JUDGMENT OF THE COURT (Sixth Chamber)
22 April 1999 *

In Case C-28/94,

Kingdom of the Netherlands, represented by J. W. de Zwaan and J. S. van den Oosterkamp, Assistant Legal Advisers in the Ministry of Foreign Affairs, acting as Agents, with an address for service in Luxembourg at the Netherlands Embassy, 5 Rue C. M. Spoo,

applicant,

v

Commission of the European Communities, represented by T. van Rijn, Legal Adviser, and M. van der Woude, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: Dutch.

APPLICATION for partial annulment of Commission Decision 93/659/EC of 25 November 1993 on the clearance of the accounts presented by the Member States in respect of the expenditure for 1990 of the European Agricultural Guidance and Guarantee Fund (EAGGF), Guarantee Section (OJ 1993 L 301, p. 13),

THE COURT (Sixth Chamber),

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

Advocate General: S. Alber,
Registrar: H. A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 17 June 1998, at which the Kingdom of the Netherlands was represented by M. A. Fierstra, Assistant Legal Adviser in the Ministry of Foreign Affairs, acting as Agent, and the Commission by T. van Rijn, assisted by M. van der Woude, of the Brussels Bar,

after hearing the Opinion of the Advocate General at the sitting on 17 September 1998,

gives the following

Judgment

1 By application lodged at the Court Registry on 26 January 1994, the Kingdom of the Netherlands brought an action under the first paragraph of Article 173 of the EC Treaty for partial annulment of Commission Decision 93/659/EC of 25 November 1993 on the clearance of the accounts presented by the Member States in respect of the expenditure for 1990 of the European Agricultural Guidance and Guarantee Fund (EAGGF), Guarantee Section (OJ 1993 L 301, p. 13, hereinafter 'the contested decision'), in so far as it applied a flat-rate reduction of NLG 82 656 019 relating to expenditure on purchasing butter accepted for intervention in the Netherlands after 28 February 1985.

The Community legislation

Community legislation on purchases of butter by the intervention agencies

Regulation No 985/68

2 Article 1 of Regulation (EEC) No 985/68 of the Council of 15 July 1968 laying down general rules for intervention on the market in butter and cream (OJ, English Special Edition 1968(I), p. 256) sets out the conditions which the composition of butter must satisfy for it to be bought in by the intervention agencies.

3 Article 1(3)(a)(aa) of Regulation No 985/68, as inserted by Regulation (EEC) No 2714/72 of the Council of 19 December 1972 (OJ, English Special Edition 1972 (28-30 December), p. 15), prescribes that butter bought by the intervention agencies must have a minimum butterfat content by weight of 82%, a maximum water content by weight of 16%, and be manufactured from sour cream. Article 1(3)(a)(bb) of that regulation prescribes that butter manufactured from sweet cream is eligible for intervention if it has a minimum butterfat content by weight of 80%, a maximum water content by weight of 16%, and a maximum salt content by weight of 2%.

Regulation No 685/69

4 Under Article 2 of Regulation (EEC) No 685/69 of the Commission of 14 April 1969 on detailed rules of application for intervention on the market in butter and cream (OJ, English Special Edition 1969(I), p. 194), the intervention agencies are to buy in the butter offered to them only if, first, the quality has been checked from a sample taken and, second, the butter satisfies the requirements as to keeping quality specified in Article 3, as to age specified in Article 4, and as to quantity and packaging specified in Article 5.

5 In particular, Article 3(a) and (b) of Regulation No 685/69 states that the butter must have been made from pasteurised sour cream in dairies which have technically suitable equipment and under conditions which ensure the manufacture of butter of good keeping quality.

Regulation No 1897/87

6 By virtue of the amendment made by Article 1 of Council Regulation (EEC) No 1897/87 of 2 July 1987 amending and derogating from Regulation (EEC) No 985/68 (OJ 1987 L 182, p. 35), Article 1(3)(a) of Regulation No 985/68 prescribes that

butter bought in by the intervention agencies may also be manufactured from sweet cream if it has a minimum butterfat content by weight of 82% and a maximum water content by weight of 16%. It follows from that regulation that the condition of a maximum salt content of 2% for butter manufactured from sweet cream laid down in Regulation No 2714/72 no longer applies.

Regulation No 2687/87

7 Under Article 1 of Commission Regulation (EEC) No 2687/87 of 4 September 1987 amending Regulation No 685/69 (OJ 1987 L 254, p. 14), the condition in Article 3(a) of Regulation No 685/69 that the butter must be manufactured from pasteurised sour cream was removed and replaced by a reference to 'pasteurised cream'.

Community legislation on the EAGGF

Regulation No 729/70

8 By virtue of Articles 1(2)(b) and 3(1) of Regulation (EEC) No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy (OJ, English Special Edition 1970(I), p. 218), the Guarantee Section of the European Agricultural Guidance and Guarantee Fund ('the EAGGF') is to finance intervention intended to stabilise the agricultural markets, provided that it is undertaken according to Community rules within the framework of the common organisation of agricultural markets.

9 Article 8(1) of that regulation requires Member States to satisfy themselves that transactions financed by the EAGGF are actually carried out and are executed correctly, to prevent and deal with irregularities, and to recover sums lost as a result of irregularities or negligence. Under Article 8(2), the financial consequences of irregularities or negligence attributable to administrative authorities or other bodies of the Member States are not to be borne by the Community.

10 Article 9(1) of Regulation No 729/70 states that Member States are to make available to the Commission all information required for the proper working of the EAGGF and take all suitable measures to facilitate the supervision which the Commission may consider it necessary to undertake within the framework of the management of Community financing, including inspections on the spot.

Regulation No 283/72

11 Under Article 2(1) of Regulation (EEC) No 283/72 of the Council of 7 February 1972 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organisation of an information system in this field (OJ, English Special Edition 1972(I), p. 90):

'Member States shall communicate to the Commission within three months of the entry into force of this regulation:

— the provisions laid down by law, regulation or administrative action for the application of the measures provided for in Article 8(1) of Regulation (EEC) No 729/70, and

— the list of authorities and bodies responsible for the application of those measures and the main provisions relating to the role and functioning of those authorities and bodies and the procedures which they are responsible for applying.'

12 The first paragraph of Article 3 of that regulation prescribes that, during the month following the end of each quarter, Member States are to communicate to the Commission a list of irregularities which have been the subject of primary administrative or judicial findings of fact.

13 Under Article 4 of that regulation, each Member State is to communicate without delay to the other Member States concerned and to the Commission any irregularities which are liable to have effects outside its territory very quickly or which show that a new fraudulent practice has been adopted.

14 Under Article 5(1) of Regulation No 283/72, Member States are to inform the Commission of all judicial or administrative procedures instituted with a view to recovering sums wrongly paid and supply the Commission with any information which is relevant in this respect.

The dispute

15 In the late 1970s the Nederlands Instituut Zuivel Onderzoek (Netherlands Institute of Research into Dairy Products) developed a new method of manufacturing butter, the 'NIZO' process. According to the Netherlands Government, the method was developed primarily with a view to improving technical control of butter manufacture, preventing organoleptic anomalies and enhancing the keeping properties of butter.

16 Under this method the butter is manufactured from sweet cream. The buttermilk obtained during manufacture is sweet, acidification taking place at a later stage, when the granules of butter are formed.

17 It appears from the written observations submitted to the Court that in the Netherlands supervision of intervention is split between three bodies.

18 The Voedselvoorzienings In- en Verkoopbureau (Foodstuffs Purchase and Sale Office, 'the VIB') is the competent intervention agency within the meaning of Article 6(1) of Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organisation of the market in milk and milk products (OJ, English Special Edition 1968(I), p. 176). It informs butter manufacturers of the price and conditions at which butter may be offered for intervention, is responsible for buying in and storing that butter and carries out the relevant checks, in particular checking whether the packaging of the butter bears the information specially prescribed for intervention.

19 The Centraal Orgaan Zuivelcontrole (Central Dairy Control Body, 'the COZ'), which is a private-law institution, supervises on behalf of the VIB compliance by manufacturers with the Community rules on the composition and quality of butter offered for intervention. It carries out the checks required for intervention, including on-the-spot checks, by taking samples directly from the butter manufacturer and analysing them.

20 Finally, the Algemene Inspectiedienst van het Ministerie van Landbouw, Natuurbeheer en Visserij (General Inspection Service of the Ministry of Agriculture, Nature Conservation and Fisheries, 'the AID') is the ministerial body with general competence for intervention checks. The AID must make sure that the COZ is performing its task of control conscientiously, in particular with respect to the methods of production used in undertakings, and check the authorisations of undertakings producing intervention butter in accordance with the Community rules.

21 In a report submitted in April 1989, Mr Dankert, the Chairman of the European Parliament's Budget Committee, stated that none of the butter offered to the intervention agencies in the Netherlands from 1982 to 1987 satisfied the conditions for intervention, since it was manufactured by the NIZO method.

22 It appears from an investigation carried out by the Commission in November 1989 pursuant to Article 9 of Regulation No 729/70 that nearly all the butter offered for intervention or placed in private storage during that period did not satisfy the conditions laid down by the Community legislation. It also appears from the Summary Report of 1 October 1993 that an analysis of the documents in the possession of the Commission shows that the butter bought for intervention during that period was manufactured either by the NIZO process or by 'half-and-half' methods, and that although the Netherlands authorities were aware of those facts they made no demand for repayment from the undertakings concerned and never informed the Commission, as they were obliged to under Regulation No 283/72.

23 The Commission therefore concluded that the Netherlands authorities had seriously failed to fulfil their obligation to check under Article 8 of Regulation No 729/70. In those circumstances, by the contested decision, it applied a reduction of NLG 82 656 019 to the accounts presented by the Kingdom of the Netherlands.

24 According to the Summary Report, the seriousness of the failings and the period of time over which irregularities had been committed prompted the Commission to apply a flat-rate reduction of 10% of the expenditure declared to the EAGGF for the 1987 financial year which related to butter accepted for public intervention in the Netherlands between 28 February 1985 and 1 July 1987, when butter produced by the NIZO process became eligible for intervention.

25 The Netherlands Government puts forward three pleas in law to challenge the contested decision.

The first plea in law

26 In its first plea in law the Netherlands Government submits that the contested decision infringes Article 8(2) of Regulation No 729/70 and Articles 3 and 5 of Regulation No 283/72.

Infringement of Article 8(2) of Regulation No 729/70

Burden of proof

27 With respect, first, to infringement of Article 8(2) of Regulation No 729/70, the Netherlands Government claims that by submitting to all the requirements concerning checks to be carried out in order to ensure compliance with Regulations Nos 985/68 and 685/69, it did all that could reasonably be required of a Member State. It submits that it fulfilled its obligations under Article 8(1) of Regulation No 729/70 and that the Commission's complaint that it failed to fulfil its obligations is unfounded.

28 The Netherlands Government submits that it informed the Commission as soon as the NIZO process was developed that application of the Community rules did not

enable the method of producing butter used by the producer to be determined. The taking of samples of the finished product required by Article 2(1) of Regulation No 685/69 and the other checks laid down by the Community legislation for intervention purchases do not make it possible to guarantee that the butter has not been produced from sweet cream by the NIZO process. Despite the repeated requests by the Kingdom of the Netherlands to the Commission to adapt the Community legislation in view of this new production method, the Commission did not take the necessary steps for that purpose until 1987.

29 As regards the checks carried out by the VIB, the COZ and the AID described in paragraphs 18 to 20 above, the Netherlands Government submits that by taking additional measures from the early 1980s to comply strictly with the Community rules it set up an appropriate system for checking compliance with intervention requirements. It points out in particular that the quality checks carried out by the COZ concerned not only samples of butter but also products in the course of manufacture, so as to confirm that only butter produced by authorised processes was packaged in cartons marked 'I' for intervention. Checking the processes used was done by tasting the cream and the buttermilk as it separated.

30 Furthermore, according to the Netherlands Government, use of the NIZO process at any stage of the production of butter offered for intervention was formally prohibited in 1986. The pre-contractual offer made to producers by the VIB had to specify expressly that dairies would be checked regularly in order to make sure that butter made by the NIZO process would not be offered for intervention.

31 The controls by the Netherlands authorities were particularly intensive in late 1986 and 1987. The AID made checks at all Netherlands butter producers of the production processes used, to ascertain whether they had appropriate technical installations which were properly managed. In 1987 the VIB refused to accept 11 636 tonnes of butter for intervention, on the basis of the AID's findings.

Moreover, the Netherlands authorities transmitted to the Commission all the reports of checks carried out by the AID in 1987 on all producers of butter for intervention.

32 According to the Netherlands Government, the Commission is unable to show that butter manufactured by the NIZO process was accepted for intervention before 1987, and does no more than make general assertions on the question whether NIZO butter was accepted for intervention in the 1987 financial year.

33 Consequently, the Netherlands Government claims that the Commission has produced no evidence of negligence on the part of the Dutch authorities and could not reasonably conclude that they had never established a system for analysing the cream during checks for compliance with intervention requirements. It concludes that the Commission's application of Article 8(2) of Regulation No 729/70 is completely unfounded.

34 The Commission, on the other hand, considers that the essential question in the present case is whether it had sufficient evidence to conclude that the Kingdom of the Netherlands had not fulfilled its obligation to make checks, thus allowing it to make a reduction. If there was a serious and reasonable doubt as to the adequacy of the national system of checks, it was for the Member State to show that the conditions for obtaining the financing refused by the Commission were satisfied.

35 According to the Commission, when the NIZO production process was developed and the Netherlands authorities became aware of the problems it raised from the point of view of the Community rules on the composition of intervention butter, they should have taken all necessary steps to avoid butter made by the NIZO

process being offered for intervention. The Commission submits *inter alia* that in 1982 two cases of fraud were discovered but no steps were taken at the time to avoid further irregularities.

36 To show that the checks carried out were insufficient, the Commission submits *inter alia* that although the COZ itself reported that its own checks were inadequate, none of its proposals for improvement was accepted. Moreover, although the COZ had been ordered to taste the cream and buttermilk, that tasting would have constituted a valid check only if it had taken place regularly and without warning. The inadequacy of the COZ's checks was clearly shown in 1987, when the AID refused batches of butter for intervention although they had been accepted by the COZ. Furthermore, the Commission submits that the first investigation by the AID did not take place until 1987 and was limited to the butter offered to the intervention agencies, excluding the butter already acquired by those agencies. Neither the COZ nor the AID applied technical or accounting methods of control which could have revealed the use of sweet cream for butter manufacture.

37 According to the Commission, the investigation by the AID established that 10 of the 25 dairies in the Netherlands had offered 23 334 tonnes of butter to the VIB which had been manufactured by a process not in accordance with the Community rules in force, but had nevertheless been accepted by the COZ. That quantity represented 40% of the butter accepted for intervention in 1987. Finally, the Commission also submits that the managers of several dairies stated that they had not been aware of the prohibition on using the NIZO process for the production of intervention butter.

38 It should be observed, first, that the purpose of the procedure for clearing the accounts is to ensure that the credits made available to the Member States have been used in accordance with the Community rules in force in the context of the common organisation of the markets.

39 Article 8(1) of Regulation No 729/70, which expressly lays down in this field the obligations imposed on Member States by Article 5 of the EC Treaty, defines, according to the Court's case-law, the principles according to which the Community and the Member States must ensure the implementation of Community decisions on agricultural intervention financed by the EAGGF and combat fraud and irregularities in relation to those operations. It obliges the Member States to take the measures necessary to satisfy themselves that the transactions financed by the EAGGF are actually carried out and are executed correctly (see Case C-2/93 *Exportslachterijen van Oordegem* v *Belgische Dienst voor Bedrijfen en Landbouw* [1994] ECR I-2283, paragraphs 17 and 18, and Case C-235/97 *France* v *Commission* [1998] ECR I-7555, paragraph 45).

40 It is settled case-law, next, that where the Commission refuses to charge 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, it is required not to demonstrate exhaustively that the checks carried out by the Member States are inadequate but to adduce evidence of serious and reasonable doubt on its part regarding the checks carried out by the national authorities (see, to that effect, Case C-54/95 *Germany* v *Commission* [1999] ECR I-35, paragraph 35).

41 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, and that it is consequently for the State to adduce the most detailed and comprehensive evidence that it has made checks and, if appropriate, that the Commission's assertions are incorrect (see, to that effect, *Germany* v *Commission*, paragraph 35).

42 With respect, in the present case, to the inadequacy of the checks established by the Netherlands authorities, it appears from the observations submitted to the Court that, in response to written questions put following the Dankert report by members of the Netherlands Parliament asking whether the AID had carried out checks between 1982 and 1986, the competent Netherlands minister replied in the negative, stating that authorisation was checked only at the request of the VIB,

which made such a request only in cases of new authorisations or changes to its communication on the conditions for intervention, as in 1982 and 1986.

43 Moreover, on the occasion of a check carried out in 1987, the AID rejected a substantial quantity of butter offered for intervention on the ground that it had been made by the NIZO process. In view of the fact that it is not certain that the AID carried out checks in the preceding years, those circumstances may, as the Advocate General rightly observes in point 45 of his Opinion, give rise to serious doubts as to the effectiveness of the Netherlands system of checks before 1987.

44 The verification reports drawn up by the AID in 1987 and forwarded to the Commission by the Netherlands authorities can only confirm those doubts. It appears from them that the managers and staff of the dairies were not informed that butter produced by the NIZO process was not authorised for intervention. The Commission made similar findings in its investigation of 1989. The fact that the undertakings were not informed of the prohibition on selling NIZO butter for intervention is a legitimate reason for doubting the effectiveness of the checking system.

45 Consequently, it must be observed that the Commission's findings constitute evidence capable of giving rise to serious and reasonable doubts as to the implementation of appropriate and effective supervision and control measures. It must therefore be held that the Commission discharged the burden of proof on it as regards the irregularities it complained of in the Kingdom of the Netherlands.

Basis of calculation and amount of the financial correction

46 As regards the basis of calculation of the financial correction, the Netherlands Government submits that, in view of the fact that the correction imposed by the contested decision concerns the 1987 financial year, it can relate only to the expenditure on butter accepted for intervention between 1 December 1986 and 1 July 1987, in other words the date on which butter made from sweet cream was authorised for intervention. The correction applied by the Commission corresponded to 10% of the total expenditure declared for the 1987 financial year for the quantities of butter stored after 28 February 1985. Butter lawfully bought for intervention during the preceding years could not give rise to unlawful expenditure in subsequent years. The total expenditure charged to the EAGGF during the relevant period of the 1987 financial year amounted to NLG 11 million. The Netherlands Government thus concludes that that sum is the maximum which could have been used as the basis of any flat-rate correction.

47 As regards the amount of the correction imposed by the contested decision, the Netherlands Government submits that the Commission itself admitted that the 10% percentage is applied only if the control system as a whole is so defective that it may reasonably be considered that there is a substantial risk of large-scale financial loss to the EAGGF. The Commission did not prove that or even show that it was likely in the present case. In the absence of any information on specific acts of the Netherlands authorities or on identified quantities of butter made by the NIZO process and unlawfully accepted for intervention, that percentage was arbitrary and is not based on any element of fact.

48 The Commission submits that, in a case such as the present one in which the checks prove to be completely inadequate, ascertaining the damage incurred by the EAGGF is difficult. In such circumstances the Commission could make a correction on a

flat-rate basis, in which case it would be for the Member State concerned to show that the correction did not correspond to reality. The Commission considers, however, that in the present case the correction was relatively moderate in view of the results of the AID's 1987 investigation. The quantity wrongfully accepted for intervention represented in 1987 40% of the butter offered in the Netherlands, and the reduction imposed represented only 10% of the expenditure declared, even though the Commission could, according to the Court's case-law, have refused the entire expenditure relating to the items concerned.

49 On this point, it must first be noted that, as stated in paragraph 38 above, the essential purpose of the decision on the clearance of the accounts is to ensure that the expenditure was incurred by the national authorities in accordance with the Community rules (see also Case 349/85 *Denmark* v *Commission* [1988] ECR 169, paragraph 19).

50 It is settled case-law, next, that the Commission may only charge to the EAGGF sums paid in accordance with the rules laid down in the various sectors of agricultural production, leaving the Member States to bear any other sum paid, and in particular any amounts which the national authorities wrongly believed themselves authorised to pay in the context of the common organisation of the markets (see, *inter alia*, *France* v *Commission*, paragraph 38).

51 Consequently, until the accounts have been duly cleared, the Commission is obliged under Article 3 of Regulation No 729/70 to refuse to charge to the EAGGF intervention intended to stabilise the agricultural markets which has not been carried out in accordance with the Community rules. That obligation does not disappear merely because the accounts are cleared after the expiry of the period prescribed in Article 5 of that regulation (see, to that effect, concerning export refunds, *Denmark* v *Commission*, paragraph 19, and Case C-50/94 *Greece* v *Commission* [1996] ECR I-3331, paragraph 6).

52 It follows that in the present case the Commission could, because of the inadequate controls, refuse to accept the expenditure on butter bought for intervention and stored after 28 February 1985 which was declared by the Kingdom of the Netherlands for the 1987 financial year.

53 Moreover, as the Commission has rightly pointed out, the fact that the correction was limited to the 1987 financial year does not mean that it could concern solely the butter accepted for intervention in 1987, since part of the expenditure declared for the 1987 financial year related to intervention purchases in preceding years. In those circumstances, the Netherlands Government's argument on this point cannot be accepted.

54 As to the amount of the financial correction, it is clear from the Court's case-law that if the Commission finds that there is no adequate system of controls, it may disallow the entire expenditure incurred (see, to that effect, Case C-197/90 *Italy* v *Commission* [1992] ECR I-1, paragraph 39).

55 In such circumstances, the Kingdom of the Netherlands cannot criticise the Commission for having applied merely a flat-rate reduction of 10%.

56 Moreover, where instead of disallowing all the expenditure affected by the infringement the Commission has endeavoured to establish rules under which irregularities are treated differently, depending on the extent of the shortcomings in the checks and the degree of risk to the EAGGF, it is for the Member State to show that those criteria are arbitrary and unfair (see, to that effect, Case C-242/96 *Italy* v *Commission* [1998] ECR I-5863, paragraph 75). Since the Netherlands Government has not done so, its argument on this point must be rejected.

Infringement of Articles 3 and 5 of Regulation No 283/72

57 As regards the obligations under Articles 3 and 5 of Regulation No 283/72, the Netherlands Government submits that the wording and the structure of Article 3 of that regulation both show that the obligation to report irregularities concerns irregularities which have been committed but not attempts at fraud.

58 According to the Government, a report by the AID on an apparent attempt at fraud cannot therefore be regarded as a primary administrative finding of fact within the meaning of the first paragraph of Article 3 of Regulation No 283/72. That provision did not require the Kingdom of the Netherlands to report irregularities, as the VIB had not bought any butter made by the NIZO process.

59 The Commission submits that compliance with the rules on information requires account to be taken not only of the financial consequences of frauds but also of the seriousness of attempted frauds and their general context. In the present case, approximately 40% of the butter offered during a single year was concerned. It is perfectly possible for butter not accepted for intervention in one Member State to be offered after a detour to an intervention agency in another Member State. In the present case the risk of fraud was all the greater in that nothing distinguished butter produced by the NIZO process from butter made by the traditional method.

60 On this point, it must be noted that, having regard to the information specified in the second paragraph of Article 3 of Regulation No 283/72 which the Member States must communicate to the Commission concerning *inter alia* the nature and amount of the expenditure, the common organisation of the market concerned, the period during which the irregularity was committed, the practices adopted in committing it and the national authorities or bodies which recorded it, that provision is

clearly intended to avoid as far as possible new cases of fraud and fresh irregularities.

61 That aim is also apparent in the fourth recital in the preamble to the regulation, which states that Member States and the Commission should cooperate more closely in order to prevent irregularities.

62 Moreover, according to Article 4 of the regulation, each Member State is to communicate without delay to the other Member States concerned and to the Commission any irregularities which are liable to have effects outside its territory very quickly or which show that a new fraudulent practice has been adopted.

63 Consequently, in order to prevent irregularities and increase cooperation between the Member States and the Commission, the competent national authorities must communicate to the Commission the irregularities which have been detected on their territory, including attempts at fraud. A decision of the AID, as the competent control body for intervention in the Netherlands under Article 6(1) of Regulation No 804/68, refusing to accept butter made by the NIZO process for intervention or establishing an apparent attempt at fraud, constitutes a primary administrative finding within the meaning of the first paragraph of Article 3 of Regulation No 283/72.

64 The Netherlands Government's argument on this point must therefore be rejected.

65 In those circumstances, the first plea in law must be rejected in its entirety.

The second plea in law

66 In its second plea in law the Netherlands Government submits that the contested decision breaches certain general principles of law, in particular the principles of diligent action and legal certainty.

67 The Netherlands Government submits in this regard that the Commission did not communicate to it the final results of the check it carried out in 1989 on the basis of Article 9 of Regulation No 729/70 until its letter of 21 June 1991, one and a half years later. There was no discussion with the Netherlands authorities before the Commission adopted its final position as set out in that letter.

68 Moreover, even after all the reports on the checks carried out by the AID in 1987 on producers of butter intended for intervention had been forwarded to the Commission, the latter reacted by simply finding, without stating reasons, that the Netherlands authorities' efforts at checking had been inadequate in 1987. The Netherlands Government states that it explained the checking measures which had been implemented at bilateral discussions with the Commission in 1991, in the course of bilateral contact in 1993, and during the discussions on the Summary Report within the EAGGF Committee in that year, but the Commission took no account of that when drawing up that report.

69 In view of the Commission's negligence in applying Article 9 of Regulation No 729/70, its decision imposing a financial correction on the Kingdom of the Netherlands under Article 8(2) of that regulation is, according to the Netherlands Government, contrary to the principle of diligent action.

70 The Netherlands Government also states that, in connection with clearance of the accounts for 1986, the Commission made an investigation in 1987 into purchases of butter intended for public storage. More precisely, in July and September 1987 the EAGGF carried out an analysis of the system of public storage of butter in the Netherlands. On that occasion the conditions under which butter was bought for intervention and compliance with the Community legislation on the matter were the subject of a detailed investigation. Neither that investigation nor the Commission's Summary Report of 15 June 1988 on the 1986 financial year showed that the Netherlands system of checks did not comply with the rule that butter accepted for intervention had to be produced from sour cream. In those circumstances, the Netherlands authorities could legitimately consider that they had implemented an adequate system of checks even before 1987 and that the Commission shared that opinion. Therefore, by finding, when the accounts for 1987 were cleared, that there were no effective checks, the Commission breached the principle of legal certainty.

71 The Commission considers that this plea has no foundation in fact or in law. It claims that although, on the occasion of the investigation it carried out in 1989, there was an extensive exchange of correspondence between it and the Netherlands authorities, it did not during those discussions make any promises as to the definitive consequences which it would attach to the inadequacies of the Netherlands system of checks. By applying a 10% reduction because of the defects of that system, the Commission acted in accordance with the terms of its communication to the EAGGF Committee.

72 Furthermore, the Commission cannot understand how the Netherlands authorities could derive from the results of the 1987 audit of the system of checks any legitimate expectations as to the results of the 1989 investigation, as the two investigations were completely different.

73 The first point to be made in that regard is that, as stated in paragraphs 38 and 49 above, the essential purpose of the decision on the clearance of the accounts is to ensure that the national authorities have incurred expenditure in accordance with the Community rules.

74 Until the accounts have been duly cleared, the Commission is obliged under Article 3 of Regulation No 729/70 to refuse to charge to the EAGGF expenditure which has not been incurred in accordance with the Community rules.

75 While it is for the Commission to produce evidence that it has serious and reasonable doubts in view of the absence or inadequacy of checks implemented by the Member State concerned, it is for that State to demonstrate, if appropriate, that the Commission erred as to the financial consequences to be drawn (see *France* v *Commission*, paragraph 39). It appears from the examination of the first plea in law that in the present case the Commission discharged the burden of proof on it as to the irregularities it had complained of as regards the Kingdom of the Netherlands. The latter has not, by contrast, shown that the Commission's doubts as to its system of checks or the financial consequences it drew from those doubts were incorrect.

76 As the Advocate General observes in point 84 of his Opinion, nothing prevents the Commission, after detecting faults in the course of a specific investigation, from drawing financial consequences therefrom, and the Netherlands Government cannot escape liability by pointing to the fact that the Commission found no irregularities during an earlier investigation.

77 Consequently, the second plea in law must be rejected.

The third plea in law

78 In its third plea in law the Netherlands Government submits that the contested decision infringes Article 190 of the EC Treaty because of failure to state reasons or, at least, breach of essential procedural requirements.

79 According to the Government, the Commission essentially relied, as its reasons for the contested decision, on general assertions and arguments which were not backed up by any evidence at all that the Netherlands system of checks could give rise to serious and reasonable doubts. The Commission does not set out the grounds for its assertion that the documents produced by the Kingdom of the Netherlands proved that fraud had been committed. All the results of the checks carried out by the AID in 1987 on all the producers who had offered butter for intervention were communicated to the Commission, and those results did not provide any justification for the assertion that fraud had been committed.

80 The Commission points out that the Netherlands authorities were closely involved in the preparation of the contested decision, as a special investigation had been carried out in the Netherlands, followed by voluminous correspondence and many bilateral meetings. The Commission therefore considers that the Netherlands authorities were altogether in a position to understand, and did perfectly understand, the complaint made against them.

81 It is settled case-law that the extent of the duty to state the reasons on which a decision is based, laid down in Article 190 of the EC Treaty, depends on the nature of the act in question and on the context in which it was adopted (see Case C-54/91 *Germany* v *Commission* [1993] ECR I-3399, paragraph 10).

82 In the particular context of the preparation of decisions relating to the clearance of accounts, the statement of reasons for a decision must be regarded as sufficient if the Member State to which the decision was addressed was closely involved in the process by which it came about and was aware of the reasons for which the Commission took the view that it should not charge the sum in dispute to the EAGGF (see, *inter alia*, Case C-27/94 *Netherlands* v *Commission* [1998] ECR I-5581, paragraph 36).

83 In the present case, in addition to the explanations in the Summary Report, it is common ground that the Netherlands Government was involved in the process of preparing the contested decision and was thus aware of the reason for which the Commission considered that it should not charge the sum in dispute to the EAGGF. The Netherlands Government itself states that it exchanged voluminous correspondence with the Commission between 1989 and 1993.

84 In those circumstances, it must be held that the Netherlands authorities were sufficiently involved in the process leading to the adoption of the contested decision, and the statement of the reasons for that decision must therefore be regarded as sufficient.

85 As the third plea in law cannot be upheld either, the application must be dismissed in its entirety.

Costs

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

On those grounds,

THE COURT (Sixth Chamber),

hereby:

1. Dismisses the application;

2. Orders the Kingdom of the Netherlands to pay the costs.

Kapteyn Hirsch Mancini

Ragnemalm Schintgen

Delivered in open court in Luxembourg on 22 April 1999.

R. Grass P. J. G. Kapteyn

Registrar President of the Sixth Chamber