OPINION OF ADVOCATE GENERAL LÉGER

delivered on 26 September 2002 [1]

1. By this action, brought under the first paragraph of Article 230 EC, the Italian Republic is seeking the partial annulment of Commission Decision 2000/216/EC of 1 March 2000 excluding from Community financing certain expenditure incurred by the Member States under the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF). [2]

2. The Italian Republic challenges the contested decision in as much as it imposes three financial adjustments for expenditure declared in respect of financial years 1995 to 1998. That expenditure relates to export refunds and the sale of alcohol from intervention stocks. The adjustments imposed are as follows:

— a 5% flat-rate adjustment applied to all expenditure relating to export refunds for the period 1 October 1995 to 31 December 1998, due to inadequate physical checks on the products concerned, amounting to ITL 61 665 065 968;

— a financial adjustment of ITL 2 957 721 060 corresponding to the amount of export refunds granted for quantities of ineligible olive oil; and

— a financial adjustment of ITL 7 760 156 831 corresponding to the amount of securities which should have been recovered in connection with the sale of alcohol held by the intervention agencies.

3. The grounds for those adjustments are summarised in the consolidated report on the results of the inspections in the clearance of the accounts of the Guarantee Section of the EAGGF as regards export refunds, fruit and vegetables, animal premiums, agri-environmental measures, financial audit, arable crops, flax and hemp. [3]

4. Before considering the specific aspects of the three adjustments at issue (Sections II to

1 — Original language: French.

2 — OJ 2000 L 67, p. 37, 'the contested decision'.

3 — Document VI/10529/99 of 27 October 1999 ('the consolidated report') (Annex 2 to the application).

IV) it is appropriate to recall the general rules relating to checks on financial transactions financed by the EAGGF (Section I).

I — General legal background

5. Articles 2 and 3 of Council Regulation (EEC) No 729/70 of 21 April 1970 on the financing of the common agricultural policy [4] provide that the European Community will finance from the Guarantee Section of the Fund refunds on exports to third countries and intervention intended to stabilise the agricultural markets, granted in accordance with the Community rules within the framework of the common organisation of agricultural markets.

6. Article 4(2) of Regulation No 729/70 provides that the Commission is to make available to Member States the necessary credits so that the authorities and bodies designated by the Member States may, in accordance with Community rules and national legislation, make the payments relating to such refunds and intervention. Article 5(2)(b) of that regulation provides that, before the end of the following year, the Commission will clear the accounts of the authorities and bodies of the Member States on the basis of the annual accounts accompanied by the documents required for clearing them.

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

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

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

4 — OJ, English Special Edition 1970 (I), p. 218.

10. Article 9(2) of that regulation provides that officials appointed by the Commission to carry out inspections on the spot are to have access to the books and all other documents relating to expenditure financed by the Fund. At the request of the Commission and with the agreement of the Member State, inspections or inquiries concerning the transactions referred to in that regulation are to be carried out by the competent authorities of that Member State. Officials of the Commission may also participate.

11. Article 1(1) of Council Regulation (EEC) No 4045/89 of 21 December 1989 on scrutiny by Member States of transactions forming part of the system of financing by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund,[5] and repealing Directive 77/435/EEC,[6] concerns scrutiny of the commercial documents of those entities receiving or making payments relating directly or indirectly to the system of financing by the Guarantee Section of the EAGGF, referred to as 'undertakings', in order to ascertain whether transactions forming part of the system of financing by the Guarantee Section of the EAGGF have actually been carried out and have been executed correctly. Article 2(1) of Regulation No 4045/89 provides that Member States are to carry out systematic scrutiny of the commercial documents of undertakings taking account of the nature of the transactions to be scrutinised. The detailed procedure for such scrutiny is laid down in Article 2(2) et seq.

12. As regards the financial consequences for the clearance of the accounts of the Guarantee Section of the Fund in the event of the absence of scrutiny by the Member States, an interdepartmental group from the Commission adopted criteria,[7] which were approved by the Commission and communicated to all the Member States within the EAGGF Management Committee, where they were favourably received. Those criteria provide for three categories of flat-rate adjustment:

A. 2% of the expenditure where the absence is limited to certain aspects of the system of scrutiny of minor importance or the performance of checks which are not essential in order to ensure that the expenditure has been incurred lawfully, so that it may reasonably be concluded that the risk of loss for the Fund is minor.

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

5 — OJ 1989 L 388, p. 18.

6 — Council Directive of 27 June 1977 (OJ 1977 L 172, p. 17).

7 — Document No VI/216/93 of 3 June 1993 ('the Belle Report').

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

13. The Belle Report notes that it is possible that none of the expenditure is accepted, and that a higher rate of adjustment may therefore be deemed appropriate in exceptional circumstances.

14. On 1 July 1994 the Commission adopted Decision 94/442/EC. [8] Article 1(1)(b) and (c) of that Decision provides that the Conciliation Body is to try to reconcile the divergent positions of the Commission and the Member State concerned, and at the end of its investigations, it is to draw up a report on the outcome of its efforts at reconciliation. Article 1(2)(a) states that for the purposes of the subsequent stages of the accounts clearance procedure, the position of the Conciliation Body is to be without prejudice to the Commission's final decision on the clearance of the accounts and will not affect the right of the Member State concerned to institute proceedings under Article 230 EC.

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

II — Export refunds (inadequate physical checks)

A — *Background and legal framework*

15. Export refunds are aid paid to Community exporters of certain agricultural products in order to enable them to be competitive on the markets of non-member States where prices are usually below Community prices. [9] The level of the refunds varies depending on a number of factors and, in particular, the precise classification of the goods in the refund nomenclature [10] and the country of final destination. [11]

16. The Community system provides for the advance payment of export refunds. [12] In such cases the refund is paid to the recipient undertaking, against the lodging of security, when the goods are placed under customs control. That operation is

9 — Annual Report of the Court of Auditors concerning the financial year 1987 together with the answers from the institutions (OJ 1988 C 316, p. 1, paragraph 4.20), ('the 1987 Annual Report of the Court of Auditors').

10 — See Commission Regulation (EEC) No 3846/87 of 17 December 1987 establishing an agricultural product nomenclature for export refunds (OJ 1987 L 366, p. 1).

11 — The 1987 Annual Report of the Court of Auditors (paragraph 4.22).

12 — See Council Regulation (EEC) No 565/80 of 4 March 1980 on the advance payment of export refunds in respect of agricultural products (OJ 1980 L 62, p. 5), and Commission Regulation (EEC) No 3665/87 of 27 November 1987 laying down common detailed rules for the application of the system of export refunds on agricultural products (OJ 1987 L 351, p. 1).

usually carried out on the premises of the undertaking several months before export actually takes place. [13]

17. In such circumstances strict checks are required in order to ensure that the products exported correspond exactly, as regards classification, state and weight, to the products which the undertaking has declared. It is also necessary to ensure that the products declared are actually released for consumption in the country of final destination and that the goods have actually been exported in accordance with the Community rules. [14]

18. In 1985 and 1987 the Court of Auditors drew up two reports which highlighted failings in the checks carried out by some Member States on the agricultural products for which refunds or other amounts were granted on export. [15]

19. In order to remedy those failings, on 12 February 1990 the Council adopted Regulation (EEC) No 386/90 on the monitoring carried out at the time of export of agricultural products receiving refunds or other amounts. [16] The purpose of that regulation is to improve and harmonise the measures taken by the Member States by setting up a Community monitoring system. [17] The provisions for implementing that regulation are contained in Commission Regulation (EEC) No 2030/90 of 17 July 1990. [18]

20. Article 2 of Regulation No 386/90 provides that Member States must carry out two types of check on agricultural products:

— a physical check at the time the customs formalities are completed and before authorisation is given for the goods in question to be exported, on the basis of documents submitted in support of the export declaration, and

— scrutiny of the documents in the export refund payment application file.

21. Article 3 of that regulation provides that the physical checks must take the form of spot checks conducted frequently and without prior warning. In any event they

13 — 1987 Annual Report of the Court of Auditors (paragraph 4.23).

14 — Ibid. (paragraph 4.24).

15 — See Special Report of the Court of Auditors on the system of payment of agricultural export refunds (checks on exports of agricultural products) (OJ 1985 C 215, p. 1) and 1987 Annual Report of the Court of Auditors (paragraph 4.20 et seq).

16 — OJ 1990 L 42, p. 6.

17 — Fourth recital.

18 — Regulation laying down detailed rules for the application of Regulation No 386/90 (OJ 1990 L 186, p. 6).

must 'relate to not less than 5% of the export declarations in respect of which applications are submitted [for payments in respect of export transactions]'. The 5% rate is to apply per customs office, per calendar year, and per product sector.

22. In addition, Article 3(3) provides that in cases where ordinary visual inspection fails to establish that the goods correspond to the description given in the refunds nomenclature, and where classification or the quality of the goods require very precise information about the ingredients thereof, the customs authorities must verify that description according to the nature of the product by using all the senses or by applying physical measures that may go as far as submitting the goods for analysis by laboratories specially equipped for the purpose.

23. As regards the inspection of documents, Article 4 of Regulation No 386/90 provides that paying agencies must scrutinize, on the basis of the payment application files and other available information, all the evidence in those files adduced to justify the payment of the amounts in question.

24. In 1992 and 1993 the Commission conducted several audits in Member States in order to inspect the conditions in which the checks provided for in Regulations Nos 386/90 and 2030/90 were being implemented.[19] In view of the failings established, on 14 January 1994 the Commission sent a letter to the national authorities asking them to take the necessary corrective measures before 1 July 1994.[20] The letter mentions the following by way of the measures required:

'...

(e) *Presentation of goods*

Where a customs officer is not present at the time the goods are loaded they shall be loaded in such a way that it is possible to carry out the check without difficulty, otherwise all the goods must be unloaded.

...

19 — See Additional Report on the application of Regulation No 386/90 (OJ 1993 C 218, p. 14).

20 — Letter from the Commission No VI/2705, of 14 January 1994 (Annex 3 to the defence). In this connection see also the observations contained in the consolidated report (pp. 3 and 4).

(g) *Effective physical checks*

The physical checks shall relate to quantity and quality.

The weight must be checked so that the inspector can be sure that the total quantity declared is correct.

The quality check must be made by taking and analysing samples, unless a visual inspection is sufficient to establish that the quality corresponds to the description given...

(h) *Summary reports on checks*

The summary reports on the checks shall indicate the measures taken to check the total quantity, the nature and the characteristics of the product declared.'

25. In 1995 the Commission included the measures provided for in letter No VI/2705 into Regulation (EC) No 2221/95 of 20 September 1995.[21] That regulation replaced Regulation No 2030/90 from 1 January 1996 and contains the detailed rules to be complied with when carrying out physical checks on agricultural products.

26. Thus, Article 5 defines physical check as 'verification that the export declaration, including documents submitted in support thereof, and the goods correspond as regards quantity, nature and characteristics'. Article 5(2) states that physical checks of which the exporter has received express or tacit prior warning are not to count as physical checks.

27. Article 7 requires each customs office to take the measures necessary to ensure that the check rate of 5% provided for in Regulation No 386/90 is achieved. It also provides that a detailed examination report on each check must be drawn up the customs officer who carried out the check.

28. Lastly, the annex to Regulation No 2221/95 sets out the specific methods

21 — Regulation laying down detailed rules for the application of Regulation No 386/90 (OJ 1995 L 224, p. 13).

for conducting physical checks on agricultural products. Paragraph 2(a) states:

— If the exporter has declared goods using automatic bagging, canning, bottling, the number of bags, cans, bottles, etc. must be counted in total and the nature and characteristics of the goods must be checked on the basis of a representative selection by the customs office of export.

— If the exporter uses pallets which are loaded with boxes, cans, etc., the customs office selects representative pallets and checks whether the number of boxes, cans, etc. declared are really present. It selects from these pallets a number of representative boxes/cans and checks whether the number of bottles, units, etc. is present.

B — *Facts*

29. In order to counter the growing risk of fraud and irregularities in the area of export refunds, the Commission has since 1996 stepped up its inspections in the Member States as regards the checks made by customs authorities. According to the Commission, the inspections conducted in Italy have uncovered the existence of systematic errors in the procedures followed by the customs authorities.

30. On the basis of the results of documentary and on-the-spot checks made during two inspections (one inspection conducted between 15 and 19 April 1996 at the customs posts at Treviso, Trieste, Fernetti and Como and the other between 2 and 6 December 1996 at the posts at Terni, Pisa, Livorno and Viareggio), the Commission considered that the Italian authorities were failing to comply with the provisions of Regulations Nos 386/90 and 2221/95 relating to physical checks on agricultural products.

31. First, the Commission criticises the partial nature of the physical checks. That complaint concerns the so-called 'direct export' procedures, that is to say, procedures in which the products are directly checked at the customs posts on the vehicles.[22] The Commission considers that in that case the physical checks are inadequate on the grounds that they are not made until the goods are loaded on to the trucks. Thus, in two cases observed at Treviso and Pisa Commission officials found that the checks were conducted without any serious attempt being made to check the full load, either by unloading

22 — See report of the Conciliation Body of 11 January 2000, paragraph 10 (Annex A9 to the application) ('the Conciliation Body's report').

the goods or by creating a passage inside the containers being examined. In addition, the 5% rate provided for in Regulation No 386/90 was not achieved at some customs offices (at Treviso). Lastly, the general and imprecise nature of the reports on the physical checks is also called in question.

32. Second, the Commission criticises the lack of checks carried without prior warning. This complaint concerns the so-called 'off-site' and 'simplified' procedures.

The 'off-site' procedure is a procedure whereby the operator brings the export declaration to the customs office whilst the goods remain on the undertaking's premises. [23] In that case the Commission found (at Pisa, Viareggio and Terni) that the procedure for the physical checks did not allow for the surprise effect. It appeared that when the customs authorities decided to carry out a check (in 5% of cases) the officer would go with the exporter to the place where the check was to be carried out, which enabled the exporter to give the company prior warning. In the other cases (95%) the exporter would take the export declaration back to the undertaking in the knowledge that no check would be carried out, which would enable it subsequently to alter or replace the goods declared.

The 'simplified' procedure is a procedure whereby the exporter sends a notice of loading to the customs office and officers check the products and the relevant documents on the undertaking's premises. [24] In that case the Commission found (at Terni) that the checking procedure did not allow for the element of surprise since where a check was to be made the exporter would be informed by the customs authorities in advance.

33. Under both those procedures the risk of cheating and substitution of goods is aggravated by the fact that the exporter himself sends the export declaration to the paying body once that declaration has been approved by the customs authorities.

34. The Commission informed the Italian authorities of its findings by letters of 23 January and 18 September 1997. On 9 July 1999 it made its conclusions official and proposed an adjustment of 5% of the expenditure incurred for all the products in respect of which export refunds had been granted between 1 October 1995 and 31 December 1998. In its report the Conciliation Body considered that, despite some uncertainties, the Commission's arguments appeared to be justified. The Commission therefore imposed the proposed adjustment, amounting to ITL 61 665 065 968.

23 — Ibid.

24 — See the Conciliation Body's report (paragraph 10) and the consolidated report (p. 52).

C — *The action*

35. The Italian Republic challenges the 5% adjustment that was imposed on it in respect of export refunds. It relies on four sets of arguments in support of its challenge:

— infringement of the *audi alteram partem* rule and the rights of the defence;

— the unrepresentative nature of the customs offices inspected;

— challenging the irregularities and negligence alleged against the Italian authorities; and

— challenging the amount of the adjustment.

36. I shall consider each of those arguments in turn.

1. Infringement of the *audi alteram partem* rule and the rights of the defence

37. The Italian Republic contends that the adjustment imposed is illegal on the grounds that the Commission's inspections were carried out in breach of the *audi alteram partem* rule and the rights of the defence. It submits that the Commission did not inform the Italian Government of the results of its inspections until a very long time after they took place, the criticisms made of the customs officers were not specific and the officers concerned were not given the opportunity to put their points of view. Also, the Commission officials failed to draw up balanced reports describing the operations carried out and the results of the inspections.

38. In that regard I should like to point out that the final and definitive decisions concerning the clearance of the EAGGF's account are adopted by the Commission at the end of a specific procedure. That procedure is laid down in Article 8 of Commission Regulation (EC) No 1663/95 of 7 July 1995.[25]

39. Article 8(1) provides that when, as a result of any enquiry, the Commission considers that expenditure was not effected according to Community rules, it must communicate to the Member State con-

25 — Regulation laying down detailed rules for the application of Regulation No 729/70 regarding the procedure for the clearance of the accounts of the EAGGF Guarantee Section (OJ 1995 L 158, p. 6).

cerned its findings, the corrective measures to be taken to ensure future compliance, and an evaluation of any expenditure which it may propose to exclude from Community financing. The Member State has two months within which to reply to the Commission. After that period has expired the Commission must initiate a bilateral meeting at which the parties must endeavour to come to an agreement as to the measures to be taken. At the end of that meeting the Commission is required formally to communicate its conclusions to the Member State concerned.

40. Furthermore, Article 8(2) prohibits the Commission from adopting a decision excluding some expenditure before considering the report drawn up by the Conciliation Body in pursuance of Decision No 94/442.

41. As the Court has consistently held,[26] the Court considers that that balanced procedure offers Member States all the necessary guarantees for them to present their points of view effectively. The procedure is therefore such that it ensures observance of the *audi alteram partem* rule and the rights of the defence.

26 — See, in particular, Case C-342/89 *Germany* v *Commission* [1991] ECR I-5031, paragraph 18, and Case C-346/89 *Italy* v *Commission* [1991] ECR I-5057, paragraph 18; Case C-69/94 *France* v *Commission* [1997] ECR I-2599, paragraph 30 and Case C-61/95 *Greece* v *Commission* [1998] ECR I-207, paragraph 39.

42. In this particular case the contested decision was adopted under such a procedure.

43. The Commission communicated the results of the inspections it conducted from 15 to 19 April 1996 and from 2 to 6 December 1996 to the Italian authorities by letters dated 23 January 1997 (with regard to the first inspection)[27] and 18 September 1997 (with regard to the second inspection).[28] The Italian authorities replied to the Commission by letters dated 13 March 1997[29] and 10 November 1997.[30] Following up that exchange of correspondence the Commission on 23 November 1998,[31] invited the Italian authorities to attend a bilateral discussion within the meaning of Article 8 of Regulation No 1663/95. It then formally communicated its conclusions to the Italian authorities by letter No VI/36257 of 9 July 1999.[32] On 6 August 1999[33] the Italian Republic referred the matter to the Conciliation Body, which issued its report on 11 January 2000.[34] The contested decision states expressly that the Commission imposed the contested adjustment after considering the Conciliation Body's report.[35]

27 — Letter No VI/03882 (Annex A1 to the application).

28 — Letter No VI/35984 (Annex A3 to the application).

29 — Annex A2 to the application.

30 — Annex A4 to the application.

31 — Letter No VI/44393 (Annex A5 to the application).

32 — Annex A6 to the application.

33 — Letter from the Director General of the Italian Ministry of Finance (Annex A7 to the application), supplemented by a letter dated 3 November 1999 (Annex A8 to the application).

34 — Annex A9 to the application.

35 — See third recital in the preamble.

44. It is clear from this evidence that the complaint that the *audi alteram partem* rule and the rights of the defence were infringed cannot be upheld. On the contrary, the evidence shows that the Commission meticulously followed the procedure laid down in Regulation No 1663/95 and that at every stage of the procedure the Italian authorities had the opportunity to put their point of view. Thus the Italian Republic had the opportunity to relay to the Commission the observations which the customs officials considered it was appropriate to make regarding the conduct of the inspections. It also had the opportunity to make comments on the content of the reports drawn up by the Commission officials.

45. At all events, the specific complaints made by the Italian Government do not appear to me to be justified.

46. As regards the delay in communicating the Commission findings, it is clear from the file [36] that a period of seven months elapsed between the inspections and communication of the results to the Italian authorities. Contrary to what the Italian Republic maintains, a period of that length cannot be considered to be excessive.

47. The length of the period cannot be assessed *in abstracto* without taking into account the context of the case. On that point, the documents on the file [37] show that the inspections carried out by the Commission were part of a general enquiry conducted in all the Member States in 1996 and 1997. The purpose of that enquiry was to assess the measures taken to carry out the physical and documentary checks required under Regulations Nos 386/90 and 2221/95 in the area of export refunds. It is clear that the results of such an enquiry take more time to emerge and are more difficult to manage than the results of spot audits. The contested period is thus easily justified by the nature and scope of the inspections carried out by the Commission officials.

48. At any event, I would point out that in other cases in the past the Court has regarded a period of one and a half years between the Commission's inspections and communication of the results of those inspections as being insufficient to lead to the annulment of the contested decision. [38] In the light of all this evidence, the complaint that the results of the inspections were communicated late should be rejected.

49. The second complaint, concerning the absence of any criticism, cannot be accepted either. A study of the file shows that, in its various communications, [39] the

36 — Point 43 of this Opinion.

37 — See summary report (pp. 13 to 17) and report of the Conciliation Body (paragraph 17).

38 — See, for example, Case C-28/94 *Netherlands* v *Commission* [1999] ECR I-1973, paragraph 67 et seq.).

39 — See in particular documents cited in point 43 of this Opinion, i.e. letters Nos VI/03882, VI/35984 and VI/36257, cited above.

Commission made some precise criticisms of the Italian customs authorities. Those criticisms are indeed the ones which are discussed by the parties in the context of the third plea supporting the claim for annulment. [40]

50. Lastly, the complaint relating to the absence of balanced records cannot, in itself, lead to the annulment of the contested decision. That complaint concerns the matter of whether the Commission correctly justified its decision to exclude the contested expenditure from Community financing. It must therefore be considered specifically in the context of the arguments concerning the existence of the irregularities or negligence alleged against the Italian authorities. The Court must therefore reserve its decision on this point until consideration of the pleas and arguments of the parties indicates that the contested records should be taken into consideration.

51. In those circumstances, I suggest that the Court should reject the first plea supporting the claim for annulment.

2. The unrepresentative nature of the customs offices inspected

52. In its second plea the Italian Republic claims that the customs posts which were inspected by the Commission were not sufficiently representative. It points out that each year some 80 000 applications for export refunds are submitted to it.

53. The file contains the following information on this point.

54. The customs offices inspected in 1996 (Terni, Pisa, Livorno, Viareggio, Treviso, Trieste, Fernetti and Como) paid out 27% of the total of export refunds recorded in Italy during 1995. [41]

In 1994 and 1995 the customs post at Como was the most significant office as regards the number of export declarations submitted. [42] The post at Treviso is the main office for the Venice region, which is the region that made the largest number of export refund payments in Italy in 1994. [43] Trieste, for its part, was among the five most significant regions in terms of payment of export refunds in Italy in 1994. [44] Its customs post is also the main office for declarations in respect of exports to the

40 — See point 59 et seq. of this Opinion.

41 — Defence (paragraph 31).

42 — Summary report (p. 53).

43 — Idem.

44 — Idem.

Republic of Slovenia and to other Eastern European countries.[45] Lastly, Trieste, Terni, Pisa and Viareggio are the main customs offices for the Florence region.

55. In addition, the Commission stresses that it took care to divide its inspections between the different customs clearance procedures operating in Italy, namely direct exports, off-site procedures and simplified procedures.[46]

56. In those circumstances, I consider the Commission has supplied sound evidence to show that the Italian customs offices it inspected in 1996 were representative.

57. At no time during the present proceedings has the Italian Government disputed that evidence. Nor has it communicated any figure to the Court in that connection.

58. In those circumstances, the second plea, alleging that the customs posts inspected were not representative, should be rejected.

45 — Idem.

46 — Defence (paragraph 32).

3. Whether the irregularities alleged against the Italian authorities did actually take place

59. In its third plea the Italian Republic challenges whether the irregularities and negligence alleged against the customs authorities did actually take place. It disputes the Commission's findings that the checks carried out by the customs posts at Terni, Pisa, Viareggio and Livorno were neither complete nor made without prior warning.

60. As regards whether the checks were only partial, the Italian Government states that, following the Commission's inspection, its own staff were asked to look into the facts at issue. The customs officers present during the inspections conducted by the Commission denied that the operations took place in the manner which the Commission stated. In fact, the customs officers stated that they carried out full checks by making a passage right through the vehicle being checked.

61. As regards whether the checks were made without prior warning, the Italian Government denies that the checks under the off-site and simplified procedures were made with notice or prior warning. Although the checks were made at the place where the goods were loaded, the decision to carry out those checks was taken while the exporter was at the cus-

toms office. When a check was made the customs officer went immediately to the undertaking's premises, so the person making the declaration did not have any opportunity of warning the company's staff.

62. At any event, the Italian Government stresses that the operations which were inspected by the Commission were not representative, since the Commission's most recent inspections were made in 1996. Following those inspections the Italian authorities sent detailed instructions to the customs offices so that the failings noted ceased in 1997. In those circumstances, the Commission should not have imposed an adjustment in respect of the years 1995 to 1998.

63. Before considering those arguments it is appropriate to recall the principles laid down by the case-law of the Court as regards the burden of proof in disputes concerning the clearance of EAGGF accounts.

64. As we have seen, only intervention operations undertaken in accordance with the Community rules within the framework of the common organisation of agricultural markets are financed by the EAGGF. In the event of any dispute it is for the Commission to prove an infringement of the rules on the common organisation of agricultural markets. [47] The Commission is therefore 'obliged to give reasons for its decision finding an absence of, or defects in, inspection procedures operated by the Member State in question'. [48]

65. The Member State concerned, for its part, cannot rebut the Commission's findings by mere assertions which are not substantiated by evidence of a reliable and operational supervisory system. [49] If it is not able to show that they are inaccurate, the Commission's findings can give rise to serious doubts as to the existence of an adequate and effective series of supervisory measures and inspection procedures. [50]

66. In the present case the Commission has provided several items of evidence which cast doubt on the reliability of the system introduced by the Italian authorities for the physical inspection of agricultural prod-

47 — See in particular, Cases 347/85 *United Kingdom* v *Commission* [1988] ECR 1749, paragraph 16; C-281/89 *Italy* v *Commission* [1991] I-347, paragraph 19; C-55/91 *Italy* v *Commission* [1993] ECR I-4813, paragraph 13 and C-48/91 *Netherlands* v *Commission* [1993] I-5611, paragraph 14.

48 — Cases C-8/88 *Germany* v *Commission* [1990] ECR I-2321, paragraph 23 and C-253/97 *Italy* v *Commission* [1999] ECR I-7529, paragraph 6.

49 — Cases C-242/96 *Italy* v *Commission* [1998] ECR I-5863, paragraph 59 and C-253/97 *Italy* v *Commission*, cited above, paragraph 7.

50 — Cases C-8/88 *Germany* v *Commission*, cited above, paragraph 28; C-242/96 *Italy* v *Commission*, cited above, paragraph 59 and C-253/97 *Italy* v *Commission*, cited above, paragraph 7.

ucts. It appears from the file that during the checks in April and December 1996 Commission officials found the following irregularities: [51]

— the physical checks carried out on agricultural products were only partial checks. Customs officers did not check a truck's full load, either by requiring the unloading of the goods or by making a passage inside the container being investigated. Customs officers checked only the boxes near the back door of the truck. They could not therefore ensure that all the boxes contained the same product or that the exporter had not placed different products at the front of the truck. Evidence of this was found at the customs posts at Treviso, Pisa, Viareggio and Terni;

— the representative rate of 5% required under Article 3(1)(b) of Regulation No 386/90 was not reached in the fruit and vegetables sector. Evidence of this was found at the Treviso customs post;

— the reports drawn up by customs officers were worded in general terms and did not contain any details regarding the conduct of the checks and the results of those checks, in breach of the criteria laid down in Article 7(2) of Regulation No 2221/95. Evidence of this was found at the Como and Terni customs posts;

— the physical checks were not being carried out without prior warning as stipulated in Article 3(1)(a) of Regulation No 386/90 and Article 5(2) of Regulation No 2221/95. Customs officers did not have official cars. This means that when an officer decided to carry out a check at the premises of an undertaking (in 5% of cases), he had to contact a representative of the exporter in advance in order to be able to travel to where the check was to be carried out. In other cases (95%) the exporter returned the export declaration in the knowledge that no checks would be made, which enabled him subsequently to alter or replace the goods that had been declared. Evidence of this was found at the Pisa, Viareggio and Terni customs posts.

67. Moreover, those irregularities persisted during 1997 and 1998. After looking at the inspection reports submitted by the Italian Republic for those two years, [52] the Commission detected the same irregularities and negligence as it had found during its inspections in 1996. The Commission states that the reports contained words

51 — See Summary Report (pp. 49 to 53).

52 — Ibid. (p. 54).

such as 'controllo totale' or 'visita totale' to certify that the checks were full checks. Back in 1996 it had found similar words in reports on products which had been the subject of partial checks.

68. The Italian Republic challenges some of that factual evidence on the basis of a report drawn up on 19 March 1999 by the Central Inspection Service of the Ministry of Finance. [53] It explains that, following the inspections carried out by the Commission it asked that service to conduct its own enquiry amongst the customs officers who had been present during the Commission's inspections. The customs officers questioned denied that the operations had taken place in the way the Commission had stated.

The customs officer who had carried out the physical check on 5 December 1996 on the products of Federici SpA at Terni stated that he had unloaded some of the goods in order to create a passage right through the container and to count the total number of boxes on the truck. He also certified he had checked the nature and characteristics of the goods according to the methods laid down in Regulation No 2221/95. [54] Similarly, the customs officers who carried out the physical check on the products of Bertolli in Pisa stated that they had entered the truck and gone right through it in order to count all the boxes making up the load. [55]

69. The Commission stands by its position and plays down the probative value of the report of 19 March 1999. [56] It states that the questions raised by the chief inspectors *[comptrollers?]* (in 1999) concerned facts which dated back more than three years (1995 and 1996). Moreover, at the time of the interviews the customs officers questioned were aware of the reason for the inspections, namely the criticisms expressed by EAGGF staff regarding the reliability of the physical checks. The Commission considers that in those circumstances it was possible that the statements made by the customs officers may have been influenced by the fact that they could have been held liable for any irregularities.

70. Like the Commission, I think that the probative value of the report of 19 March 1999 cannot cast doubt on the findings made by the officials of the EAGGF.

71. First, the various documents submitted by the Italian Republic contain numerous contradictions. For example, as regards the physical checks carried out by the post at

53 — Annex A10 to the application ('the report of 19 March 1999').

54 — See report of 19 March 1999 (paragraph 1.3) and report of the Terni Customs of 12 February 1999 on the physical check carried out on 5 December 1996 at Federici SpA on the consignment of goods declared as EX-T1 No 82 of 5 December 1996 (Annex 6 to the defence).

55 — See report of 19 March 1999 (paragraph 2.3).

56 — Defence (paragraphs 38 to 41).

Pisa, the customs officers questioned in 1999 claimed they went right through the truck and counted all the boxes making up the load. [57] However, in his letter of 10 November 1997, [58] the Central Director of the Customs Directorate expressly acknowledged that the check carried out at Pisa was a partial check in that the customs officers had not inspected the entire load. Also, as regards the checks carried out by the post at Viareggio, the customs officers questioned in 1999 claimed they had gone to the company's premises in their own service vehicle. [59] However, in his letter of 10 November 1997, the Central Director of the Customs Directorate expressly acknowledged that '[t]he problem of customs service vehicles [is] extremely acute at present in this country: it is part of a programme of drastic reductions in costs and expenditure on the maintenance of service vehicles for the public services as a whole.... [T]he question cannot be satisfactorily resolved [so] the Commission cannot take it into account objectively'. [60]

72. Contrary to what the Italian Republic claims, [61] those various contradictions cannot be explained by the fact that the Commission was late in forwarding the results of its inspections to the national authorities. I have already established that the Commission communicated the result of its inspections within a reasonable period of time and that those communications contained a precise description of the irregularities alleged against the Italian authorities. [62] In September 1997 the Italian authorities were therefore in possession of all the evidence needed in order to dispute the reality of the facts established by the Commission officials.

73. Second, I think that the probative value of the report of 19 March 1999 should be played down in view of the context in which it was drawn up. That context is described by the Italian Republic in its reply. [63]

74. The applicant states that initially it was sure that the physical checks carried out in its territory were in accordance with the criteria laid down in Regulations Nos 386/90 and 2221/95. According to its explanations, 'it was only at the beginning of 1999 that the Italian Government became aware the Commission intended to impose a financial adjustment at a high level and that the Italian Government considered it was necessary to make an inspection in order to obtain more information and a better understanding of the facts'. [64]

57 — See report of 19 March 1999 (paragraph 2.3).

58 — Letter from the Italian authorities, cited above (paragraph 3.4, third subparagraph).

59 — See report by the Viareggio Customs of 10 February 1999, paragraph A (Annex 5 to the Defence).

60 — Letter from the Italian authorities, cited above (paragraph 7, antepenultimate and penultimate subparagraphs) (free translation).

61 — Application (paragraph 7) and reply (p. 3).

62 — See points 46 to 49 of this Opinion.

63 — See point 4.

64 — Idem.

75. The result of this was that the report of 19 March 1999 was drawn up at a time when the Italian authorities knew the Commission was intending to impose a flat-rate adjustment in respect of expenditure relating to export refunds. It should also be remembered that the customs officers questioned in 1999 were in an unusual situation since their conduct during the physical checks was being directly called into question by the Commission. In such circumstances I do not think that anyone could exclude the possibility that mistakes might have crept into the statements made by the main parties concerned.

76. Third, I think it would be legally incorrect to attribute to the statements made by the customs officers questioned in 1999 a probative value equivalent to that of the reports drawn up by the Commission officials. The statements at issue cannot, strictly speaking, be called 'reports'. A report is an official document in which the competent authority establishes, in particular, that an act entailing legal consequences *actually occurred*. [65] However, in this case the customs officers questioned did not establish that the inspection operations at issue. In their own words, they merely 'reconstructed, at the request of the [Ministry of Finance inspectors], the operations at which the Commission was present'. [66] There are therefore objective and legal reasons for considering that such statements cannot constitute evidence to refute facts found by a Commission official in the exercise of his duties.

77. At all events, I think that the evidence contained in the report of 19 March 1999 is insufficient to dispel all doubt as to whether an adequate and effective set of inspection measures had been put in place. Even if one accepts its probative value, the report would only make it possible to establish that some checks carried out by some customs posts complied with the criteria laid down in Regulations No 386/90 and 2221/95. The Commission, however, lists other irregularities which are not disputed or refuted by the Italian Government.

78. The Italian Government has not submitted any evidence to disprove the Commission's findings concerning the inadequacy of the checks carried out at the other customs posts. Neither has it established that the 5% check rate required under Article 3(1)(b) of Regulation No 386/90 was achieved at the Treviso post. Nor has it shown that the reports drawn up by the customs officers were sufficiently detailed for the purposes of Article 7(2) of Regulation No 2221/95. Lastly, the Italian Republic has not supplied any evidence that the irregularities pointed out by the Commission did actually cease at the start of 1997.

65 — See, in this connection [for a definition of the French term 'materialite'], *Le Petit Robert*, Dictionnaire de la langue française, Paris, published by Dictionnaires Le Robert, 1999.

66 — See report of 19 March 1999 (paragraph 2.3, first subparagraph)

79. In those circumstances, I consider that the Italian Republic has not provided evidence of the existence of a reliable and operational system of checks. I therefore suggest that the Court should reject the third plea supporting the claim for annulment.

4. The amount of the adjustment

80. In its fourth plea the Italian Republic disputes the amount of the adjustment imposed by the Commission. It considers that that amount is excessive for two sets of reasons.

81. First, the adjustment at issue is excessive on the ground that it covers export refunds granted over four consecutive years, namely the financial years 1995 to 1998, whereas the inspections carried out by the Commission related only to conduct over less than one year (April 1996 and December 1996). The adjustment at issue is excessive also because it applies to all the export refunds. Since Regulation No 386/90 provides that physical checks should relate to only 5% of transactions, the adjustment should only apply to 5% of the export refunds granted during the contested financial years.

82. With regard to the first argument, I have already stated that the inspections carried out by the Commission revealed serious failures in the Italian inspection system for the financial years 1995 and 1996. [67] Moreover, the Commission has provided evidence that those failures persisted during the financial years 1997 and 1998. [68] As the Italian Government has not shown that the Commission findings were incorrect, there was justification for the adjustment at issue to cover the period from 1995 to 1998. The first argument must therefore be rejected.

83. The second argument cannot be accepted either.

84. First, that argument totally disregards the guidelines laid down in the Belle Report. As we have seen, the Belle Report lists categories of flat-rate adjustments which are classified according to various factors. Those factors concern the seriousness of the failings established, whether they are random or general, the susceptibility of the measures to fraud, whether the national authorities have or have not rectified the irregularities discovered and whether the failings were or were not

67 — See points 66 and 78 of this Opinion.
68 — See points 67 and 78 of this Opinion.

linked to difficulties in interpreting the Community rules.

85. The Italian Government's arguments amount to abolishing all those criteria. By claiming that the adjustment at issue should be limited to 5% of the export refunds on the ground that the physical checks are only required to be made on 5% of transactions, the Italian Government's arguments amount to applying a 5% flat-rate adjustment in all circumstances. Such an adjustment would therefore uniformly replace the criteria laid down in the Belle Report.

86. The Italian Government's arguments also fail to take into account the structure of the system for inspecting operations financed by the EAGGF.

87. It should be pointed out that the rules on the financing of the common agricultural policy require that all financial interventions should be carried out in accordance with Community rules. In the case of export refunds this means that *all* the refunds must comply with the criteria laid down by the regulations in force. [69] It is clear, however, that the national authorities cannot carry out physical checks on all agricultural products. That is why Regulation No 386/90 provides that checks must take the form of spot checks and relate to a sample of not less than 5% of transactions. The inspection system is therefore based on the rule of 'a representative sample', in that the result of the checks actually carried out (5% of cases) is deemed to reflect the situation as regards all applications for export refunds.

88. The Italian Government's arguments disregard this principle, however. In claiming that the adjustment at issue should be limited to 5% of export refunds the Italian Government forgets that the failings found in the checks which were actually carried out are deemed to exist in the case of all other applications for export refunds. In reality the argument put forward by the Italian Republic amounts to a claim that only 5% of the applications for export refunds should comply with the criteria laid down by the Community rules. Clearly such an argument cannot be accepted.

89. I therefore suggest that the Court reject the fourth plea supporting the claim for annulment.

69 — The conditions for applying export refunds are set out in the various sectoral regulations applying in the field of the common agricultural policy (see, for example, the regulations cited in Article 1 of Regulation No 3665/87).

III — Export refunds (olive oil)

A — *Law*

90. Article 9(2) of the EC Treaty (now, after amendment, Article 23(2) EC) provides:

'The provisions of Chapter, 1 Section 1 [elimination of customs duties between Member States], and of Chapter 2 [elimination of quantative restrictions between Member States] of this Title shall apply to products originating in Member States and to products coming from third countries which are in free circulation in Member States.'

91. Export refunds on Community olive oil are provided for in Regulation No 136/66/EEC, [70] according to the implementing rules laid down in Regulation No 3665/87. Article 8 of Regulation No 3665/87 provides:

'1. A refund shall be granted only in respect of products which come within the terms of Article 9(2) of the Treaty, even if the packaging does not come within those terms.

...

2. When compound products qualifying for a refund fixed on the basis of one or more of their ingredients are exported, that refund shall be paid in so far as the ingredient or ingredients in respect of which the refund is claimed come within the terms of the Article 9(2) of the Treaty.

The refund shall also be paid where the ingredient or ingredients in respect of which the refund is claimed came originally within the terms of the said Article 9(2) and no longer do so by reason solely of their incorporation in other products.

3. For the purposes of paragraph 2, the following refund are considered as refunds fixed on the basis of an ingredient:

— refunds applicable to products of the cereals, eggs, rice, sugar, isoglucose

70 — Regulation No 136/66/EEC of the Council of 22 September 1966 on the establishment of a common organisation of the market in oils and fats (OJ, English Special Edition 1965-1966, p. 221).

and milk and milk products sectors, exported in the form of goods referred to in Article 1 of Council Regulation (EEC) No 3035/80 [of 11 November 1980 laying down general rules for granting export refunds on certain agricultural products exported in the form of goods not covered by Annex II to the Treaty, and the criteria for fixing the amount of such refunds (OJ 1980 L 323, p. 27)];

— refunds applicable to white sugar and raw sugar falling within heading No 1701 of the Combined Nomenclature, glucose and glucose syrup falling within subheadings 1702 30 51, 1702 30 59, 1702 30 91, 1702 30 99, 1702 40 90 and 1702 90 50 of the Combined Nomenclature, isoglucose falling within subheadings 1702 30 10, 1702 40 10, 1702 60 10 and 1702 90 30 of the Combined Nomenclature and beet and cane syrups falling within subheadings 1702 60 90 and 1702 90 90 of the Combined Nomenclature used in products listed in Article 1(1)(b) of Council Regulation (EEC) No 426/86 [of 24 February 1986 on the common organisation of the market in products processed from fruit and vegetables (OJ 1986 L 49, p. 1)];

— refunds applicable to products of the milk and milk products and sugar sectors, exported in the form of products falling within subheadings 0402 10 91 to 99, 0402 29, 0402 99, 0403 10 31 to 39, 0403 90 31 to 39, 0403 90 61 to 69, 0404 10 19 and 99 and 0404 90 51 to 99 of the Combined Nomenclature;

— refunds applicable to products of the cereals sector, exported in the form of products falling within subheadings 2309 10 11 to 70 and 2309 90 31 to 70 of the Combined Nomenclature and mentioned in Annex A to Council Regulation (EEC) No 2727/75 [of 29 October 1975 on the common organisation of the market in cereals (OJ 1975 L 281, p. 1)];

— refunds applicable to products of the milk and milk products sector, exported in the form of products falling within subheading 2309 10 11 to 70 and 2309 90 31 to 70 of the Combined Nomenclature and mentioned in Article 1 of Council Regulation (EEC) No 804/68 [of 27 June 1968 on the common organisation of the market in milk and milk products [OJ, English Special Edition 1968(I), p. 176].'

B — *Facts*

92. During an inspection conducted from 2 to 6 December 1996, Commission officials found that certain customs offices (including Pisa and Viareggio) were granting

export refunds in respect of Community olive oil blended with olive oil coming from third countries (in particular Tunisia), refined under inward processing arrangements.

93. The Commission considered that no export refunds could be granted in that case on the ground that olive oil was not one of the products listed in Article 8(2) of Regulation No 3665/87. On 14 January 1997 the Commission instructed the Italian authorities to undertake recovery of the payments made. In 1998 it officially informed the Italian Republic that it would make a financial adjustment in this respect. The adjustment imposed was ITL 2 957 721 060. It excluded from Community financing all payments made by way of export refunds in respect of the contested quantities of olive oil.

C — *The arguments of the Italian Republic*

94. The Italian Republic disputes the adjustment imposed.

95. It claims that Community olive oil, whether or not blended with olive oil originating from a third country, falls within Article 8(1) of Regulation No 3665/87 and can therefore be granted an export refund. Olive oil is a basic product which can take the form of either a finished product or an ingredient, blending does not alter either the chemical composition or the nutritional characteristics of the product. Article 8(2) and (3) does not apply in this case since olive oil is not a compound product within the meaning of those provisions. The fact that the olive oil has been blended with other oils is irrelevant.

D — *Assessment*

96. Like the Commission, I have some difficulty in following the Italian Republic's arguments. It seems to be claiming that since olive oil may take the form of both a finished product and an ingredient it should always fall within Article 8(1) of Regulation No 3665/87 and, hence, be granted an export refund.

97. It should be pointed out that Article 8 of Regulation No 3665/87 draws a distinction depending on the nature of the product concerned.

98. Paragraph 1 deals with a case in which products are exported, unaltered, to a third country. In that case, paragraph 1, which supplements the system of export refunds provided for in the sectoral regulations, [71] states that the refund is to be granted only in respect of products which come within the terms of Article 9(2) of the Treaty. The product must therefore originate in a Member State or, failing that, be in free circulation within the meaning of Article 10(1) of the EC Treaty (now, after amendment, Article 24 EC). [72]

99. On the other hand, paragraphs 2 and 3 deal with a case in which a product is a compound product, that is to say a product composed of several ingredients. In that case the export refund is fixed not on the basis of the product itself, but by reference to the basic products of which it is composed. [73] Paragraph 2 provides that in order for a refund individualised in this way to be granted the ingredient must come within the terms of Article 9(2) of the Treaty. Furthermore, paragraph 3 contains an exhaustive list of products in respect of which the refunds are considered as being fixed on the basis of an ingredient. [74] In order to be granted a refund, it is therefore necessary for the ingredient to appear on the list of eligible products and for it to originate in a Member State or, failing that, be in free circulation in the Community.

100. Unlike the Italian Republic, I think that olive oil cannot always be regarded as a finished product for the purposes of Article 8(1) of Regulation No 3665/87. As the applicant itself has stated, olive oil may take the form of either a finished product or a basic ingredient entering into the composition of another product. In the first case the oil would fall within the scope of Article 8(1), whilst in the second case it would fall within the scope of Article 8(2) and (3).

101. In the present case it is established that the olive oil at issue was blended with oil originating from a third country (Tunisia) which was covered by Community inward processing arrangements. The oil at issue therefore is a basic product entering into the composition of another product. In order to be eligible for an export refund it must therefore comply with the conditions laid down in Article 8(2) and (3) of Regulation No 3665/87.

102. However, as the Commission has stated, the oil at issue does not comply with the condition laid down in paragraph 3. It does not appear on the exhaustive list

71 — That is to say, the sectoral regulations adopted within the framework of the common agricultural policy. Thus, as regards olive oil, Article 1 of Regulation No 3665/87 refers to the relevant provisions of Regulation No 136/66.

72 — That article provides that '[p]roducts coming from a third country shall be considered to be in free circulation in a Member State if the import formalities have been complied with and any customs duties or charges having equivalent effect which are payable have been levied in that Member state, and if they have not benefited from a total or partial drawback of such duties or charges'.

73 — Sixth recital.

74 — Idem.

of products for which refunds are considered as being fixed on the basis of an ingredient. That list, reproduced in point 91 of this Opinion, does not contain olive oil as referred to in Regulation No 136/66. Consequently, I think that the Commission was right to exclude the payments made by way of export refunds on the quantities of olive oil at issue.

103. Since the Italian Republic does not put forward any other arguments in order to dispute the adjustment imposed I suggest that the Court should reject the plea supporting the claim for annulment.

IV — The sale of alcohol held by intervention agencies

A — *Background and legal framework*

104. Council Regulation (EEC) No 822/87 of 16 March 1987,[75] seeks to attain the objectives of the common agricultural policy in the wine sector and, in particular, to stabilise markets. Article 37 of that regulation provides that disposal of alcohol held by intervention agencies must not cause any disturbance of the market in alcohol and spirituous beverages produced in the Community. Therefore it must be disposed of in other sectors, in particular the fuel sector, each time disposal is likely to bring about such disturbance. Furthermore, alcohol must be disposed of by tendering procedures,[76] in accordance with the detailed rules laid down in Commission Regulation (EEC) No 1780/89 of 21 June 1989.[77]

105. That regulation provides for different tendering procedures depending on the use and/or destination of the alcohol concerned.[78] As regards the special tendering procedure applicable in this case, Article 20 provides that the Commission will initiate the procedure by publishing in the *Official Journal of the European Communities* a notice issuing a special invitation to tender specifying the formalities for the submission of tenders and the tender specifications. In principle the tender is to be awarded to the highest tenderer. Under Article 24(2) the successful tenderer must, within 20 days, lodge a 'performance guarantee' to ensure that the alcohol will in fact be used for the purposes specified in the notice of invitation to tender. Article 33 states that the use of the alcohol for the purposes specified constitutes a primary requirement within the meaning of Article 20 of Regulation (EEC) No 2220/85 of 22 July 1985 laying down common detailed rules for the application

75 — Regulation on the common organisation of the market in wine (OJ 1987 L 84, p. 1). See fourth recital.

76 — Article 1(1) of Council Regulation (EEC) No 3877/88 of 12 December 1988 laying down general rules for the disposal of alcohol obtained from the distillation operations referred to in Articles 35, 36 and 39 of Regulation (EEC) No 822/87 and held by intervention agencies (OJ 1988 L 346, p. 7).

77 — Regulation (EEC) No 1780/89 laying down detailed rules for the disposal of alcohol obtained from the distillation operations referred to in Articles 35, 36 and 39 of Regulation (EEC) No 822/87 and held by intervention agencies (OJ 1989 L 178, p. 1). That regulation was replaced with effect from 27 February 1993 by Commission Regulation (EEC) No 377/93 of 12 February 1993 (OJ 1993 L 43, p. 6). However, only Regulation No 1780/89 applies in this case.

78 — Article 1(1).

of the system of securities for agricultural products. [79]

106. Regulation No 2220/85 contains provisions governing the system of securities required by several regulations within the framework of the common agricultural policy. [80] Article 20 of that regulation states that an obligation may include primary or secondary requirements: a primary requirement is a requirement, basic to the purposes of the regulation imposing it, to perform, or to refrain from performing, an act. A secondary requirement, however, is a requirement to respect the time limit for fulfilling a primary requirement.

107. Article 21 provides that the security is to be released once the evidence has been furnished that all primary and secondary requirements have been fulfilled. Article 23, which provides for cases where only the primary requirements have been fulfilled, reads as follows:

'1. If the evidence laid down by the specific Regulation is produced within the specified period that all primary requirements have been met, in circumstances where a secondary requirement has been breached, a partial release of the security shall be made and the rest of the sum secured forfeited. The procedure in Article 29 for recovering the sum forfeited shall be followed.

2. The proportion of the security released shall be: the security covering the relevant part of the sum secured less

(a) 15%, and

(b) — 10% of the sum remaining after deduction of the 15% for each day by which:

— a maximum period of 40 days or less has been exceeded,

79 — OJ 1985 L 205, p. 5.
80 — First recital.

— a minimum period of 40 days or less has not been respected,

— 5% of the sum remaining after deduction of the 15% for each day by which:

— a maximum period of between 41 and 80 days has been exceeded,

— a minimum period of between 41 and 80 days has not been respected;

— 2% of the sum remaining after deduction of the 15% for each day by which:

— a maximum period of 81 days or more has been exceeded,

— a maximum period of 81 days or more has not been respected.'

108. Article 29 provides that once the competent authority is aware of circumstances giving rise to forfeiture of the security, in whole or in part, it must without delay demand the party required to meet the obligation to pay the sum forfeited. That payment must be made within 30 days from the date of issue of the demand for payment. Where payment has not been made at the end of this period the competent authority must without delay take steps to recover the security.

B — *Facts*

109. By Regulation (EEC) No 3390/90 of 26 November 1990,[81] the Commission opened special tendering procedure No 8/90 EC for the sale of 1 600 000 hl of alcohol for use in the fuel sector. The notice of invitation to tender stated that the performance guarantee, set at ECU 90 per hl, would be released when the successful tenderer had provided evidence that the alcohol had actually been used for the purposes specified within a period of one year from the removal of each lot from storage. The tender was awarded to F. Palma SpA ('Palma'), which lodged the security with a bank in Turin (Italy).

81 — Regulation opening a special sale by tender of vinous alcohol held by intervention agencies, for use as motor fuel within the Community (OJ 1990 L 327, p. 21).

110. After various problems the Commission, by Regulation (EEC) No 2710/93 of 30 September 1993, [82] reduced the quantity of alcohol for use in the fuel sector and cancelled the sales by tender in respect of the lots of alcohol not yet taken out of intervention storage (three lots out of five). [83] With regard to the two lots which had already been taken out of storage the Commission extended the time limit for the actual use of the products until 1 October 1995. [84] The Commission stated that the security concerning those two lots could not be released by the intervention agency concerned until evidence had been provided that the alcohol had actually been used for the specified purposes. [85]

111. On 7 March 1996 the Commission ordered that the overrun on the time limit laid down was such that the security would be forfeited before all the alcohol had been used for the specified purposes. By Regulation (EC) No 416/96, [86] it decided to extend the time limit and to relax the rules for the forfeiture of the security as follows:

— forfeiture of 15% of the security in respect of the quantity of alcohol which has not been used in the fuel sector by 1 October 1995;

— forfeiture of 50% of the amount remaining of the security in respect of the quantity of alcohol which has not been used in the fuel sector by 30 June 1996, and

— forfeiture of the entire amount remaining of the security for the quantity of alcohol which has not been used in the fuel sector by 31 December 1996.

112. From 12 October 1995 Commission officials requested the Azienda di Stato per gli Interventi nel Mercato Agricolo (State authority for intervention in the agricultural market, 'AIMA') to undertake the recovery of the various tranches of the security according to the dates laid down in Regulation No 416/96. It appears from the file [87] that Palma systematically disputed the demands for payment made by AIMA and brought interlocutory proceedings before the Italian courts. On 30 August 1997 the Tribunale di Roma (Italy) ordered the temporary suspension of the recovery of

82 — Regulation concerning certain special sales by tender of vinous alcohol held by intervention agencies, for use as motor fuel within the Community (OJ 1993 L 245, p. 131).

83 — Article 1(2) and fourth recital in the preamble.

84 — Article 2.

85 — Article 3.

86 — Commission Regulation of 7 March 1996 amending Regulation No 2710/93 (OJ 1996 L 59, p. 5).

87 — Application (paragraph 19).

the contested security. The case is currently pending before the court adjudicating on the merits.

113. On 14 July 1997, having granted a final deadline to the Italian authorities, the Commission formally made known its intention to make a financial adjustment of ITL 7 760 156 831, corresponding to the amount of the security which should have been forfeited. On 26 October 1999 the Conciliation Body rejected the application for conciliation made by the Italian Republic on the grounds that Italy had not attended the bilateral meeting provided for in Decision 94/442. The Commission confirmed the adjustment proposed in the contested decision.

C — *The arguments of the Italian Republic*

114. The Italian Republic disputes the adjustment imposed by the Commission. It claims that the delay in the recovery of the contested security is the result of the behaviour of Palma, which systematically disputed AIMA's requests for payment and brought several actions before the courts. The applicant also points out that Palma directly approached the Commission in letters of 3 June and 20 November 1996 asking for permission to destroy quantities of alcohol which had not been used in the fuel sector.

115. At all events, the delay which may be attributable to AIMA had no effect as regards recovery of the contested amounts since on 30 August 1997 the Tribunale di Roma ordered suspension of recovery of the security. That circumstance clearly cannot be attributed to the Italian authorities.

D — *Assessment*

116. The main facts are not disputed by the parties. It is accepted that Palma did not adduce any evidence of the actual use of the products concerned in the fuel sector and that the Italian authorities should recover the amounts secured. The only question which arises is whether the Italian authorities wrongly delayed in initiating recovery of the contested security.

117. As we saw above,[88] Article 29 of Regulation No 2220/85 does not lay down any specific time limit for recovering secured amounts. That absence does not however mean that initiation of the recovery procedure is left entirely to the discretion of the national authorities. Indeed, Article 29 provides that once the competent authority is aware of circumstances giving rise to forfeiture of the security it must 'without delay' demand payment from the party concerned. Like-

88 — Point 108 of this Opinion.

wise, where payment has not been made within 30 days from the demand for payment the competent authority must 'without delay' take the necessary measures to recover the security.

118. According to the usual meaning of the words, the expression 'without delay' is used as a synonym for the adverb 'quickly'. [89] That means that the national authorities must recover the secured amount within a short period of time once they are aware of circumstances giving rise to forfeiture of the security. The other provisions of Regulation No 2220/85 confirm that interpretation. Indeed, I would point out that where only the primary requirements have been met Article 23 provides that a partial release of the security is to be made and part of the sum secured forfeited. As regards the part forfeited to the national authorities, Article 23 states that the procedure in Article 29 for recovering the sum forfeited is to be followed 'immediatement'. Hence, once the national authorities learn that the security is to be forfeited to them (in full or in part) they must take due care to initiate the recovery procedure quickly, if not immediately.

119. It is in the light of this evidence that it is appropriate to consider whether the Italian authorities wrongly delayed in initiating the procedure for recovering the contested security.

120. As regards the first tranche of the security (15%), the time limit laid down in Regulation 416/96 expired on 1 October 1995. After that date AIMA should have requested the company quickly (if not immediately) to pay the corresponding amount within thirty days. It is clear from the file, however, [90] that AIMA sent its first demand for payment to Palma on 23 April 1996, which was almost seven months after the prescribed time limit had expired. Having repeated its demand, AIMA called on the institution lodging the security to pay the secured amount on 16 January 1997, which was over fifteen months after the time limit expired.

121. As regards the second tranche of the security (50%), the time limit laid down in Regulation No 416/96 expired on 30 June 1996. AIMA should therefore have requested the company quickly (within fifteen days, for example) to pay the amount within thirty days (by 15 August 1996, for example). It is clear from the file, [91] however, that AIMA sent its first demand for payment on 3 December 1996, which was more than five months after the prescribed time limit had expired. Similarly, AIMA called on the institution lodging the security to pay the secured amount

89 — See *Le Petit Robert*, Dictionnaire de la langue française, Paris, published by Dictionnaires Le Robert, 1999 [translater's note: this adverb finds no counterpart in the English text of the provision].

90 — Application (paragraph 19).

91 — Application (paragraph 19) and defence (paragraph 57).

on 16 January 1997, which was over six months after the time limit expired.

122. As regards the balance of the security the time within which action was taken was much shorter. Where the time limit laid down in Regulation No 416/96 expired on 31 December 1996 AIMA sent its demand for payment on 29 January 1997 and its demand for implementation on 7 March 1997.[92]

123. In my view it is clear from this evidence that as regards the first two tranches of the security AIMA did not show due promptness in implementing the recovery procedure. Whatever the correct interpretation is of Article 29 of Regulation No 2220/85 ('quick' or 'immediate' implementation of the procedure), it cannot be considered that the competent authority took the necessary steps 'without delay' once it was aware of circumstances giving rise to forfeiture of the security.

124. Contrary to what the Italian Republic contends, the time taken is not attributable exclusively to the behaviour of Palma. Of course, documents on the file indicate that Palma disputed the demands for payment sent by AIMA and brought an action before the court seeking suspension of the recovery of the security. However, those various steps took place after the recovery procedure had begun and could not therefore justify the length of time that elapsed between the time the security was to be forfeited and the time when AIMA actually embarked upon the recovery procedure. Similarly, the fact that the Tribunale di Roma ordered recovery of the security to be suspended does not justify the time originally taken by the Italian authorities to implement the procedure. Moreover, I think that those national proceedings have no effect on the present case since, if the judgment in the interlocutory proceedings were to be overturned by the court adjudicating on the merits, the Italian authorities could recover the amount of the security and make up for the loss sustained as a result of the contested decision.

125. I therefore suggest that the Court reject the plea put forward by the Italian Republic.

92 — Application (paragraph 19) and defence (paragraph 57).

V — Costs

126. 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 applied for an order for costs and the Italian Republic has been unsuccessful, the latter must be ordered to pay the costs.

VI — Conclusion

127. In the light of the foregoing I propose that the Court:

(1) dismiss the application;

(2) order the Italian Republic to pay the costs.