JUDGMENT OF THE COURT (Sixth Chamber)
3 October 1996 *

In Case C-41/94,

Federal Republic of Germany, represented by Ernst Röder, Ministeralrat in the Federal Ministry of the Economy, and Bernd Kloke, Regierungsrat in the same ministry, acting as Agents, D-53107 Bonn, Federal Republic of Germany,

applicant,

v

Commission of the European Communities, represented by Ulrich Wölker, of its Legal Service, acting as Agent, assisted by Georg M. Berrisch and Hans-Jürgen Rabe, Rechtsanwälte, Hamburg, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the 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) to the extent to which it did not charge to the EAGGF the sum of DM 7 518 141 disbursed by the Federal Republic of Germany in relation to the Community scheme providing for a special premium for beef and veal producers,

* Language of the case: German.

THE COURT (Sixth Chamber),

composed of: C. N. Kakouris (Rapporteur), President of the Chamber, P. J. G. Kapteyn and J. L. Murray, Judges,

Advocate General: A. La Pergola,
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 5 October 1995,

after hearing the Opinion of the Advocate General at the sitting on 7 December 1995,

gives the following

Judgment

1 By application lodged at the Court Registry on 31 January 1994, 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 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) to the extent to which it did not charge to the EAGGF the sum of DM 7 518 141 disbursed by the Federal Republic of Germany in relation to the Community scheme providing for a special premium for beef and veal producers.

2 In the summary report on the results of the checks for clearance of the EAGGF Guarantee Section accounts for 1990, annexed to its application, the Commission found that the Federal Republic of Germany (in particular the *Länder* of Bavaria and Baden-Württemberg) had not properly applied the special premium scheme provided for by the Community rules in favour of beef and veal producers. Consequently it did not charge the abovementioned amount to the EAGGF.

3 That amount derives from three corrections: one of DM 5 040 986 for lack of effective administrative controls and deficiencies in the system of granting the beef premium, as applied in Bavaria and Baden-Württemberg (point 4.10.4.2.1 of the summary report); a second for deficiencies involving the risk of multiple payments, comprising DM 838 636 for imports from other Member States and DM 311 529 for exports to other Member States (point 4.10.4.2.2 of the summary report), and a third of DM 1 326 990 for inadequacies in the application of the transitional provisions contained in Article 11 of Commission Regulation (EEC) No 714/89 of 20 March 1989 laying down detailed rules applying to the special premium for beef producers (OJ 1989 L 78, p. 38) (point 4.10.4.2.3 of the summary report).

4 It is apparent from the documents before the Court that the contested decision was preceded by three letters from the Commission to the German Government of 9 August 1991, 4 September 1991 and 29 September 1992, which set out in detail the findings made by the Commission in its checks; the German Government replied to those letters.

5 In its application, the applicant puts forward a number of pleas in law directed against the criticisms made in points 4.10.4.2.1, 4.10.4.2.2 and 4.10.4.2.3 of the summary report. It also claims that the Commission was informed of the implementation in Germany of the special premium scheme and that, in any event, the alleged deficiencies derive from Community law.

I — The lack of effective administrative controls and the deficiencies in the system for granting special beef premiums, as applied in Bavaria and Baden-Württemberg (point 4.10.4.2.1 of the summary report)

6 The special beef premium, as granted in 1989-90, is based on Article 4a(1) of Regulation (EEC) No 805/68 of the Council of 27 June 1968 on the common organization of the markets in beef and veal (OJ, English Special Edition 1968 (I), p. 187), as amended by Council Regulation (EEC) No 571/89 of 2 March 1989 (OJ 1989 L 61, p. 43).

7 According to that provision:

'1. Beef and veal producers may qualify for a special premium. It shall be granted at the producers' request for male animals at least nine months old which are fattened on their holdings. The premium shall be limited to 90 animals per calendar year and per holding. (...)

The premium shall be granted once only for each animal. It shall be paid to the producer or passed on to the producer.'

8 Other rules on the conditions for granting the special beef premium are contained in Council Regulation (EEC) No 468/87 of 10 February 1987 laying down general rules applying to the special premium for beef producers (OJ 1987 L 48, p. 4), as amended by Council Regulation (EEC) No 572/89 of 2 March 1989 (OJ 1989 L 63, p. 1).

9 Article 2(1) of Regulation No 468/87, as amended by Regulation No 572/89, provides:

'Each animal shall qualify only once in its lifetime for application of the premium referred to in article 4a of regulation (EEC) no 805/68.

Only animals which are at least six months old at the date of the lodging of a request for a premium may be the subject of such a request.'

10 The rules intended to ensure compliance with those substantive conditions are laid down in Regulation No 714/89.

11 Those rules concern:

— indication of the age of the animals concerned (Article 2);

— identification of the animals concerned (Article 7);

— administrative controls and on-farm inspections by the competent national authorities (Article 8).

12 Point 4.10.4.2.1 of the summary report makes five criticisms concerning: (a) the administrative controls in general, (b) administrative controls concerning indication of the ages of animals, (c) the criteria for selecting claimants for on-farm inspections, (d) on-farm inspections as regards identification of animals and (e) other inadequacies of on-farm inspections.

A — *The administrative controls in general*

13 Article 8 of Regulation No 714/89 provides:

'1. The competent authority appointed by each Member State shall operate administrative checks and on-farm inspection in order to verify that the provisions governing the special premium are complied with. These inspections must be carried out at a minimum number of holdings to be determined by the Commission .... The control measures shall cover in particular:

(a) the presence on the holding run by the producer of the number of male cattle covered by the application ...;

(b) the correctness of the required declarations and fulfilment of the undertakings made by the producer;

(c) compliance with the provisions on identification and marking specified in Article 7.

2. In order to enable them to exercise adequate control of applications lodged pursuant to Article 2, Member States shall set a minimum period during which male cattle must be kept on the holding following the date of lodging of the application. This period may not be less than two nor more than five months.'

14 In the summary report, the Commission states:

'It was established that administrative control of claims not selected for on-farm inspection was limited to a check on correct completion and lodging of the claim forms by claimants and respect of the maximum number of 90 animals per calendar year.

...

The EAGGF determined that the administrative controls implemented by the German authorities were not those intended by governing legislation and that they were inadequate in providing minimum safeguards for the Fund.'

15 The applicant contends, first, that the term 'administrative control' means effective verification of the plausibility of claims and that it would be unreasonable to require an administrative control of results that were almost as reliable as those obtained in an on-farm inspection.

16 The Commission states that its criticism in the summary report certainly does not imply that the administrative control must permit approximately the same degree of certainty as that obtained in an on-farm inspection. When carrying out administrative controls, the national authorities should, in particular, verify the correctness and credibility of the figures and of the commitments or declarations given in

the claims with a view to satisfying themselves that the conditions for granting the premiums have been observed.

17 It must be observed that administrative controls preceding on-farm inspections must be carried out in such a way as to enable the national authorities to draw all possible conclusions, be they matters of certainty or of doubt, regarding compliance with the conditions for granting premiums. Accordingly, such controls should consist in checking that the claims and the undertakings or declarations accompanying them are in due order, comparing claims with any lodged by the same producer in earlier years, comparing claims with those relating to other holdings, above all the larger ones, and examining the information obtained in combination with the available statistics, and any other relevant data, so as to identify any dubious cases.

18 The applicant maintains, secondly, that the competent departments of the two *Länder* audited by the Commission carried out an effective administrative check of the plausibility of the claims. The details given in the claims for premiums were in general compared with those appearing in the previous year's claims. Moreover, for holdings which had previously undergone an on-farm inspection, it was possible to cross-check with the corresponding inspection records. Where a significant variance was observed in the number of premiums claimed for different years the holdings concerned were subjected to more frequent administrative controls.

19 In support of its statements, the applicant refers in its reply to an investigation carried out on 12 September 1991 by the Bavarian Ministry of Food, Agriculture and

Forests involving all the agricultural departments in Bavaria. That investigation, which was concerned with the measures taken to check the credibility of the information given in the claims, showed that certain departments were capable of checking large volumes of information.

20 The Commission objects that it is too late for the applicant to seek to rely on that investigation at this stage of the procedure. The final date for transmission of any additional information that the Member States wished to provide was 15 December 1992, as laid down by a Commission decision of 6 November 1992, adopted under Article 1(3) of Regulation (EEC) No 1723/72 of the Commission of 26 July 1972 on making up accounts for the European Agricultural Guidance and Guarantee Fund, Guarantee Section (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). Moreover, under Article 42(1) and the first subparagraph of Article 42(2) of the Rules of Procedure of the Court, the applicant is prohibited from introducing new evidence or new pleas in law.

21 The Commission also contests the applicant's statement that the competent departments of the two *Länder* inspected by the Commission undertook an effective administrative check of the credibility of the claims. In particular, Malcolm Slade, a Commission official and inspector assigned to this case, stated at the hearing that during inspections carried out by him in the *Länder* of Bavaria and Baden-Württemberg the authorities had been unable to produce any document (memorandum, report or form completed by the competent national official) showing that comparisons had actually been made and that the available statistics had been taken into account for the purposes of the administrative control. Furthermore, there was no document to show that the competent ministry of the *Land* concerned had instructed the inspection departments to follow that course of action.

22 The applicant replies that since the officials responsible for the control had themselves carried out the on-farm inspections, they had such detailed knowledge of the holdings that it was unnecessary to draw up a report.

23 It must first be noted that the investigation of 12 September 1991, having been mentioned for the first time by the applicant in its reply, cannot be taken into consideration by the Court, since it constitutes evidence adduced out of time. By decision of 6 November 1992, based on Article 1(3) of Regulation No 1723/72, as amended by Regulation No 422/86, the Commission set 15 December 1992 as the final date for transmission of additional information by the Member States. However, the applicant did not produce the results of the investigation concerned by that date and did not ask the Court to take account of any exceptional circumstances such as to justify the delay (see also Case C-54/91 *Germany* v *Commission* [1993] ECR I-3399, paragraphs 13 to 15).

24 It must also be observed that, in the absence of any written evidence which could invalidate the findings in the summary report to the effect that the competent authorities did not undertake a control of the kind described in paragraph 16 above, the applicant's contentions concerning the substance of the administrative controls carried out in the two *Länder* must be regarded as having no foundation.

25 Accordingly, the pleas put forward by the applicant concerning the criticism of the administrative controls in general must be rejected.

B — *The administrative controls concerning indication of the animals' ages*

26 Article 2 of Regulation No 714/89 provides:

'Applications for the premium ... shall ...:

— indicate the age of the animals ...'.

27 In the summary report, the Commission states:

'Such information was not required by the German authorities who satisfied themselves with a simple declaration by claimants that all animals claimed were at least six months old.

Bearing in mind that in Germany:

— animals are sometimes kept to an age exceeding 24 months

— there is a claim period every eight months

— claimants themselves earpunch the animals,

It is clear that a more precise indication of age would have improved:

— administrative control

— selection of claimants for on-farm inspection

— the quality of on-farm inspections by providing a positive indication that animals claimed are those inspected, i. e. 10 animals claimed at 6 months old should have the appearance of 9-months-old animals 3 months later.'

28 The applicant maintains that the claims submitted conformed with Article 2 of Regulation No 714/89, since that provision imposes no formal condition regarding indication of the age of animals.

29 Moreover, according to the applicant, the system established in Germany for implementation of the special premium scheme is organized so as to preclude any possibility of a premium being granted twice for the same animal. In particular, that system provides for different types of marking applied alternately, according to the period of the claim, to the left ear or the right ear of the qualifying animal. It is uneconomic for the producer to keep animals on the holding until a new period for which the marking is the same since, first, the minimum age for an animal to qualify is six months and the periods for submitting claims are separated by eight-month intervals and, secondly, producers receive a better price if the animal is slaughtered at 18 months, when its meat quality is at its best.

30 According to the Commission, the fact that Article 2 of Regulation No 714/89 does not determine how ages are to be indicated does not mean that the method used in the German forms meets the requirements of Community law. If that were the case, the Community legislation could have dispensed with that indication. In particular, the indication in the claim, not of the age of the animal concerned but of the minimum age laid down by the rules, does not enable any conclusions to be drawn in the administrative control or on-farm inspection, it being impossible to establish that the animals covered by the claim are the same as those inspected on the farm.

31 Furthermore, the arguments put forward by the applicant as to how duplication of payments is obviated are based on the reliability of the German marking system, and it is precisely that reliability which the Commission challenges.

32 It must be observed that Article 2 of Regulation No 714/89 is to be interpreted in the light of the aim pursued by the regulation, which is to establish an effective control procedure guaranteeing that the substantive preconditions for granting the premium will be fulfilled.

33 Specific indication of the age of the animal concerned is of fundamental importance since it provides the only means of ensuring that the animals covered by the claim are the same as those on the holding at the time of the on-farm inspection.

34 Nothing in the applicant's arguments concerning the manner in which the special beef premium scheme is implemented in Germany detracts from that finding, particularly since the marking of the animals is carried out by the claimants.

35 Consequently, the pleas put forward by the applicant concerning the criticism of the administrative controls regarding the age of the animals must be rejected.

C — *The criteria for selecting claimants with a view to on-farm inspections*

36 The following finding appears in the summary report concerning the selection of claimants:

'The EAGGF failed to detect a systematic approach to selection of claimants for on-farm inspection and considers that this failing weakened the overall control regime'.

37 The applicant claims that the procedure followed, which in most cases involves leaving selection of the holding to be inspected to chance, is in practice satisfactory and objective, and means that holdings previously inspected cannot thereby feel 'protected' for several years.

38 However, where a previous administrative control or past experience prompted the competent authorities to consider an on-farm inspection particularly appropriate for certain holdings, the latter were chosen as a matter of priority. The same applied to claims containing vague information. Moreover, the competent authorities had been instructed to increase the number of checks appropriately in the event of a rise in the number of irregularities. In that connection the applicant refers to the letters from the competent Bavarian ministry of 24 January 1989 and

13 August 1990, and to the letter from the Baden-Württemberg Ministry of Rural Areas, Food, Agriculture and Forests of 7 June 1989.

39 Moreover, according to the applicant, the Member States enjoy a considerable degree of latitude regarding the procedure for selecting claimants who are to be the subject of on-farm inspections. In a letter of 9 August 1991, the Commission itself recognized that that power had been correctly exercised by the Federal Republic of Germany.

40 The Commission contends, first, that pursuant to Article 8(2) of Regulation No 714/89 the Member States must ensure that there are sufficiently effective controls, even if they are only required to inspect a minimal number of holdings. It is therefore hardly advisable to leave to chance the choice of those claimants who are to be subjected to an on-farm inspection. The Federal Republic of Germany ought, on the contrary, to have established selection criteria adapted to the risks associated with the grant of premiums.

41 Next, the applicant's statement that priority was given to certain holdings remains to be proved. The applicant is debarred from relying, for the first time in its reply, on the letter from the competent Bavarian ministry of 24 January 1989. As regards the letter from the same ministry of 13 August 1990, it could have had no practical effect during the year in question.

42 Finally, the Commission considers that its letter of 9 August 1991 does not show that it approves in principle of random selection. On the contrary, it expressly stated that it was necessary to use an appropriate combination of different selection criteria.

43 It must be stated in that connection that administrative controls and on-farm inspections were designed by the Community legislature as two means of verification which, although separate, complement each other within the control procedure under Article 8 of Regulation No 714/89.

44 In view of the findings in paragraph 17 of this judgment regarding the substance of the administrative controls, the selection of claimants to be subjected to an on-farm inspection must be based on a combination of appropriate criteria and not solely, or even mainly, on chance. Thus, on-farm inspections may for example, in order to ensure the effectiveness of the control procedure, focus as a matter of priority on the largest holdings or those which, on the basis of the results of the administrative control, appeared suspect, and the others may be inspected on a random basis.

45 The applicant's argument that, notwithstanding application of the principle of random selection, the suspect holdings were inspected as a matter of priority cannot, in the absence of any substantiation, be upheld. Moreover, the letters from the competent Bavarian and Baden-Württemberg ministries relied on by the applicant are concerned not with the criteria for selecting claimants but with the number of holdings to be inspected.

46 In those circumstances, the pleas put forward by the applicant in relation to the criticism concerning the criteria for selecting claimants for on-farm inspections must be rejected.

D — *On-farm inspections as regards identification of the animals*

47 The first subparagraph of Article 7(1) of Regulation No 714/89 provides:

'Animals for which a premium application as mentioned in Article 2 is lodged shall, within the time-limits fixed by the Member States and at the latest within five weeks from the date when the application was lodged, bear a clearly visible permanent identification consisting of either perforation or marking of the ear or of an ear notch.'

48 In the summary report, the Commission states:

'In Germany ... identification consists of circular perforation or tagging with a lilac-coloured metal eartag; such marks being applied by claimants themselves without official supervision. The method of marking was decided by claimants ...

The EAGGF is not satisfied that such a marking system provides the necessary guarantees because:

— the metal eartags may be easily removed (either by accident or deliberately)

— the minimum hole size of 1 cm has a tendency to close

— a variety of other holes and scars frequently result from commercial or veterinary activities.

... [R]eal risks of irregularity arising from the theoretical possibilities outlined above have been fully borne out to a surprising degree by the EAGGF's own on-farm inspections conducted in Germany.'

49 The applicant claims first that the marking undertaken in Germany conforms with the first subparagraph of Article 7(1) of Regulation No 714/89 and that cases in which holes in animals' ears are not sufficiently identifiable or the eartags are lost are rare and exceptional. In its reply, it refers to an expert's report which is dated 7 July 1994 but relates to an inquiry carried out in 1987. Furthermore, even in those cases, claimants were, as is apparent from a letter of 25 September 1989 from the Federal Ministry of Agriculture to the *Länder*, under an obligation to re-mark the animals. Finally, requests for premiums for animals whose marking was not absolutely in order had been rejected, leading to a number of actions before German administrative courts.

50 The applicant then asserts that the Commission, after being informed in accordance with Regulation No 714/89 of the system adopted in Germany, recognized that the marking method used was in conformity with Article 7(1) of that regulation. It refers in support of that statement to a letter of 23 November 1989 from the Commission to the Federal Republic of Germany, and to a telex of 2 July 1987, also from the Commission to that Member State, regarding the conformity of the same marking method with the similar rules contained at that time in Article 6(1)

of Regulation (EEC) No 859/87 of 25 March 1987 laying down detailed rules applying to the special premium for beef producers (OJ 1987 L 82, p. 25).

51 According to the applicant, its statement is corroborated by the fact that in other cases the Community has laid down identification systems similar to the one used in Germany. That applies in particular in the case of Council Directive 92/102/EEC of 27 November 1992 on the identification and registration of animals (OJ 1992 L 355, p. 32).

52 In reply, the Commission states first that although the marking system used in Bavaria and in Baden-Württemberg used two of the methods expressly authorized for that purpose by Article 7(1) of Regulation No 714/89, it still did not meet the requirements of Community law. In particular, it did not facilitate clearly visible and permanent identification or indelible marking of one of the animal's ears. Both the controls and certain witness evidence obtained by Commission officials from German producers confirmed the inadequacy of the system of identification used. At the hearing the Commission stated in that connection that the animals displayed a 'multitude' of perforations which made correct identification difficult or even impossible.

53 Secondly, the Commission considers that the applicant is debarred, for being out of time, from relying on the expert's report.

54 Thirdly, it observes that in its letter of 23 November 1989, referred to by the applicant, it confirmed the reliability only of earpunching as such, without giving any positive assessment concerning the manner in which such earpunching was carried out in Germany, particularly since at that time it was not aware of the details, which is confirmed in particular by the fact that it made no reference to identification using 'lilac-coloured eartags' which are also used in Germany.

55 Fourthly, Directive 92/102, referred to by the applicant, does not affect the 1990 financial year.

56 It must be observed, first, that in the summary report the Commission did not criticize in the abstract the method of marking used in Germany but rather the specific manner in which it was carried out.

57 The applicant has not succeeded in establishing that the Commission was wrong to do so.

58 The expert's report, mentioned for the first time in the reply, cannot be taken into account by the Court, since it constitutes evidence submitted out of time. Irrespective of the truth or otherwise of the statement made by the applicant at the hearing that the Commission did not inform it of its criticisms concerning the identification of the animals until several days after the deadline set by the Commission itself for the Member States to forward additional information, the Federal Republic of Germany was in a position to obtain an expert's report in good time and therefore to lodge it with its application.

59 In view of the findings made on the spot by Commission officials and the statements made by its Agents at the hearing, the letter of 25 September 1989 from the Federal Ministry of Agriculture does not constitute proof that the obligation mentioned therein to re-mark animals in the event of defective marking was actually complied with by claimants. Moreover, the proceedings initiated before the German administrative courts confirm, rather than refute, the existence of serious problems regarding the method of marking.

60 As regards the argument based on the Commission's letter of 23 November 1989, that too is not such as to detract from the finding contained in the summary report. In that letter, the Commission dealt in abstract terms with the conformity with Regulation No 714/89 of one of the two marking methods used in Germany, without expressing any view as to the manner in which that method was actually applied.

61 Finally, the argument based on Directive 92/102 is irrelevant: that directive post-dated the material events and has no bearing on them.

62 Consequently, the pleas put forward by the applicant in relation to the criticism concerning on-farm inspections as regards identification of animals must be rejected.

E — *The other inadequacies of the on-farm inspections*

63 The second subparagraph of Article 7(1) of Regulation No 714/89 provides for a document to accompany each animal or for a livestock register where, in applying the special premium scheme, a Member State uses a system of identification not adopted specifically for use in connection with the special premium.

64 In the summary report, the Commission finds that the on-farm inspections were basically flawed because they 'were conducted with the sole aim of reconciling the number of suitably marked animals present on-farm at the time of inspection with the numbers claimed.' It adds that '[c] laimants were not obliged to maintain herd registers or other accounts which could demonstrate the presence and age of the actual animals claimed'.

65 The applicant considers that that criticism is based on erroneous information. It considers that the German inspectors' local knowledge and ability to assess the age of the animals, thanks to their role as advisers, combined with the information obtained in the administrative controls, made it possible to carry out effective on-farm inspections. Moreover, paragraph 7 of the inspection report form expressly requires inspectors to check whether the animal has been present on the holding for the minimum period.

66 According to the applicant, the Commission's complaint has no legal basis either. It is clear, *a contrario*, from the second subparagraph of Article 7(1) of Regulation No 714/89 that where, in connection with the special premium, a Member State (in this case Germany) uses a specific system of identification and not a pre-existing system, Community law imposes no obligation to keep a livestock register or other accounting records.

67 The Commission acknowledges that the applicant is correct in its assertion that the Community rules do not expressly require that a register or accounting records be kept. That does not mean however that, in an on-farm inspection, the German officials were entitled to confine their action to checking whether the number of animals present at the time of the inspection corresponded with the number indicated in the claim. They should at least have sought also to determine whether, when the claim was lodged, the stated number of cattle aged at least six months were actually present on the holding and whether they had been kept for the minimum period. They should also have questioned the owners of the holdings on that point. However, the EAGGF officials had found that the German inspectors did not ask the relevant question contained in paragraph 7 of the inspection report form.

68 It must be observed that the criticism contained in the summary report relates not to the absence of registers or other accounting records but to the inadequacies of the inspections carried out as regards checking the age of the animals covered by claims and their presence on the holding.

69 The applicant does not deny that the inspectors were under an obligation to question claimants on that point since it states that such questions were contained in the inspection report form.

70 The question thus arises whether such questions were actually put to claimants by the German inspectors.

71 The Commission contends, on the basis of the findings of EAGGF officials, that they were not.

72 The applicant, for its part, has produced no evidence to show that the German inspectors actually asked claimants questions concerning paragraph 7 of the inspection report.

73 In those circumstances, the plea in law advanced by the applicant concerning the other inadequacies of the on-farm inspections must be rejected.

II — The correction concerning the import and export of animals benefiting from premium (point 4.10.4.2.2 of the summary report)

74 That part of the summary report concerns (a) the import of animals from Belgium and France and (b) exports of animals to Italy.

A — *Imports of animals from Belgium and France*

75 The summary report states:

'Animals coming from these two countries were specifically earpunched but the German authorities have failed to demonstrate that they took the necessary measures (e. g. by instructions to claimants and controllers) to avoid subsequent payment of a second premium in Germany'.

76 The applicant maintains that the danger of a premium being paid twice for animals imported from Belgium and France bearing an identification mark similar to the German one had been brought to the Commission's attention on several occasions, orally and in writing in December 1989, and again by letter of 16 November 1990. However, it was not until 3 May 1991 that the Commission informed the Federal Government that those two Member States were going to introduce export marking in the form of a triangular perforation of the ear.

77 The Commission, although confirming that statement, considers that the German authorities should have fulfilled the general obligations incumbent on every Member State in implementing the common agricultural policy in order to avoid double payment of the premium.

78 It must be stated that at the material time no provision of Community law required the Member State of importation to take measures to identify imported animals in a specific manner different from that used in that State.

79 Furthermore, the adoption of the measures necessary to ensure the free movement of cattle without risk of double payment of premium presupposes coordination of the different national systems. However, by its nature that task is a matter for the Community institutions, not the Member States.

80 In those circumstances, the plea in law put forward by the applicant in response to the criticism concerning the import of animals from Belgium and France must be upheld and the corresponding correction in the amount of DM 838 636 must be annulled.

B — *Exports of animals to Italy*

81 In order to ensure that each animal benefits from only one premium in its lifetime, Article 7(1) of Regulation No 714/89 lays down rules on identification.

82 The first subparagraph of that provision, set out in paragraph 47 of this judgment, requires 'permanent identification consisting of either perforation or marking of the ear or of an ear notch'.

83 According to the second subparagraph, where a Member State uses a method of identification other than in specific connection with the special premium, it may also use it for that purpose, provided that that system incorporates the affixing of a number on the ear or on an ear tag and provided, in particular, that an accompanying document is kept for each animal, or a register.

84 The third subparagraph of that provision states:

'However, animals so identified which are consigned, after payment of the premium, to another Member State must be marked in a specific way at the time of consignment.'

85 In the summary report, the Commission states:

'The required specific marking was not applied by Germany, so there was no obstacle to the payment of a second premium in that Member State.'

86 The applicant considers that the obligation to mark exported animals in a specific way applies only in the case referred to in the second subparagraph of Article 7(1) of Regulation No 714/89 and therefore only to Member States which use a system of marking that is also employed for purposes other than the special premium. On the other hand, those which, like the Federal Republic of Germany, use a specific system of marking for animals which have benefited from the premium are, in its view, under no obligation to re-mark the exported animals.

87 Moreover, the marking carried out in Germany (lilac-coloured metal eartag on which is printed: 'Special premium — Regulation No 468/87' or a circular perforation in the animal's ear) cannot be used for claims for the special premium in Italy because that country uses a different identification mark (white and green eartag).

88 The Commission contends on the contrary that specific marking is required for all animals consigned, after payment of the premium, to another Member State. The third subparagraph of Article 7(1) is concerned not only with animals identified by a system mentioned in the second subparagraph but also with those which are identified in accordance with the first subparagraph of that paragraph.

89 It is therefore necessary to consider whether the expression 'so identified', used in the third subparagraph of Article 7(1), refers only to the second subparagraph or whether it refers also to the first subparagraph of that provision.

90 It must first be noted that the provision at issue must be interpreted in accordance with the aim pursued by Article 7(1), which is to ensure that the premium is not paid twice for the same animal.

91 Having regard to that purpose, it must be observed that the requirement of additional specific marking, laid down in the third subparagraph of Article 7(1), relates only to the animals mentioned in the preceding — second — subparagraph.

92 Where a Member State applies the same marking system both for cattle eligible for the special premium and for other purposes, it is impossible for the authorities of other Member States to which such cattle are consigned to determine whether the mark borne by the animal relates to payment of the special premium or to something else. That is why additional specific identification is indicated.

93 In contrast, animals already bearing specific marking which is used only for the purposes of the special premium and conforms to the first subparagraph can be identified by the authorities of the Member State to which they are consigned.

94 That interpretation is borne out, as demonstrated by the Advocate General in paragraph 48 of his Opinion, by the history of the provision concerned: the obligation of specific additional marking for animals consigned to another Member State, initially prescribed for every animal marked under the standard system and then extended to animals consigned which had been marked under the identification system allowed by way of derogation, was finally removed by Regulation No 714/89 for animals in the first category.

95 In those circumstances, the plea in law advanced by the applicant regarding the criticism concerning exports of cattle to Italy must be upheld and the corresponding correction of DM 311 529 must be annulled.

III — The correction relating to application of the transitional arrangements for older animals (point 4.10.4.2.3 of the summary report)

96 Article 11(1) of Regulation No 714/89 introduced, by way of derogation from Article 2 of the same regulation, a transitional period in which claims might be lodged, for older animals, by producers in Member States applying the special premium for the first time.

97 According to Article 11(2) and (3):

'2. Member states, not concerned by the application of paragraph 1, may open, from 3 April to 4 June 1989, a period for the lodging of transitional premium applications for animals whose fattening is almost completed.

In this case, the producer must declare in his application:

— that the animals concerned are at least 12 months old at the date of lodging of the application,

— that he is keeping them on his holding for at least one month,

— that the animals will be slaughtered or exported to third countries before 3 September 1989.

3. The animals concerned must have a clearly visible and permanent identification mark.'

98 Point 4.10.4.2.3 of the summary report contains findings concerning: (a) the identification of the animals, (b) probable double payment of the premium, (c) slaughter documents and (d) central supervision.

A — *Identification of the animals*

99 According to the summary report:

'The normal rules regarding on-farm inspection and permanent and visible marking of the animals applied.

... As well as the normal (on-farm) system of eartagging or earpunching, claimants were allowed a third option of colouring the head or back of the animals claimed under this regulation. ...

As regards the visible and permanent marking of animals, the EAGGF also made critical observations because a high proportion of the older animals claimed were marked only by the unspecified colouring of the head or back'.

100 The applicant considers that the provision applicable to the marking of such animals is not Article 7(1) of Regulation No 714/89, which contains the 'normal rules', but Article 11(3) of that regulation, as a *lex specialis.* Moreover, the ninth recital in the preamble to that regulation states that it was to lay down for those animals, which by virtue of their age are difficult to handle, an 'exception to the marking system'.

101 Furthermore, since the animals had to be slaughtered before 3 September 1989, marking was necessary only for a maximum period of six months. In view of the fairly slow growth of the animals' hair, marking by colouring was sufficient; such marking had to be renewed where, as a result of extraordinary circumstances, it was not clearly recognizable.

102 The applicant adds that, since the bovine animals concerned were all slaughtered or exported to a non-member country before 3 September 1989 and the EAGGF checks took place in May 1991, the Commission was not in a position to determine that the animals had been marked using an inappropriate system.

103 The Commission contends, first, that the identification for the purposes of Article 11 of Regulation No 714/89 had, in order to be reliable, to meet the normal requirements as to clearly visible and permanent marking. However, the marking carried out in Germany was insufficient.

104 It then states that its findings are based on a detailed examination of all the 296 claims lodged in Bavaria and Baden-Württemberg. In its letter of 29 September 1992 to the German Government, it cited by way of example two cases of inadequate marking. It also determined that neither the German inspectors nor the claimants had been informed of the prescribed colour or the special provisions which they had to observe. At the hearing, it explained that the German authorities had not specified the colour to be used to mark the animals and that the claimants could thus use different colours.

105 It must be pointed out that, according to the ninth recital in the preamble to Regulation No 714/89, authority was given for an exception to the system of marking prescribed by Article 7(1) in the case of animals covered by the transitional arrangements introduced by Article 11(2) of the regulation. However, it is clear from Article 11(3) that the marking permitted by way of derogation had to be

clearly visible and permanent. It also had to be of the same colour for all the animals concerned, by reason of the aim pursued. The Community legislature thus sought to ensure that application of the marking system permitted by way of derogation incorporated the necessary guarantees to ensure identification of the animals covered by the transitional arrangements.

106 The Commission maintains that the marking carried out in this case (colouring of the head and back) did not meet the requirements of the regulation since the national departments had not issued specific instructions concerning the colour to be used by the claimants, giving rise to differences from one holding to another, and the national inspectors were not informed of the prescribed colour.

107 The applicant has produced no evidence to refute those findings.

108 In those circumstances, it must be considered that the marking carried out did not incorporate the guarantees necessary to ensure identification of the cattle covered by the transitional arrangements.

109 Accordingly, the plea in law put forward by the applicant in relation to the criticism concerning identification of the animals must be rejected.

B — *Probable double payment of the premium*

110 In the summary report, the Commission states:

'Given the timing of events and the absence of viable controls, the EAGGF believes it highly likely that some animals claimed 6-9 months old in September 1988 were claimed again (with a different system of marking) under the Art. 11 derogation in April/May 1989.

In the absence of precise instructions and judging by EAGGF on-farm inspections, the 10% on-farm inspection would not necessarily have detected such an occurrence; inspectors contented themselves with a head count of variously coloured animals without attempting to ascertain whether remaining traces of holes in the animals' ears were the result of previous ear punching or removal of any number of official and/or commercial eartags.'

111 The applicant considers that those findings are based on the assumption that, contrary to the law in force, the animals covered by a normal claim procedure in September 1988 were not marked or that the German inspectors did not call attention to the double marking. However, it says, the Commission has produced no supporting evidence.

112 In their reports of on-farm inspections, the inspectors were expressly called on to check whether and in what manner the animals were marked. Any lack of marking, or double marking, would have been noted and mentioned. The inspectors were also required to determine whether there were grounds for believing that the

claimant had already received a special premium for the animals concerned or whether certain circumstances which it was their responsibility to ascertain precluded grant of the premium.

113 Finally, the German rules on beef, veal, mutton and lamb premium required a livestock register to be kept from the date of lodgment of the claim until the latest possible slaughter date, 2 September 1989. Those registers were checked during on-farm inspections.

114 The Commission states that the applicant has given no specific indication of the actual rigour of the controls. The conditions laid down by the inspection report form are in its view inadequate and confirm the criticisms made by the EAGGF officials. In particular, the inspectors were not required to check whether animals bearing a colour marking showed traces of long-standing perforation of the ears.

115 The Commission also states that the livestock register was of limited scope since it had to be kept separately for animals covered by the special regime under Article 11(2) of Regulation No 714/89. It did not therefore indicate whether those animals had already benefited from premium or whether the other conditions for it to be granted had been fulfilled.

116 It must first be observed that, in its criticism in the summary report, the Commission charges the applicant with failing to take all the appropriate measures, in particular regarding identification of the animals and the effectiveness of the on-farm inspections, in order to ensure that the animals for which a claim for a premium had already been made under the general scheme could not then become the subject of a new claim under the transitional arrangements.

117 It must also be borne in mind that, as has been found in paragraphs 56 to 62 and 105 to 109 of this judgment, the identification of animals, as practised in Germany, both under the general regime and under the transitional arrangements, did not meet the requirements laid down by the Community rules and, therefore, was not capable of guaranteeing identification of the animals for which a premium had been claimed.

118 That fact certainly rendered more difficult the checks carried out in on-farm inspections. According to the summary report, the EAGGF officials found that the German inspectors contented themselves 'with a head count of variously coloured animals without attempting to ascertain whether remaining traces of holes in the animals' ears were the result of previous ear punching or removal of any number of official and/or commercial eartags.'

119 In those circumstances, the arguments put forward by the applicant that the inspection report form enabled the inspectors to detect double premium claims must be regarded as irrelevant since they relate not to what the inspectors actually did but to what they should have done.

120 Finally, the keeping of a register of the animals covered by the transitional arrangements cannot preclude all possibility of double payment of the premium since the register gave no information as to the identity of the animals covered by the general scheme.

121 Consequently the plea in law put forward by the applicant in relation to the criticism regarding probable double payment of the premium must be rejected.

C — *Slaughter documents*

122 The summary report records a series or irregularities concerning slaughter documents accepted by the regional authorities in Bavaria and Baden-Württemberg, such as failure to give:

— the date and place of slaughter of animals purchased live by dealers;

— a clear definition of the animal(s) concerned;

— the price and/or weight of the animals;

— the name of the applicant for the premium, or the dealer.

123 The summary report also contains the following findings:

'Clearly the most unsatisfactory documentation related to transactions for live animals supported only by invoices given by dealers.

Even where apparently satisfactory proof of slaughter was supplied directly (i. e. slaughterhouse invoices) it was impossible to demonstrate that the animals

concerned were those claimed under the Article 11 derogation and had not also been claimed under the on-farm system in either April 1989 or September 1988 ...

Almost all slaughter certificates (Bestätigungen) had been completed by dealers and very few bore the stamp of the relevant slaughterhouses, which were not in any case controlled.'

124 The applicant submits that the Commission's finding that '[a] lmost all slaughter certificates' had been completed by dealers is incorrect since the evidence produced came from dealers for only about half the cases checked in Baden-Württemberg. Moreover, many slaughterhouses grew up out of livestock businesses and thus still operated as dealers.

125 Furthermore, additional evidence and further information showed with certainty, even on the basis of dealers' invoices, that the animal was slaughtered (for example, weight certificates issued by the slaughterhouse or sales documents giving weight levels which show that it would be totally absurd, economically, to fatten such animals for a further eight months; and records of classification of animal carcases by an independent expert). If that information had been suspect, criminal proceedings for fraud would have had to be taken against the undertaking which drew up the documents.

126 In any event, according to the applicant, the substantive conditions for grant of the premium were fulfilled, even in those cases where the supporting documents produced were formally incomplete, thanks in particular to the detailed knowledge of the regional inspectors concerning local farming practice.

127 The Commission maintains the criticisms set out in the summary report. It also refers to the findings mentioned in its letter of 29 September 1992 to the German Government. In that letter it observed that the statements presented by the

livestock dealers did not prove that the animals had been slaughtered without passing though the hands of another producer who could have claimed a premium for a second time and within the time-limit, that is to say before 2 September 1989.

128 It must be stated that, in its arguments, the applicant does not deny that there were irregularities but endeavours to explain the reasons for which those irregularities occurred, whilst at the same time asserting that the substantive conditions for grant of the premium were observed because the regional inspectors were familiar with local farming practice.

129 It follows that the applicant has not succeeded in establishing that the criticism made in the summary report is unfounded.

130 The plea in law put forward in relation to the criticism concerning slaughter documents must therefore be rejected.

D — *Central supervision*

131 In the same point 4.10.4.2.3 of the summary report, the Commission states:

'These corrections apply only to the regions of Bayern and Baden-Württemberg, which are the most decentralized *Länder* in Germany with about 120 administrative (in the context of the premia schemes) control units between them, a factor

which together with a lack of central supervision is considered to have exacerbated the difficulties encountered'.

132 The applicant maintains that, in its criticism concerning the lack of central supervision, which is expressed in general terms, the Commission is clearly trying to question the effectiveness of the implementation in Germany of the special premium scheme and of the control of that scheme.

133 The Commission replies that its criticism certainly does not allege that there is no central control by the authorities of the Federal Republic of Germany. It merely found, in the summary report, that the difficulties and inadequacies mentioned in relation to application of the special arrangements for older animals were further increased by a lack of control on the part of the central authorities.

134 It must be stated that the passage of the summary report objected to contains no criticism separate from those made in relation to other findings in point 4.10.4.2.3 of the summary report concerning the transitional arrangements, but merely a view expressed by the Commission in general terms.

135 Accordingly, the arguments put forward by the applicant are irrelevant.

IV — The pleas concerning notification to the Commission of the German procedure for implementation of the special premium scheme

136 Article 13(1) of Regulation No 714/89 provides:

'Member states shall notify the Commission of the measures taken to implement Regulation (EEC) No 468/87 and this regulation, not more than 10 days after the date on which they are implemented.'

137 The applicant claims that, since the Commission was informed of the German procedure for implementation of the premium scheme in accordance with Article 13(1) of Regulation No 714/89, it cannot subsequently take exception to that procedure as regards not only matters of detail but also its essential features without having first given the applicant an opportunity of improving it. By acting in that way, the Commission failed in the duty of sincere cooperation with the Member States incumbent on the Community institutions (Case 230/81 *Luxembourg* v *Parliament* [1983] ECR 255, paragraph 38).

138 It must be noted that the criticisms made by the Commission in the summary report concern not the measures taken by the national authorities in implementation of the special premium scheme, which were notified to the Commission, but irregularities concerning the specific application in Germany of the Community rules on the special premium.

139 The pleas in law put forward by the applicant in that regard must therefore be rejected.

V — The plea in law alleging lacunae in Community law

140 The applicant submits that any defects which the Court might find in the premium scheme as applied in Germany have their origins in Community law.

141 It must be stated in that regard that, apart from the criticism concerning the import into Germany of animals from Belgium and France, in relation to which, moreover, the Court has upheld the applicant's plea in law, examination of the summary report has disclosed no reason to conclude that the irregularities found in Germany derive from Community law.

142 That plea by the applicant must therefore also be rejected.

143 In view of all the foregoing considerations, Decision 93/659 must be annulled in so far as it did not charge to the EAGGF the sum of DM 838 636 in respect of expenditure relating to the import into Germany of animals from Belgium and France and the sum of DM 311 529 in respect of expenditure relating to the export of animals to Italy.

Costs

144 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. However, under the first subparagraph of Article 69(3), the Court may order that the costs be shared or that the parties bear their own costs if the parties are successful on some heads and unsuccessful on others. Since the Federal Republic of Germany and the Commission have been partially unsuccessful, they should be ordered to bear their own costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. **Annuls 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, in so far as it did not charge to the EAGGF the sum of DM 838 636 in respect of expenditure relating to the import into Germany of animals from Belgium and France and the sum of DM 311 529 in respect of expenditure relating to the export of animals to Italy;**

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

3. Orders the parties to bear their own costs.

Kakouris Kapteyn Murray

Delivered in open court in Luxembourg on 3 October 1996.

R. Grass

Registrar

C. N. Kakouris

President of the Sixth Chamber