature, in so far as they were made because the rate of refund was higher. The German Government claims, on that point, that since the Member States are unable to influence the level at which the rate of refund is set, they cannot bear the financial burden of exports made after the rate is determined either.

70 The Commission's response is that the German Government is misinterpreting its reference to the speculative nature of the exports in issue. The Commission's refusal can be explained by the task that the taking into account of refunds for exports made in accordance with the rules has no part in the clearance procedure, which does not involve any calculation of profit or loss, and is based solely on verifying that Community law has been applied. In order to obtain, in the context of the clearance procedure, the refund for slaughter cattle that had actually been exported, it would have been necessary to request that a new customs declaration relating to

the export of slaughter cattle be drawn up post-clearance, pursuant to Article 78(3) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1).

71 Article 78(3) of Regulation No 2913/92 provides:

'Where revision of the declaration or post-clearance examination indicates that the provisions governing the customs procedure concerned have been applied on the basis of incorrect or incomplete information, the customs authorities shall, in accordance with any provisions laid down, take the measures necessary to regularise the situation, taking account of the new information available to them.'

72 The German Government replies that Article 78 of Regulation No 2913/92 does not require that a new customs declaration be drawn up. The provision merely points out that the customs authorities must take the necessary measures where it is clear from post-clearance examination of the customs declaration that the provisions governing the customs procedure have been applied on the basis of incorrect or incomplete information.

73 The Commission counters this by noting that the reference to Article 78(3) of Regulation No 2913/92 simply indicates how the customs declaration may be amended post-clearance. In the instant case, there is no doubt that proof of the export of the animals to Poland (transport documents and Polish customs documents) was not provided. That was why it was not possible to take into account levels of refund that would have been payable for the export of animals for slaughter.

74 It should be pointed out here that, under Article 2(1) of Regulation No 729/70: 'Refunds on exports to third countries, granted in accordance with the Community rules within the framework of the common organisation of agricultural markets, shall be financed ...'.

75 The disbursement of an export refund by the national authorities cannot be considered to have been made in accordance with the Community rules if, as a result of conduct attributable to the exporter, the product actually exported is not the same as the product declared.

76 In the context of this plea, the German Government does not dispute that, in an attempt to obtain the higher rate of refund, the exporters knowingly declared that the animals exported were pure-bred breeding cattle though they were in fact slaughter cattle.

77 It follows that it would have been possible to take into account refunds disbursed up to the level of the rate for slaughter cattle only if the customs declarations relating to the export of pure-bred breeding animals of the bovine species had been rectified post-clearance, on presentation of the documents required by the Community rules for the export of animals for slaughter (veterinary certificates, transport documents and Polish customs documents, etc.).

78 The Commission, however, maintained, without being contradicted by the German Government, that the customs declarations were not rectified in this way.

79 In those circumstances, the Commission was right to refuse to charge to the EAGGF expenditure incurred up to the level of the rate set for animals for slaughter.

80 Accordingly, that plea must also be rejected.

III — The correction relating to irregularities committed in connection with the export of livestock to the Near and Middle East (Imex affair — point 6.2.2 of the summary report)

81 It is apparent from the documents in the case that the correction in issue, totalling DEM 56 692 508.70, is made up of three amounts relating to three separate sets of facts, all of which are bound up with the many-faceted dossier on Imex whose fraudulent conduct covers a period extending from 1981 to 1987.

82 In detail, the Commission refused to charge to the Community budget: (a) a sum of DEM 22 011 281.10 by way of correction for irregularities committed after 1 January 1986; (b) a sum of DEM 25 024 493 by way of correction for export refunds disbursed during the period 1981 to 1987 as a result of quantitative manipulations by auxiliary customs officers; and (c) a sum of DEM 9 656 734.74 by way of correction linked to the alleged late transmission of certain information by the German Government, in the context of the procedure for the clearance of accounts.

The correction of DEM 22 011 281.10 relating to irregularities committed after 1 January 1986

83 The summary report (point 6.2.2) notes the following:

'The various frauds committed by the company (Imex) include false proof of arrival at destination (forged customs stamps, forged proof of arrival using blank forms), quantitative manipulations (at point of export) or a combination of the two types of fraud.

...

The EAGGF regards the inquiry as successful. On the strength of a single testimony on 20 October 1987, an inquiry was launched by the competent German authority on 28 October 1987. The illegal trade ceased almost immediately and in January 1988 the company (one of the biggest cattle trading companies in Germany) went into liquidation.

However, the Member State could and should have started checking up much earlier:

— In June 1985 a truck driver had already made a statement to the German customs authorities concerning quantitative manipulations.

— In October of the same year, France informed Germany of the excess weight of exported German cattle.

— In November 1985 and March 1986 (reminder), the EAGGF informed Germany of its doubts regarding the exceptional weights noted in the figures and insisted on the need to investigate (especially exports announced and foreseeable at that time).

The reply received from Germany showed that no genuine investigations were undertaken in response to the information and explicit invitation referred to above. It would appear that the reputation and size of the Imex company placed it above suspicion. Furthermore, according to the national authorities, the quantitative manipulations could not be detected from the company's books because trade in breeding animals was based on headage and not on weight.

In the opinion of the Commission's staff, the Member State, by failing to make the necessary thorough investigations within a reasonable period after receiving the request from the EAGGF, carries a substantial share of the responsibility for the scale of the impact of this case and of the financial consequences and expenditure charged to the Fund.

...

The Member State has therefore been informed (letters No 5354 of 10.2.1993 and No 33301 of 14.10.1993) of the conclusions of the Commission staff in this case.

It was confirmed in the said letters that the EAGGF cannot bear the cost of the expenditure resulting from exports made after 1986 because the requested inquiry was not carried out.'

84 The German Government claims that the Commission's finding that the German authorities responsible for conducting investigations did not undertake 'genuine' inquiries in time, thereby abusing their discretion, is unfounded and does not contain a sufficient statement of reasons. The German authorities responsible for the inquiries did not fail to observe any obligation that could give rise to a financial charge.

85 More particularly, the statement made by the driver from the Hefter haulage company, which transported cattle for Imex at the time, resulted in inquiries which failed to substantiate initial suspicion and were closed on 20 December 1985.

86 The communication from the French authorities of 21 October 1985 did not contain any information concerning Imex, but provided certain data relating to a particular case of which the investigating authorities were already aware.

87 The Commission's letter of 20 November 1985 contained a general warning concerning Imex for the first time. On 17 February 1986, the Munich customs investigation unit reported that no new findings could be derived from the statistical data on quantitative averages annexed to that letter by the Commission, as the animals were counted by headage and not by weight on-the-hoof; there was, however, some evidence of inaccurate weights that merited further investigation.

88 On 19 June 1986, the Cologne customs investigation unit gave central responsibility for the inquiries conducted by the various services to the Hamburg customs investigation unit which tried, unsuccessfully, to establish proof of falsification of quantities by the suppliers (breeder and producer associations) from whom Imex sourced its product. Furthermore, the independent weight checks made on live cattle exported to Saudi Arabia via Cologne/Bonn airport were not challenged. Finally, checks to confirm weight in Hamburg after the animals' weight had been quanti-

tatively recorded by the auxiliary customs officer failed for technical reasons (there was no unloading device for the animals).

89 Other investigative measures, set in motion during October and November 1986, such as the evidence of the Imex employee accompanying the shipment and the technical checks on the weight cards for the weighbridge used in Hamburg failed to establish any evidence that could be relied on before the courts. Only after the Munich police forwarded, in October 1987, the outcome of their investigation into the falsification of the customs stamp used, was it possible to put a stop to the fraud by Imex.

90 The German Government adds that the authorities responsible for the investigations are in principle free to decide what measures to take, and that the type and scale of the measures must be commensurate with the scale and seriousness of the offence. In this case, the German authorities had to conduct their inquiries in such a way as to avoid arousing suspicions on the part of Imex that could have led that company to conceal its illegal conduct. Furthermore, no action could be brought before the criminal courts until sufficient evidence had been collected. In the circumstances, the German authorities could not have acted differently.

91 As regards, first, the plea alleging insufficient reasoning for the contested decision, according to the case-law of the Court of Justice, decisions concerning the clearance of accounts do not require detailed reasons if the government concerned was closely involved in the process by which the decision came about and is therefore aware of the reason for which the Commission considers that it must not charge the sums in dispute to the EAGGF (Case C-50/94 *Greece* v *Commission* [1996] ECR I-3331, paragraph 9).

92 In the instant case, in addition to the explanations given in the summary report, referred to in paragraph 83 of this judgment, it is common ground that the German

Government was closely involved in the process by which the contested decision came about and was therefore aware of the reason why the Commission considered that it could not charge to the EAGGF the sum in dispute. Indeed, it is clear from the text itself of the summary report that it was not drawn up until after the Commission had sent the two letters of 10 February and 14 October 1993 in which it informed the German Government of the reasons that had led it to refuse to charge to the EAGGF the expenditure in issue.

93 Consequently, this plea must be rejected.

94 As regards the plea alleging that the Commission's findings concerning the controls and inquiries carried out by the German authorities are unfounded, it should be pointed out that, according to Article 8(1) of Regulation No 729/70, the Member States are to take, in accordance with national provisions laid down by law, regulation or administrative action, the measures necessary to satisfy themselves that transactions financed by the Fund are actually carried out and are executed correctly, and to prevent and deal with irregularities. Pursuant to Article 8(2), the financial consequences of irregularities or negligence are to be borne by the Commission, with the exception of the consequences of irregularities or negligence attributable to administrative authorities or other bodies of the Member States.

95 Furthermore, in the case of supervisory measures adopted at the national level in order to implement Community rules regarding the common agricultural policy, the national authorities must act with the same degree of care as they exercise in implementing the corresponding national legislation, in order to prevent any erosion of the effectiveness of Community law (Case C-2/93 *Exportslachterijen van Oordegem*, cited above, paragraph 19).

96 It should be made clear in this connection that while the national authorities remain free to select the measures they consider appropriate to safeguard the Community's financial interests, that freedom may not in any way jeopardise the speed, the sound organisation or the comprehensiveness of the requisite controls and inquiries.

97 It is common ground in this case that the German authorities did not remain inactive and that they succeeded, in October 1987, in putting a stop to the fraudulent activities of Imex. However, the action they took was frequently marked by poor coordination between the different services involved in the inquiries and poor organisation of the controls set in place which, furthermore, themselves proved inadequate.

98 It is, for example, apparent from the file that for a period of at least seven months from 20 November 1985, the date on which the Commission letter was dispatched to the German authorities, responsibility for organising the inquiries shifted from one service to the other — from the Munich customs investigation unit to the Cologne unit and then on to the Hamburg unit — for reasons of territorial jurisdiction.

99 Next, the Commission submitted, and this was not disputed by the German Government, that several of the controls effected failed because of poor organisation. For instance, the controls on the Imex suppliers proved ineffective because, given that animals are traded by headage and not by weight — weight being the criterion used for the grant of export refunds — the weight of animals at the suppliers was merely estimated and not accurately determined; consequently, it was impossible to make a comparison with the weight of the same animals at the point of export. Similarly, the controls on animals transported by air were bound to fail from the outset, as quantitative manipulations were unlikely using that form of transport in which the animals had compulsorily to be weighed before being loaded on to the aircraft.

100 Moreover, with the exception of the latter control and another attempt to carry out controls on the animals, which again failed for technical reasons, the file does not indicate either that the German authorities carried out controls on the animals on a large scale or that they set in place a reliable system for weighing the animals in order to detect the quantitative manipulations, despite the fact that there were only two exporters suspected of engaging in fraudulent practices, namely Imex and Südfleisch.

101 In those circumstances, that plea too must be rejected.

The correction of DEM 25 024 493 relating to the refunds disbursed during the period 1981 to 1987 on the basis of quantitative manipulations by auxiliary customs officers

102 According to the summary report (point 6.2.2.3):

'The inquiry report states that, of the total amount of DEM 152.3 million, a little over DEM 25 million (DEM 25 024 493) relates to quantitative manipulations by or under the authority of several *Zollhilfspersonen* (auxiliary customs officers). Given that these are authorised officials representing the customs authority for the determination of the weight of products for export, the sum will not be borne by the EAGGF.'

103 The German Government takes the view that its responsibility must be limited to the conduct of customs auxiliary officer H. who, according to a judgment of 30 May 1990 of the Landgericht (Regional Court) München, was implicated in 125 cases of falsification of quantities giving rise to damage of DEM 11 745 714. It claims that the Commission did not have the authority to go beyond the findings

of the national court because, according to a general principle of law, only irregularities established by the criminal courts may be deemed proven and, consequently, result in correction of the relevant expenditure.

104 The Commission, however, considers that it was not only customs auxiliary officer H. who took part in the quantitative manipulations. Two hundred and eighty-four instances of quantitative manipulation giving rise to damage totalling DEM 25 024 493 were in fact cited by the Munich customs investigation unit in its final report on the inquiry into Imex. The Commission adds that, in the context of the clearance procedure, it need merely be established whether the credits have been disbursed by the Member States in accordance with the Community rules. A national court's finding would not be conclusive in that respect.

105 It should be noted that, as the Commission is right to emphasise, the aim of the procedure for the clearance of accounts is to establish whether the credits made available to the Member States have been disbursed in accordance with the Community rules in force in the context of the common organisation of the markets. As pointed out at paragraph 35 of this judgment, where the Commission refuses to charge certain expenditure to the EAGGF on the ground that it was incurred as a result of breaches of Community rules for which a Member State can be held responsible, the Commission is required not to demonstrate exhaustively that there are irregularities in the data submitted by the Member States but to adduce evidence of serious and reasonable doubt on its part regarding the figures submitted by the national authorities (Case C-48/91 *Netherlands* v *Commission*, cited above, paragraphs 16 and 17).

106 It follows that, when clearing the accounts of the Member States, the Commission is not precluded from making findings that extend beyond the irregularities that have been proven before a national criminal court, if it has serious and reasonable doubt concerning the regularity of the transactions financed by the EAGGF. Moreover, procedure before such a court is governed by different rules of evidence.

107 In this case, the Commission made the correction in issue on the basis of the findings contained in the final report of the Munich customs investigation unit, drawn up as part of the inquiry mounted into Imex. Those findings are certainly such as to give rise to serious and reasonable doubt on the part of the Commission regarding the regularity of the transactions involved, which the Member State has been unable to rebut.

108 Consequently, that plea must also be rejected.

The sum of DEM 9 656 734.74 relating to the alleged late transmission of certain data by the German Government in the course of the clearance procedure

109 It is apparent from the documents in the case that, being of the opinion that, save for a sum of DEM 2 156 195.60, there was virtually no chance that the German authorities would be able to obtain repayment of the refunds wrongly paid to Imex and that the EAGGF could not therefore continue, as it had done so far, to reserve its position, the Commission informed the applicant, by letter of 14 October 1993, that it intended closing the dossier on Imex in the context of the 1991 clearance of accounts, and asked Germany to transmit to it details of the payments made to that company before 1 January 1986. The Commission stated that it was willing to charge those payments to the Community budget, provided that they had not been made as a result of manipulation by auxiliary customs officers.

110 By decision of 21 January 1994, taken on the basis of Commission Regulation (EEC) No 1723/72 of 26 July 1972 on making up accounts for the European Agricultural Guidance and Guarantee Fund, Guarantee Section (OJ, English Special Edition, Second Series III, p. 109), as amended by Commission Regulation (EEC) No 422/86 of 25 February 1986 (OJ 1986 L 48, p. 31), the Commission set 31

January 1994 as the deadline by which the Member States were to transmit all the additional information required for the clearance of accounts for the 1991 financial year.

111 According to the summary report (point 6.2.2.6): 'A long time after the deadline of 31 January 1994 ... the German authorities presented a list of payments enabling the Commission to propose a financial correction for the amounts paid after 1 January 1986 and relating to losses due to *Zollhilfspersonen*, this being DEM 47 035 774. Given the failure to respect the deadline ... the reduction of the initial correction justified by the information received late will be limited to 90%.'

112 The German Government claims that the list of payments in question was communicated to the Commission on the basis of Article 5(2) of Council Regulation (EEC) No 595/91 of 4 March 1991 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organisation of an information system in this field and repealing Regulation (EEC) No 283/72 (OJ 1991 L 67, p. 11). Article 5(2) of the regulation provides:

'Where a Member State considers that an amount cannot be totally recovered, or cannot be expected to be totally recovered, it shall inform the Commission, in a special notification, of the amount not recovered and the reasons why the amount should, in its view, be borne by the Community or by the Member State.

This information must be sufficiently detailed to enable the Commission to decide who shall bear the financial consequences, in accordance with Article 8(2) of Regulation (EEC) No 729/70 ...'

113 The German Government concludes that, if no notification is made by the Member State, the information to which that communication relates may not be included in the clearance of accounts. Furthermore, given that Article 5 of Regulation No 595/91 does not set any deadline for that notification (and rightly so because the recovery procedure is a matter for the Member States, so that they are best-placed to assess whether recovery is still a possibility), the Commission cannot impose an 'additional penalty' for the alleged delay in transmitting that notification. If it considers that the Member State is in breach of its obligations under Regulation No 595/91, it could bring Treaty infringement proceedings.

114 The Commission, while taking the view that the notification provided for in Article 5 of Regulation No 595/91 is a vital component of the clearance procedure, argues that its decision setting the deadline of 31 January 1994 was based not on Regulation No 595/91 but on Regulation No 1723/72. In fixing that date, the Commission was seeking to obtain from the German Government the exact details of the expenditure incurred before 1 January 1986 to enable it to deal with the Imex dossier as part of the clearance of accounts for 1991. A distinction has therefore to be made between the transmission of those figures and the notification provided for in Article 5 of Regulation No 595/91. Consequently, the sum in issue was not a penalty for late communication within the meaning of Article 5 of Regulation No 595/91, but a correction based on general Commission practice whereby, in the case of late transmission of information that justifies a reduction in the amount charged, that reduction is limited to 90%.

115 The plea put forward by the German Government first raises the question whether, where procedures for the recovery of sums wrongly granted are under way at national level, it is for the Member States or the Commission to determine that those procedures are no longer going to result in total recovery.

116 In that connection, it is clear from Article 5(2) of Regulation No 595/91 that the Member State is to inform the Commission, by means of a special notification, of the amount that has not been recovered, where the State considers that the sum wrongly paid cannot be totally recovered, or cannot be expected to be totally recovered, and the Commission has then to take a decision on who should bear the financial consequences. It is also apparent from that same provision that the special notification is not subject to any deadline.

117 However, the exercise of the power the Member States have to assess whether or not a recovery procedure that is under way is going to be successful cannot have the effect of unduly delaying the clearance of accounts for a given financial year.

118 If that is the case, the interest that attaches to scrutinising Member States' accounts rapidly (see the first recital in the preamble to Regulation No 422/86) means that the Commission must be able to set a deadline for the Member State concerned to forward the information required for the clearance of accounts for the financial year in question, including information as to recovery procedures under way, without having to activate the procedure for failure to fulfil an obligation provided for in Article 169 of the EC Treaty. In doing this, the Commission has to respect the principles of sound administration, such as the principle that there must be a certain and predictable financial relationship between the Community and the Member States.

119 In the instant case, the summary report states (point 6.2.2.4): 'With regard to recovery of the sums concerned, only DEM 2 156 195.60 has been recovered so far.' It continues: 'There is virtually no chance of recovering any more.' On the one hand, the claims for reimbursement of DEM 38.5 million entered against three banks which had been subrogated to the rights of Imex had produced no result; in addition, under the compulsory liquidation procedure, the liquidator had, as early as 19 June 1989, informed the agency that had disbursed the refunds that the allowability of claims was limited to DEM 5 million and added that the loss of debt for non-preferential creditors, such as the paying agency, would be total.

120 The German Government did not dispute those findings.

121 In those circumstances, the Commission was right to inform the Federal Republic of Germany, by letter of 14 October 1993, that it intended to close the Imex dossier during the clearance of accounts for the 1991 financial year and to ask that Member State to communicate to it, by 31 January 1994, the figures concerning the payments made to Imex before 1 January 1986.

122 The question arises whether, in view of the fact that the information requested was not forwarded within the period fixed, the Commission was entitled to impose upon Germany a correction in respect of the relevant expenditure.

123 In that regard, Article 1(3) of Regulation No 1723/72, as amended by Regulation No 422/86, provides: 'In the case of failure to submit the aforementioned information within the period fixed, the Commission shall take its decision on the basis of those elements of information in its possession at the deadline, except in cases where the late submission of information is justified by exceptional circumstances.'

124 It follows that as the Commission did not have in its possession, on expiry of the period fixed, the information needed to clear the accounts concerning the payments made to Imex before 1 January 1986, it was entitled to apply a correction amounting to 100% of the relevant expenditure. However, since it subsequently received the figures it had asked for, the Commission, in accordance with its consistent practice, limited the correction to 10% of the expenditure in issue. For the reasons stated in paragraph 13 of this judgment, the legality of that correction cannot be challenged on the ground that it constituted an 'additional penalty'.

125 Accordingly, that plea must be rejected.

IV — The correction relating to irregularities concerning the export of beef and veal to Lebanon (Südfleisch affair — point 6.2.3 of the summary report)

126 This part of the dispute concerns the Commission's refusal to charge to the EAGGF a sum of DEM 997 814, paid by the German authorities to the Südfleisch company by way of refunds for the export of beef and veal to Lebanon.

127 It is apparent from the documents in the case that, in March 1991, Südfleisch obtained customs clearance in Germany for a consignment of 628 750.20 kg of beef and veal destined for export to the United Arab Emirates. At the material time, the export refund for the United Arab Emirates was DEM 423.7524 per 100 kg net weight, whereas, for exports to Lebanon, the refund amounted to DEM 294.2725 per 100 kg net weight.

128 In July 1991, Südfleisch submitted to the German authorities a document, which later proved to be a forgery, confirming that the goods had entered the United Arab Emirates.

129 In March 1992, that is to say within the 12-month period stipulated by the Community rules, Südfleisch obtained evidence that part of the initial consignment (364.185 tonnes) had been unloaded in March 1991 in Beirut (Lebanon). Südfleisch received the refund appropriate to that export, and that payment was not subject to any correction by the Commission.

130 As regards the rest of the consignment (282.565 tonnes), Südfleisch submitted on 1 July 1992, after the German authorities had granted the company an extension of the deadline, evidence of its arrival in Lebanon. Südfleisch received the appropriate export refund, amounting to DEM 997 814. It is the latter payment which has been the subject of the correction made by the Commission.

131 In the summary report, the Commission points out that by granting Südfleisch an extension in the circumstances of this case, the German authorities failed to observe Article 47(4) of Regulation No 3665/87.

132 Article 47(2) and (4) of Regulation No 3665/87 provides:

'2. Except in cases of *force majeure*, the documents relating to payment of the refund or release of the security must be submitted within 12 months following the date of acceptance of the export declaration.

...

4. Where the documents required under Article 18 cannot be submitted within the period referred to in paragraph 2, although the exporter has acted with all due diligence to obtain them and communicate them within such period, he may be granted further time for the production of these documents.'

133 In the light of the wording of Article 47(4) of Regulation No 3665/87, the arguments put forward by the parties turn on whether the condition it lays down was met in this case, namely whether Südfleisch acted with diligence to obtain proof that the goods had reached their destination and whether, in granting an extension of the 12-month deadline, the German authorities properly exercised their power of assessment.

134 The applicant claims that the German authorities did not fail to observe Article 47(4) of Regulation No 3665/87. It argues that the Hamburg-Jonas Principal Customs Office granted the extension because it considered, on the basis of the information in its possession and in the absence of proof to the contrary, that Südfleisch had acted with diligence to obtain and transmit the requisite documents.

135 Indeed, as early as May 1991, Südfleisch had commissioned an insurance agent to conduct inquiries into the actual location of the vessel transporting the goods. Then, in June 1991, Südfleisch sent three of its employees to Saudi Arabia to establish that the goods had in fact been unloaded in that country. Though the unloading did not take place while the three employees were in Saudi Arabia, as the date coincided with an Islamic festival, they did inspect the vessel carrying the goods and established that the holds were virtually full of Südfleisch containers with their seals intact. As regards the submission, in July 1991, of the forged document confirming the arrival of the goods in the United Arab Emirates, it could not be ruled out that Südfleisch had been misled by its associate, the Al Fatha Goldstore company.

136 In those circumstances, and acknowledging that the customs authorities had, in exercising their discretion, to take into account the intentions of the exporter — a point which the German Government disputes — the competent authorities could not have known, at the date on which the deadline was extended, whether Südfleisch had produced the forged document deliberately or as a result of serious negligence, as maintained by the Commission. Furthermore, the inquiries con-

ducted in Germany by the prosecutor's office and the customs investigation unit were unable to establish that Südfleisch was responsible for falsifying and making fraudulent use of the document submitted.

137 Moreover, an extension of the deadline would not have precluded a refusal to pay the refund or, if appropriate, reimbursement of the sum received, had it subsequently emerged that the requirements for granting that extension had not been fulfilled.

138 At any event, the Commission cannot, without running the risk of causing the Member States and the economic operators concerned serious legal uncertainty, impose its own view in place of the assessment made by the competent national authorities in the exercise of the discretion accorded to them by Community law.

139 The Commission's response is that an exporter who, deliberately or at any rate as a result of serious negligence, has already submitted a forged customs clearance document does not fulfil the requirements of Article 47(4) of Regulation No 3665/87.

140 It points out in this regard that, although it had doubts concerning the destination of the meat as early as May 1991, Südfleisch submitted a forged customs entry certificate on 1 July 1991 and applied in writing for the payment of the refunds applicable to exports to the United Arab Emirates. The 'controls' effected by three employees sent out to Saudi Arabia in June 1991, on which the German Government primarily relies, hardly deserve to be so described; the fact that the employees did not wait for the cargo to be unloaded was not acceptable to the Commission, as they should have known that proper execution of the transaction included customs clearance of the goods for release on to the Saudi Arabian market.

141 Consequently, in the initial stages, and despite being aware that it was not entitled to them, Südfleisch made every effort to benefit from the higher export refunds disbursed for exports of beef and veal to the United Arab Emirates. Only when its application could not be allowed, because it was discovered that the customs entry certificate had been forged and it was at risk of having to repay the refunds in full, did Südfleisch first request, by letter of 24 September 1991, an extension of the deadline in order to produce the necessary documents.

142 In the face of such conduct, the Commission is of the opinion that Südfleisch cannot be said to have shown diligence in its efforts to produce the necessary documents within the 12-month period. That finding is in no way altered by the fact that a lack of evidence prevented both the federal prosecutor's office and the customs investigation unit from establishing the criminal liability of persons acting on behalf of Südfleisch. Ascertaining whether the requirements laid down in Article 47(4) of Regulation No 3665/87 have been fulfilled does not consist in establishing criminal liability.

143 Furthermore, on 28 May 1991, the Commission had informed the Federal Republic of Germany of a mission to Beirut to obtain from the Lebanese customs authorities documents enabling the German authorities to prove that 'the declarations of arrival of the beef and veal exported from Germany and destined for the United Arab Emirates but diverted to Lebanon had been falsified.' Those inquiries, which were conducted on the spot from 8 to 15 June 1991, and in which a representative of the Munich customs investigation unit took part, revealed that export refunds amounting to approximately DEM 10 million had been wrongly disbursed for some 2 500 tonnes of meat. It is true that the outcome of the mission was not officially forwarded to the German services until 25 September 1991, but they were informed of it directly, as soon as the mission ended, by their representative who had taken part in the on-the-spot investigations.

144 In addition, the extension was granted on 24 September 1991, that is to say on the very day Südfleisch applied for it and one day before the official outcome of the verification mission in Lebanon was forwarded, even though the statutory 12-month deadline did not expire until March 1992.

145 In the light of those circumstances, the grant of the extension to Südfleisch constitutes improper use of the margin of discretion which the national authorities are allowed under Article 47(4) of Regulation No 3665/87. The Commission is not thereby seeking to impose its own decisions in place of those of the national authorities, but to show that, in this case, by granting an extension, the competent national authority clearly exceeded the limits of its discretion.

146 It should be borne in mind in this regard that Article 47(4) of Regulation No 3665/87 accords the national authorities the possibility of granting the exporter an extension of the deadline for the submission of the documents required, that is to say the proof that the goods exported have arrived at their destination, if the exporter has been unable to submit them within the statutory 12-month period, despite having acted with diligence in seeking to obtain and communicate them within that period.

147 That provision thus accords the national authorities a margin of discretion enabling them to ascertain whether the exporter has exhibited diligence and to decide whether they are going to avail themselves of the possibility accorded to them of granting an extension.

148 However, the exercise of the discretion thus conferred on the national authorities cannot exceed the limits dictated by the purpose of that rule, which is to ensure that exporters who, despite having made every effort required of them, have been prevented, as a result of circumstances beyond their control, from producing the

requisite documents within the 12-month period, are not automatically deprived of the refunds provided for under the Community rules.

149 Consequently, where there are doubts concerning the exporter's conduct, the requirement relating to diligence cannot be considered to be fulfilled. That does not necessarily mean that the exporter has committed acts in respect of which he has been held criminally liable on the basis of national law. An operator may not be diligent, within the meaning of Article 47(4) of Regulation No 3665/87, but that does not mean that he has committed a criminal act.

150 Furthermore, even if it is established that the exporter acted with diligence, given that Article 47(4) of Regulation No 3665/87 merely affords the national authorities the possibility of granting an extension but does not require them to do so, they must, when taking their decision, take into consideration not only the diligence of the exporter but all the factors that make it possible to determine whether the grant of an extension is justified.

151 In the instant case, it is apparent from the file that on 24 September 1991, the date on which the decision granting an extension was adopted, the competent authority was in possession of the following information.

152 As regards the conduct of the exporter, it knew that on 1 July 1991 Südfleisch had submitted a forged certificate and had done so despite having doubts, as early as May 1991, about the destination of the meat exported. The controls carried out in June 1991 by the three Südfleisch employees dispatched to Saudi Arabia were not apt to dispel those doubts nor, therefore, to persuade the competent authority that Südfleisch had done everything in its power, because the three employees did not remain in Saudi Arabia until the goods had been unloaded and given customs clearance.

153 In those circumstances, and even though it was not possible to establish criminal liability on the part of Südfleisch for submitting the forged certificate, its conduct was such as to justify doubt about the efforts made to produce the requisite documents.

154 It is also incontestable that the German authorities, including therefore the authority responsible, knew about the verification mission and the inquiries which the Commission had conducted in Lebanon, from 8 to 15 June 1991, with the participation of a representative of the German customs services, in an effort to obtain from the Lebanese customs authorities documents proving that the declarations of arrival of the beef and veal exported from Germany and, though destined for the United Arab Emirates, in fact diverted to Lebanon, had been falsified.

155 Finally, it is also common ground that, on 24 September 1991, there was no urgency about extending the 12-month deadline which was to expire in March 1992. Quite the reverse, the factors set out above justified either the adoption of a wait-and-see approach or a refusal by the competent authority.

156 In the light of the above considerations, it must be held that, by granting an extension to Südfleisch, the competent national authority did not comply with Article 47(4) of Regulation No 3665/87.

157 Accordingly, that plea must be rejected.

V — The correction relating to the export of beef and veal to Zimbabwe (Barfuß affair — point 6.2.4 of the summary report for the 1991 financial year and point 6.2.2 of the summary report for the 1990 financial year)

158 The summary report for the 1991 financial year details the financial correction made by the Commission to the expenditure relating to the export of beef and veal declared to have been exported to South Africa but actually intended for Zimbabwe. The summary report also states that the case was reviewed in the summary report for the 1990 financial year and that the correction was held over until the clearance of accounts for 1991 because the Federal Republic of Germany was seeking to obtain reimbursement of the sums wrongly paid.

159 In the summary report for the 1990 financial year, the Commission noted that quantities of beef and veal, for which the refund had been accorded on the basis of proof of arrival in South Africa, had simply been stored in South Africa and re-exported to Zimbabwe for processing. The processed products were then imported into the Community free of customs duties on the basis of the EEC-ACP agreement.

160 The summary report also states that, in November 1987 and February/March 1990, the EAGGF had conducted inquiries which concluded that such practices had occurred in relation to transactions originating in a number of Member States, including Germany, and that the States concerned had been asked to recover the refunds wrongly disbursed.

161 As regards Germany, the Commission notes that:

'... the request for reimbursement was not sent to one exporter until 1 July 1991. However, the exporter contested this immediately (25 July 1991). Since then this case has not progressed since the paying agency is unable to produce the proof provided by the German inspector. However, the latter had annexed this to his mission report which he forwarded on 5 June 1990.

On the basis of the information given above, the Commission considers that ... the non-recovery of amounts unduly paid cannot be borne by the EAGGF (Article 8(2) of Regulation (EEC) No 729/70) ...'

162 The applicant claims that the German authorities did not infringe any obligation that could give rise to a financial charge, such as, for example, the obligation that stems from the combined provisions of Article 5 of the Treaty and Article 8 of Regulation No 729/70.

163 It states in this connection that, by letter of 5 July 1990, the Hamburg customs investigation unit informed the competent authority, that is to say the Hamburg-Jonas Principal Customs Office, of the findings concerning German certificates of fitness for consumption discovered in Zimbabwe and relating to quantities of meat exported by Barfuß to South Africa.

164 By decision of 1 July 1991, the competent authority asked Barfuß to repay the export refunds disbursed amounting to DEM 518 181.97.

165 On 25 July 1991, Barfuß appealed against that decision and at the same time requested that its enforcement be suspended. By decision of 20 August 1991, the competent authority acceded to the request to suspend enforcement because, in the absence of proof, there were serious doubts concerning the legality of the decision on recovery.

166 The competent authority first decided to suspend the appeal proceedings, in the light of the request for a preliminary ruling referred to the Court of Justice in a similar case by the Finanzgericht Hamburg on 20 December 1991 (Case C-27/92 *Möllmann-Fleisch* v *Hauptzollamt Hamburg-Jonas*), then allowed the appeal by Barfuß, by decision of 7 June 1994, on the ground that there was no evidence that the consignments of beef and veal exported at the time to South Africa had reached Zimbabwe. Quite the reverse, Barfuß had stated irrefutably that the goods in issue had been given customs clearance and released for consumption in South Africa.

167 The fact that certificates of fitness for consumption were discovered in Zimbabwe is not significant since such certificates provide no information as to the actual route taken by the goods. The only conclusions that may be drawn from them concern the quality of the exported products. Furthermore, the possibility cannot be ruled out that the certificates were improperly used in the African countries by being attached to consignments of meat other than those for which they had been drawn up originally.

168 The Commission's response is that the correction in issue was made because, initially, the German services had been very reluctant to undertake recovery of the export refunds wrongly paid and subsequently abandoned the recovery procedure completely, without adequate reason.

169 As regards the reluctance to implement the recovery procedure, the Commission emphasises two facts. Firstly, the competent authority did not initiate the recovery procedure until a whole year had elapsed. The German Government provided no explanation for this.

170 A further substantial delay arose because the competent authority suspended the appeal proceedings until the Court of Justice had delivered its judgment on the reference for a preliminary ruling from the Finanzgericht (Finance Court) Hamburg in Case C-27/92 *Möllmann-Fleisch* [1993] ECR I-1701. That request for a preliminary ruling concerned in particular whether proof of importation into a non-member country may be regarded as not having been provided if there is reason to doubt that the goods specified in the customs entry certificate have actually reached the market of the country of destination. However, it was pointless awaiting the Court's judgment in that case, because consistent case-law already existed in the field (Case 125/75 *Milch-, Fett- und Eier-Kontor* v *Hauptzollamt Hamburg-Jonas* [1976] ECR 771 and Case 89/83 *Dimex* v *Hauptzollamt Hamburg-Jonas* [1984] ECR 2815).

171 As regards the closure, without good reason, of the recovery procedure, by decision of 7 June 1994, the Commission points out that, contrary to the German Government's contentions, the certificates of fitness for human consumption discovered in Zimbabwe were capable of giving rise to justifiable doubt as to whether the goods had been regularly imported into the country of destination, and therefore undermine the probative force of the customs clearance certificates submitted by Barfuß (Case C-27/92 *Möllmann-Fleisch*, cited above, paragraph 15).

172 The real reason for closing the recovery procedure was, as is apparent from a letter of 29 April 1994 sent by the Federal Ministry to the Commission, that the originals of the certificates of fitness for consumption handed over to the Hauptzollamt (Principal Customs Office) 'could not be found at the Principal Customs Office and, consequently, there was no evidence.'

173 The German Government argues in response that the recovery procedure was opened in July 1991, but the competent authority immediately had doubts concerning its legality, as the documents in its possession were not, in its view, adequate to bring a recovery procedure against Barfuß with any chance of success. Nor can the competent authority be criticised for having suspended the appeal proceedings in the light of the request for a preliminary ruling in *Möllmann-Fleisch*, cited above; the Commission argument that case-law already existed in that area is incorrect.

174 Furthermore, the recovery procedure was closed because the competent authority took the view that its decision would not have stood up to judicial review and not, as the Commission claims, because the originals of the certificates of fitness for consumption handed over to the competent authority could not be found. Although it was true that the originals no longer existed, the competent authority had photocopies made by Commission officials.

175 The Commission counters this by saying that, as regards the reluctance to implement the recovery procedure, the argument advanced by the German Government implies that procedures for the recovery of refunds wrongly paid are possible only where it has been established with absolute certainty that the goods in question did not in fact reach the market of the country of destination to be marketed there; that view is not, however, compatible with the principles evolved through the case-law (see the abovementioned *Milch-, Fett- und Eier-Kontor*, *Dimex* and *Möllmann-Fleisch* judgments).

176 As regards the closure of the recovery procedure, the Commission's view remains unchanged and it makes the point that, in accordance with German procedural law, photocopies of certificates that are not certified copies of the original have no evidential value.

177 It should be recalled here that, according to the case-law of the Court of Justice, the Member States must, in the first place, respect the obligation of general diligence in Article 5 of the Treaty, as specifically embodied in Article 8(1) and (2) of Regulation No 729/70 with regard to the financing of the common agricultural policy. That obligation implies that the Member States must take steps to rectify irregularities promptly. With the passage of time, recovery of sums wrongly paid is likely to become complicated or impossible for reasons such as the fact that undertakings may have ceased trading or accounting documents may have been lost (Case C-34/89 *Italy* v *Commission* [1990] ECR I-3603, paragraph 12).

178 Furthermore, national authorities cannot justify a failure to fulfil their obligations to rectify irregularities quickly by relying on the length of administrative or judicial proceedings commenced by an economic agent (Case C-28/89 *Germany* v *Commission* [1991] ECR I-581, paragraph 32).

179 It should also be pointed out that while, pursuant to Article 8(1) of Regulation No 729/70, recovery procedures undertaken at national level are carried out in accordance with the rules of national law, including those allocating the burden of proof (see, to that effect, Joined Cases 205/82 to 215/82 *Deutsche Milchkontor and Others* [1983] ECR 2633, paragraph 36), it is also settled case-law that recourse to rules of national law is possible only in so far as it is necessary for the implementation of provisions of Community law and in so far as the application of those rules of national law does not jeopardise the scope and effectiveness of that Community law (Cases 146/81, 192/81 and 193/81 *BayWa and Others* v *Bundesanstalt für Landwirtschaftliche Marktordnung* [1982] ECR 1503, paragraph 29).

180 In this case, it is common ground that the recovery procedure was opened after a year had elapsed, that it was immediately suspended and that it was finally closed on 7 June 1994.

181 According to the German Government, the delay in opening the procedure, the stay in enforcing the decision to recover and, finally, the closure of the procedure were essentially the result of the assessment made by the competent national authority which was of the opinion that, in the absence of evidence, the procedure could not have a successful outcome. First, the certificates of fitness for consumption discovered in Zimbabwe provided no information as to the actual route taken by the goods. Secondly, the competent authority had in its possession, in respect of those transactions, transport documents and customs entry certificates indicating that South Africa was the country of destination of the goods or the country in which they had obtained customs clearance.

182 It should be pointed out here that, according to the case-law of the Court of Justice, proof of completion of customs formalities in the country of destination amounts only to rebuttable evidence that the objective of the variable export refunds has in fact been attained (see, to that effect, the abovementioned judgments *Dimex*, paragraph 11, and *Möllmann-Fleisch*, paragraph 13). More particularly, the probative force which normally attaches to the customs entry certificate may be disregarded where there is reason to doubt the actual access of the goods to the market of the territory of destination in order to be marketed there (*Möllmann-Fleisch*, cited above, paragraph 15). In circumstances of that kind, the actual access of the goods to the market of the country of destination may be proved by producing other documents provided for under the Community rules (see, to that effect, *Möllmann-Fleisch*, cited above, paragraph 14), such as the documents confirming that the goods were unloaded in the country of destination.

183 In the instant case, the certificates of fitness for consumption discovered in Zimbabwe were capable of justifying doubt as to whether the consignments of meat to which they referred, and which had been exported by Barfuß, had actually reached the market of their declared country of destination, namely South Africa. It was then for the company in question to prove, relying on documents other than the customs entry certificates, that the goods exported had in fact been released on to the market in their declared country of destination. In the absence of such proof, the exporting company had to repay the refunds already disbursed.

184 However, the German Government has advanced no argument to show that Barfuß produced documents, other than the transport documents and the customs entry certificates, to confirm that the goods exported had been unloaded in South Africa so as to dispel the doubt surrounding the true destination of the goods.

185 In those circumstances, and without it being necessary to establish whether the recovery procedure was in fact closed because the originals of the certificates of fitness for consumption discovered in Zimbabwe had been lost, it must be held that the delay in opening the recovery procedure and the manner in which it was conducted constitute a failure to comply with the obligations incumbent on the Federal Republic of Germany pursuant to Article 8(2) of Regulation No 729/70.

186 Accordingly, that plea must be rejected.

187 Having regard to all of the foregoing considerations, the application must be dismissed.

Costs

188 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs to be awarded against the Federal Republic of Germany and the latter has been unsuccessful, the Federal Republic of Germany must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Dismisses the application;

2. Orders the Federal Republic of Germany to pay the costs.

Kapteyn Hirsch Ragnemalm

Schintgen Ioannou

Delivered in open court in Luxembourg on 21 January 1999.

R. Grass

Registrar

P. J. G. Kapteyn

President of the Sixth Chamber