OPINION OF ADVOCATE GENERAL LÉGER

delivered on 22 April 1999 *

1. The Kingdom of Spain seeks, under Article 173 of the EC Treaty, partial annulment of Commission Decision 97/333/EC of 23 April 1997 on the clearance of accounts presented by the Member States in respect of the expenditure for 1993 on the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF). [1]

2. The part of the annex to Decision 97/333 dealing with the Kingdom of Spain indicates that expenditure in the sum of ESP 16 765 516 175 was not recognised by the Commission as chargeable and is not therefore being repaid to the Spanish Government.

3. The application seeks the annulment of the decision to the extent to which the Commission made the following financial adjustments:

— ESP 518 290 080 in respect of export refunds for butter,

— ESP 74 468 109 in respect of export refunds for beef and veal, and

— ESP 58 804 012 in respect of aid for the processing of citrus fruit.

I — The export refunds for butter

A — *The Community legislation*

Regulation (EEC) No 804/68

4. Regulation (EEC) No 804/68 of the Council of 27 June 1968 establishes a common organisation of the market in milk and milk products. [2]

* Original language: French.

1 — OJ 1997 L 139, p. 30.

2 — OJ English Special Edition, 1968 (I), p. 176.

5. In the version applicable to these proceedings,[3] Article 17(1) provides that, to the extent necessary to enable the products governed by the regulation, including butter, to be exported on the basis of the prices for those products in international trade, the difference between those prices and prices in the Community may be covered by an export refund.

Regulation (EEC) No 729/70

6. Under Article 1(2)(a) of Regulation No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy,[4] the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (hereinafter 'EAGGF') finances refunds on exports to non-member countries.

7. Under Article 2(1) of that regulation, refunds on exports to non-member countries are financed by the Guarantee Section of the EAGGF provided that they were granted in accordance with the Community rules on the common organisation of agricultural markets.

8. Article 8(1) of Regulation No 729/70 provides:

'The Member States in accordance with national provisions laid down by law, regulation or administrative action shall take the measures necessary to:

— satisfy themselves that transactions financed by the Fund are actually carried out and are executed correctly;

— prevent and deal with irregularities;

— recover sums lost as the result of irregularities or negligence.

...'

9. By virtue of Article 8(2) of the same regulation, the financial consequences of irregularities or negligence attributable to administrative authorities or other bodies of the Member States are not to be borne by the Community.

3 — Article 17(1) of Regulation No 804/68, as amended by Council Regulation (EEC) No 3904/87 of 22 December 1987 (OJ 1987 L 370, p. 1).

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

Regulation (EEC) No 565/80

10. Article 5(1) of Council Regulation (EEC) No 565/80 of 4 March 1980 on the advance payment of export refunds in respect of agricultural products [5] provides: 'An amount equal to the export refund shall, at the request of the party concerned, be paid as soon as the products or goods have been brought under the customs warehousing or free zone procedure with a view to their being exported within a set time-limit'.

Regulation (EEC) No 3665/87

11. Commission Regulation (EEC) No 3665/87 of 27 November 1987 lays down common detailed rules for the application of the system of export refunds on agricultural products. [6]

12. Article 4(1) of that regulation provides that the refund is to be paid only upon proof being furnished that the products for which the export declaration was accepted have, within 60 days from the date of acceptance, left the customs territory of the Community in the unaltered state.

5 — OJ 1980 L 62, p. 5.
6 — OJ 1987 L 351, p. 1.

13. The first and last subparagraphs of Article 5(1) provide as follows:

'Payment of the differentiated or non-differentiated refund shall be conditional not only on the product having left the customs territory of the Community but also — save where it has perished in transit as a result of *force majeure* — on its having been imported into a non-member country and, where appropriate, into a specific non-member country within 12 months following the date of acceptance of the export declaration:

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

or

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

...

In addition, the competent authorities of the Member States may require that additional evidence be provided such as to satisfy them that the product has actually been placed on the market in the non-member country of import in the unaltered State.'

14. According to Article 13 of the same regulation, 'No refund shall be granted on products which are not of sound and fair marketable quality, or on products intended for human consumption whose characteristics or condition exclude or substantially impair their use for that purpose'.

Regulation (EEC) No 595/91

15. Council Regulation (EEC) No 595/91 of 4 March 1991 concerns irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organisation of an information system in that field. [7]

16. Article 5(2) of that regulation provides: 'Where a Member State considers that an amount cannot be totally recovered, or cannot be expected to be totally recovered, it shall inform the Commission, in a special notification, of the amount not recovered and the reasons why the amount should, in its view, be borne by the Community or the Member State'.

17. According to Article 6(1) of the same regulation:

'Where the Commission considers that irregularities have taken place in one or more Member States, it shall inform the Member State or States concerned thereof and that State or those States shall, at the earliest opportunity, hold an inquiry in which officials of the Commission may take part.

For the purposes of this article, "inquiry" shall be taken to mean any inspection, verification or action carried out by officials of the national administration with a view to establishing whether there has been an irregularity, with the exception of action carried out at the request or under the direct authority of a court.'

18. The first subparagraph of Article 6(2) states: 'The Member State shall, as soon as possible, communicate to the Commission the inquiry findings.'

7 — OJ 1991 L 67, p. 11. This regulation repeals Regulation No 283/72 of the Council of 7 February 1972 (OJ 1972 L 36, p. 1).

B — *The facts*

19. On 21 January 1992, Quesos Frías SA (hereinafter 'Quesos Frías') concluded with the public State undertaking All-Union Association for Foreign Economic Affairs 'Prodintorg' (hereinafter 'Prodintorg'), whose headquarters are in Moscow, a contract for the sale of 1 550 tonnes of butter to be shipped to Kaliningrad (Russia).

20. The sale price, determined by the parties in a contractual addendum dated 8 May 1992, was USD 1 959 per tonne, CIF Baltic seaport. [8]

21. On 28 May 1992, Quesos Frías completed three single customs documents at the Bilbao customs office for the export of butter to Russia, the total price indicated being USD 3 036 450.

22. On 3 June and 8 July 1992, Quesos Frías submitted three requests for advance export refunds to the competent authority, Servicio Nacional de Productos Agrarios, [9] which were accompanied by a guarantee for 120% of their amount and were conditional upon actual export of the butter to a non-member country.

23. Senpa granted an advance of ESP 431 909 672 to Quesos Frías after checking the guarantees given, in accordance with Article 5(1) of Regulation No 565/80.

24. Having been informed that the cover for risks associated with exports to Russia was uncertain as a result of the political instability affecting that State and that it could no longer have recourse to the line of credit established to finance the export transaction, in view of breaches by the Russian lending institution, Quesos Frías sought a new purchaser outside the customs territory of the Community in order to avoid losing the guarantee set up in respect of the payment of advance export refunds.

25. Quesos Frías sold 500 tonnes of butter stored at the Bilbao bonded warehouse to the company Rossmarsh Ltd, to be forwarded to Alexandria (Egypt).

26. Following negotiations conducted at the same time, Quesos Frías concluded a sale contract on 24 November 1992 with the French company Union Commerciale pour l'Europe et l'Afrique in respect of 1 050 tonnes of butter for the price of USD 1 185 per tonne FOB Bilbao, [10] to be marketed in Algeria.

8 — Cost Insurance Freight: the sale price thus includes, in addition to the price of the goods, the cost of carriage and insurance.

9 — National Agricultural Products Department, hereinafter 'Senpa'.

10 — Free on board: the sale price does not include carriage and insurance costs.

27. Performance of the contract was assigned to the English company, Commagric UK, [11] whose registered office is in London.

28. On 21 December 1992, the 1 550 tonnes of butter were shipped at Bilbao aboard the vessel *Maere*, chartered by the French company Unshipping SARL, whose registered office is in Paris.

29. After leaving Bilbao on 24 December 1992, the *Maere* reached the port of Skikda (Algeria) on 29 December 1992.

30. Unloading of the goods was suspended following an Algerian veterinarian inspection which found stains on a number of packages.

31. On 3 February 1993 Quesos Frías and Commagric agreed to cancel the sale contract. The sale of the consignment of 500 tonnes for Egypt was also cancelled because it was impossible to deliver the goods within the stipulated time-limit.

11 — Hereinafter 'Commagric'.

32. The butter was then carried by the vessel *Maere* from Skikda to Limassol (Cyprus), arriving on 22 February 1993. It was placed in storage in the Limassol and Larnaka refrigerated bonded warehouses.

33. On 18 June 1993, the goods were shipped aboard the vessel *Reefer Sea* at Limassol, bound for Kaliningrad, after the 1 550 tonnes of butter had been sold to the Swedish company Handelshuset Redline AP, acting as intermediary for export of the goods to Russia, the final consignee being Prodintorg.

34. The butter was unloaded on 5 July 1993 at Kaliningrad and was cleared through customs. The price of the 1 550 tonnes sold to Prodintorg was USD 936 per ton, CIF Baltic port. Quesos Frías received in respect of this transaction the gross sum of ESP 200 864 500.

C — *The application*

35. The Spanish Government observes that the Commission has refused to refund to it the sums paid by way of advance export refunds on the ground that in its view the

butter had not actually been exported owing to its poor quality.

36. In support of its application, it contends that the competent Spanish authorities regarded as adequate the evidence produced by the exporter to the effect that the butter met the relevant requirements both when it left the customs territory and when it arrived at the destination where it was to be consumed.

37. In its view, the quality of the butter when it left Spain is evidenced by the veterinarian certificates, the certificates issued by the external health department and the fact that it was held in refrigerated storage at the Bilbao bonded warehouse, and by the certificate drawn up by SGS Española de Control SA, a company responsible for the checking and verification of international commercial transactions (hereinafter 'SGS'), in particular. It was also proved, on arrival of the goods, by the official certificates issued by the Russian authorities.

38. The Kingdom of Spain considers that the Commission, for its part, has produced no evidence such as to establish that the butter was of poor quality when shipped in Spain.

39. The Commission points out that, under Regulation No 729/70, the financing of export refunds is subject to compliance with the applicable rules within the framework of the common organisation of the agricultural markets.

40. It states that, if it refuses to charge certain expenditure to the EAGGF on the ground that it derives from infringements of Community legislation imputable to a Member State, it is, by virtue of the case-law of the Court, incumbent on that State to show that the conditions are fulfilled for the withheld financing to be paid.

41. The Commission states that its doubts derive from the following facts:

— the poor quality of the goods, dating back to the shipment thereof in Spain, prevented unloading in Algeria;

— the goods finally sold in Russia are not the same as those which gave rise to payment of the advance export refunds;

— the low price finally agreed upon is, moreover, lower than the minimum price laid down in international agree-

ments and than the price initially agreed with the purchaser.

42. It contends that the payment of refunds is subject to proof being furnished that the products for which the export declaration was accepted left the customs territory of the Community in the unaltered state no later than 60 days after the acceptance of that declaration. A further condition for such payment is that the product was imported and actually released in the unaltered state onto the market in the importing non-member country within the 12 months following the date of acceptance of the export declaration.

43. The Commission then states that, under Article 13 of Regulation No 3665/87, no refund is to be granted on products which are not of sound and fair marketable quality or on products intended for human consumption whose characteristics or condition exclude or substantially impair their use for that purpose.

44. It considers that the Kingdom of Spain did not discharge its obligation under Article 8 of Regulation No 729/70 to check the various operations at issue and to recover refunds improperly received by the beneficiary. It explains that the Kingdom of Spain produced no specific relevant evidence such as to undermine that view.

45. The Commission adds that the competent Spanish authorities should, both at the time of export and thereafter, have proceeded, at its request and as promptly as possible, with the inquiries necessary to investigate the presumed irregularities.

46. The aim of the common agricultural policy is to attain the objectives of Article 39 of the EC Treaty and, in particular, to stabilise markets and to ensure a fair standard of living for the agricultural community. [12] In order to ensure, in particular, that price fluctuations on the world market do not affect prices ruling within the Community, provision is made for a refund to be paid on exports of butter to non-member countries to cover the difference between the prices ruling outside and inside the Community. [13]

47. It is clear from Articles 4(1) and (5)(1) of Regulation No 565/80 that payment of the refunds is subject to proof that the goods left the customs territory of the Community in the unaltered state for importation into a non-member country.

12 — Fourth recital in the preamble to Regulation No 804/68.
13 — Ibid., sixth recital, Article 1(c), and Article 17(1).

48. Under Article 13 of Regulation No 3665/87, the export refund can be granted only if the butter was of sound and fair marketable quality.

49. With respect more particularly to the obligations incumbent on the Member States regarding examinations and controls, it is clear from Article 8(1) of Regulation No 729/70 that they must, in accordance with national provisions laid down by law, regulation or administrative action, take the measures necessary to satisfy themselves that the transactions financed by the EAGGF are actually carried out and are executed correctly and to prevent and deal with irregularities. According to Article 8(2), the financial consequences of irregularities or negligence are to be borne by the Community, except those deriving from irregularities or negligence attributable to administrative authorities or other bodies of the Member States. [14]

50. Furthermore, whilst the national authorities remain free to select the measures they consider appropriate to safeguard the Community's financial interests, that freedom may not in any way jeopardise the speed, the sound organisation or the comprehensiveness of the requisite controls and inquiries. [15]

51. Before considering the many aspects of the journey of the goods at issue from Bilbao to Kaliningrad, it is appropriate to review the settled case-law of the Court concerning the rules of evidence regarding financing of the common agricultural policy.

52. According to the Court, 'Only refunds granted and intervention undertaken "in accordance with Community rules" within the framework of the common organisation of agricultural markets are financed by the EAGGF.' [16]

53. In that connection, the Court has held that 'it is for the Commission to prove an infringement of the rules on the common organisation of the agricultural markets ... Accordingly, the Commission is obliged to give reasons for its decision finding an absence of, or defects in, inspection procedures operated by the Member State in question'. [17] Consequently, the latter 'cannot rebut the Commission's findings by mere assertions which are not substantiated by evidence of a reliable and operational supervisory system. 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'. [18]

14 — Case C-54/95 *Germany* v *Commission* [1999] ECR I-35, paragraph 94.

15 — Ibid., paragraph 96.

16 — Case 347/85 *United Kingdom* v *Commission* [1998] ECR 1749, paragraph 11. See more recently, for example, Case C-242/96 *Italy* v *Commission* [1998] ECR I-5863, paragraph 58.

17 — *Italy* v *Commission*, cited above, paragraph 58.

18 — Ibid., paragraph 59.

54. In this case, the Commission contends that the butter sold by Quesos Frías and shipped aboard the *Maere* in the port of Bilbao did not meet the quality conditions laid down in Article 13 of Regulation No 3665/87 either at the time of export or on arrival at its destination.

55. As regards the quality of the butter on leaving Bilbao, the following points are noteworthy, since, as the Commission points out, they give the impression that the goods, even before being exported, did not meet the criteria laid down by the relevant provisions for the grant of an export refund.

56. After being placed in the Bilbao bonded warehouse on 28 May 1992, the butter, loaded aboard the *Maere*, left the port of Bilbao on 24 December 1992. Between those two dates, several examinations or inspections were carried out, the conclusions of which are contradictory.

57. On 18 November 1992, the butter was examined by the Carlos III Health Institute of the Spanish Ministry of Health and Consumer Affairs, which concluded that the butter was fit for human consumption. [19]

58. On 21 December 1992, at the request of Commagric, SGS issued two certificates to the effect that the consignments of butter conformed with the Algerian compliance rules for imported products. [20]

59. Doubt has been cast on the scope of those checks, however, by reason of a number of factors.

60. On 17 December 1992, the Spanish veterinary authorities issued an official certificate to the effect that the butter:

— met the prescribed quality standards for export,

— was of sound quality,

— was less than six months old,

— was fit for consumption.

19 — Annex 2 to the application.

20 — Annex 5 to the application.

61. However, the Commission correctly points out that, in view of the date on which the butter was put into storage — May 1992 — the goods could not be regarded as less than six months old as at the date of the certificate. That finding thus detracts from the probative force of the document produced by the Spanish Government.

62. By letter of 22 September 1993, the Commission reminded the competent Spanish authorities that 'a straightforward routine examination would ... *inter alia* have revealed that the packages bore production dates falling considerably earlier than six months prior to the date of the certificate', [21] thereby highlighting the inadequacy of the checks undertaken by the Spanish administration.

63. The record of agreement dated 3 February 1993, drawn up with the involvement of all the parties, in so far as it was signed by Commagric and Quesos Frías, also shows that Commagric had expressed reservations as to the quality of the butter when the goods were shipped aboard the *Maere* in Bilbao. [22] Those reservations, the existence of which is not disputed by the Spanish Government, which, however, regards them as a pretext for cancelling the operation on grounds related to difficulties of marketing the butter on Algerian territory, nevertheless justified an inquiry being carried out as to the exact condition of the goods before the *Maere* proceeded to sea.

64. At that stage of the export procedure, it appears that only immediate intervention by the Spanish authorities, prompted by their being informed without delay of the indications that the goods might be defective, would have enabled all uncertainties on this point to be dispelled.

65. In any event, the suspicions as to the condition of the goods became more serious in several respects.

66. After the arrival of the *Maere* at Skikda on 29 December 1992, the Algerian veterinary inspector at the frontier post made the following observations: 'Presence of abnormal stains (black and red) and rancid taste: unloading of the product disallowed'. [23]

67. A record drawn up on 2 January 1993 on board the vessel, signed by experts representing the shipowner, the charterer and the consignee of the goods and by the master of the vessel, shows that it was found that, in hold No 1, a number of boxes, on being opened, contained butter with dark stains on the area exposed and

21 — Annex 7 to the defence.

22 — Annex 9 to the application, record of agreement, p. 2.

23 — Annex 7 to the defence.

that a rancid odour was noticeable. According to the report, no leakage of water was observed. [24]

68. Finally, at the request of Commagric, an examination was arranged for on 5 January 1993 by the Institut Scientifique d'Hygiène Alimentaire ('the ISHA'), the report for which was produced on 15 January 1993. [25] According to that document, two types of examination were carried out: a visual and organoleptic examination, and chemical and microbiological analyses.

69. The visual and organoleptic examination showed that the goods aboard the vessel were giving off a rancid odour (very strong in hold no 1, distinctly noticeable in holds Nos 2 and 3, very slight in hold No 4), had a rancid taste (holds Nos 2 and 3) or were very slightly oxydated (hold No 4) and displayed varying numbers of stains of varying intensity (numerous stains and black spots in hold No 1, slightly dark stains of limited extent in hold No 3).

70. The chemical analyses disclosed high levels of acid and peroxides, accounting for the rancid taste in holds Nos 2 and 3. The microbiological analyses confirmed the presence of very extensive mould in hold No 1, the other three holds being less contaminated. Finally, the presence of contaminating and caseolytic bacteria was noted in hold No 4.

71. The report concluded that the goods were not of sound and fair marketable quality.

72. The Spanish Government disputes those various points.

73. It submits that, during shipment and after the departure of the *Maere* from Bilbao, Commagric indicated that it was reluctant to proceed with the operation, essentially because of difficulties of marketing the butter in Algeria. The political instability in that country and the pressure brought to bear by the Algerian buyer to prevent independent marketing of butter by public undertakings were the reasons for which the Algerian authorities prevented unloading of the goods.

74. As regards the inspection of 2 January 1993, the Kingdom of Spain states that only hold No 1 was inspected, that the origin, dimensions and characteristics of the stains appearing on certain boxes were not described in detail, that it had been found that the packages were in good condition and that no trace of any leak had been observed. It adds that no representative of Quesos Frías had been allowed to attend when the Algerian veterinary

24 — Annex 14 to the defence.
25 — Annex 7 to the defence.

authorities carried out their inspection or when the check was carried out on 2 January, even though an employee of that company was in the port of Skikda at that time.

75. Finally, the Spanish Government denies that the ISHA report has any probative force since, first, it was carried out at the request of Commagric to provide the latter with a pretext for cancelling the export to Algeria and, second, the procedure according to which samples were taken and analyses were carried out was not described and must therefore be regarded as insufficiently rigorous.

76. Each of those points should be examined.

77. The Spanish Government attributes the reluctance manifested by Commagric to political instability in the country of destination and pressure brought to bear by the Algerian purchaser, in turn deriving from State control of the market in question in that country, without adducing the slightest evidence to support its allegations. There are thus no serious grounds for doubting the value of the check carried out by the authorities in the importing country.

78. It is undeniable that the check of 2 January 1993 was partial, in that only hold no 1 was inspected, and that Quesos Frías was not present. Those factors clearly mean that the record cannot be accepted as irrebutable evidence of the defective quality of all the goods. The fact remains, nevertheless, that the findings were made by representatives of the parties to the contract of affreightment, who had no interest in conceding that the cargo was in poor condition.

79. It must be borne in mind that two experts represented the shipowner and the charterer respectively and that the master of the vessel was present.

80. That fact is particularly important since it is clear from a letter from the Spanish customs authorities dated 17 September 1993 [26] that Quesos Frías claimed that a small part of the cargo had been damaged in transit. Whether or not the cause of the damage was determined, those responsible for the transport operation might therefore have had a genuine interest in minimising the damage affecting the butter. Moreover, it is clear from the letter from the Spanish customs authorities that Quesos Frías admitted that some of the goods had been damaged, so that the only issue then outstanding related to the origin of the damage.

81. The fact having been recognised that some of the goods were damaged, the extent of the damage had not yet been

26 — Annex 8 to the defence.

determined, and this could have been done by means of inquiries on the initiative of the Spanish authorities.

82. Furthermore, the time at which the damage occurred — before or during transit — is of little importance in view of the fact that there was no importation, and the payment of a refund is subject to the goods being actually imported in an unaltered state into a non-member country.[27] Any damage occurring during the voyage is therefore also likely to have an impact on the economic operator's right to receive an export refund and in no way detracts from the Community's interest in ensuring that effective checks are carried out.

83. The Spanish Government attributes the preparation of the expert's report entrusted to ISHA to the unilateral intention of Commagric to breach its contract with Quesos Frías. However, it has produced no evidence to support that assertion.

84. As regards the content of the actual expert's report, the inadequacies complained of, although beyond doubt in so far as no reference is made to the procedure used by the ISHA in reaching its conclusions, affect in the same way the certificates drawn up by the private company SGS, on which the Spanish Government relies in support of its contention that the quality of the butter had not deteriorated. Those two inspections can therefore be regarded only as indicative: their probative force, being entirely relative, depends upon the production of further evidence.[28]

85. We have seen the reservations expressed by Commagric when the butter was loaded, the check by the Algerian authorities, the record of 2 January 1993 and the fact that part of the cargo was damaged constitute pointers which, although not amounting to formal evidence of the defective condition of goods, may at least give rise to serious doubts as to their quality when they were imported into Algerian territory.

86. As well as the foregoing points directly connected with the quality of the butter, account must be taken of the records of accord and satisfaction signed on 7 January 1993 and 3 February 1993[29] by Quesos Frías and Commagric. In those two documents it is stipulated that Quesos Frías took back the goods at issue and that the existing disputes were resolved. The document of 7 January provided for the payment by Quesos Frías of the sum of USD 100 000 to Commagric. The sum was raised to USD 375 000 in the document dated 3 February, which supersedes the earlier one. Moreover, the document of

27 — First and last subparagraphs of Article 5(1) of Regulation No 3665/87.

28 — It should also be emphasised that the Commission has stated that Quesos Frías, of which a representative was present at the inspection, accepted the results thereof (paragraph 23 of the defence) and was not contradicted on this point by the Spanish Government.

29 — Annex 9 to the application.

3 February cancelled outright the initial contract of sale.

87. Those agreements confirm the reality of the doubt as to the actual state of the goods at issue, in that they confer on the buyer the right not to proceed with performance of the contract of sale and at the same time to receive a considerable sum by way of compensation. It would be surprising, if the goods were of indubitable quality, that Quesos Frías should have agreed to pay Commagric, by way of settlement, more than a quarter of the nominal sale price ultimately paid by Prodintorg.

88. The route then taken by the butter, to Kaliningrad via Limassol, gives rise to further uncertainties as to the propriety of the operation.

89. Admittedly, a number of documents in the file show that the quality of the goods complied with the rules in force and that the butter was fit for human consumption when shipped from Cyprus to Russia.

90. That is apparent in particular from the veterinary certificates drawn up Burgos (Spain) on 4 May 1993, [30] from the bills of lading drawn up on 8 July 1993, after the goods were unloaded at Kalinigrad, [31] from the survey report by the commercial survey office for the province of Kalinigrad, part of the USSR Chamber of Commerce and Industry, dated 16 July 1993, [32] and from the cargo manifest of 3 January 1994. [33]

91. However, the presumptions already referred to, which cast doubt on the quality of the butter, the probative force of which might have been undermined by certain documents, are on the contrary supported by the survey report of 16 July 1993.

92. As pointed out by the Commission, the butter analysed was presented as having been produced in October 1992, which is about five months after the date on which the butter in question and was placed in storage.

93. That factor increases the uncertainty as to the identity of the goods unloaded in Russia with the cargo loaded in Spain, already deriving from the conflict between the examinations carried out after the goods arrived in Cyprus, which coincide

30 — Annex to 11 to the application.

31 — Annex 12 to the application.

32 — Annex 16 to the application.

33 — Annex 14 to the application.

in the view that the butter was in good condition, and the indications to the contrary mentioned above. [34]

94. One may certainly take the view that the production date attributed to the butter in question is the result of a simple error, or affects the value of one item of evidence in the file, without a having any repercussions as to the decision to be given in these proceedings.

95. But that detail may also take on a different significance where, among other items of evidence and like them, it contributes to the emergence of serious suspicions as to the propriety of the export transaction. To the hypothesis that the goods at issue were defective when they left the Member State or deteriorated in transit must be added, as a result of the incorrect assessment as to the date of production of the butter, the idea that that situation might have been concealed by the subterfuge of switching the goods in question.

96. In order to give judgment in the case before it, it is unnecessary for the Court to demonstrate that such switching actually took place.

97. If it merely holds that serious doubts as to the healthiness of the goods derive from the evidence in the file, then the requirement of an inquiry by the Commission is justified and the lack of diligence on the part of the Member State concerned is such as to expose it to the risk of financial adjustments when the EAGGF accounts are cleared.

98. That also is the view taken by the conciliation body in its final report of 11 December 1996. [35]

99. The conciliation body states that 'the exporter's interpretation of the facts raises more questions than that put forward by the Commission, but probability is not an adequate basis to corroborate a specific allegation against the competent authorities of a Member State'. [36] It adds that 'the Spanish authorities should have treated more seriously their obligation to initiate an inquiry under Article 6 of [Regulation No 595/91], as requested by the Commission, rather than relying on the documentation provided by the exporter'. [37]

100. By letter of 17 March 1993, the director of the EAGGF alerted the competent Spanish authority as to the quality of

34 — See point 85 of this Opinion.

35 — Annex 13 to the defence.

36 — Ibid., point 14.

37 — Ibid., point 12.

the butter shipped aboard the vessel *Maere* and asked for discharge of the guarantee or payment of the refunds to be temporarily suspended. [38]

101. By letter of 28 October 1993 it asked the Spanish administration to initiate administrative or legal proceedings with a view to recovering the refunds improperly obtained by the exporter. [39]

102. The Commission was informed of the decision of the Spanish authorities definitively to grant the export refund to the beneficiary thereof by letter of 10 January 1995, 'since the copious documentation provided by the company in question attests to the validity of the product and its entire conformity with the quality standards in force in the Western world ...'. [40]

103. As noted by the conciliation body, the evidence provided by the Spanish administration is therefore based essentially on documents produced by the exporter and does not derive from investigations undertaken by the competent national authorities.

104. That lack of diligence is confirmed by the Spanish Government itself, which stated that 'the explanations given by the exporter and annexed to the application were so persuasive that it seems unnecessary to take any further action, unless is decided to challenge the reliability of documents issued by certain public and private bodies, here and abroad'. [41]

105. The dubious nature of those explanations has been noted, after comparison thereof with other evidence.

106. To the foregoing must be added the observation by the Commission regarding the price finally charged.

107. The Government and the Commission agree that the price of the butter fixed by Quesos Frías and Prodintorg on 8 May 1992 was USD 1959 per tonne, at a rate of exchange of 104 or 105 ESP/USD, giving a total price of around USD 3 036 450 or ESP 317 790 700.

108. However, the sale price of the goods was definitively fixed in the sum of USD

38 — Annex 1 to the defence.

39 — Annex 10 to the defence.

40 — Annex 11 to the defence.

41 — Part one, point 2, second subparagraph, of the reply

936 per tonne, at a rate of exchange of 138 ESP/USD, which gives USD 1 450 808, or ESP 200 864 500. From that sum must also be deducted the sum of USD 375 000 paid to Commagric. The total received by Quesos Frías was therefore ESP 149 134 500.

109. It is therefore clear that the selling price of the butter was substantially reduced, between May 1992 and July 1993, between the same contracting parties, since, notwithstanding the export to Algeria, which was ultimately aborted, Prodintorg became the ultimate consignee of the goods. The fall in the selling price cannot be accounted for solely by changes in the rate of exchange since the increase in the value of the dollar was not sufficient to compensate for the level of the final price.

110. We can only query the reasons for such a substantial fall and regret the fact that no investigations allowed the Commission to determine the true quality of the butter at the time of export, so as to overturn the hypothesis of deterioration of the goods on leaving Spain or in transit to Algeria and thereby reduce suspicions that the goods were switched between Algeria and Russia.

111. In view of the foregoing considerations, I am of the opinion that, by not taking the necessary action to clarify the circumstances in which the cargo of butter shipped from Bilbao to Skikda, then to Kaliningrad, via Limassol, was exported to a third country, in order to justify payment of the export refund at issue, the propriety of which was disputed by the Commission on the basis of solid and consistent evidence, the Spanish authorities have not fulfilled the obligations laid down by Article 8 Regulation No 729/70.

112. It is appropriate to say, for the sake of completeness and by way of information, in order to give an answer to the Kingdom of Spain which expressed uncertainty as to the nature of the inquiries called for by the Commission, that it might have been particularly useful to take evidence or arrange for evidence to be taken from certain participants in the various phases of the export transaction and for them to be confronted with each other, or indeed for the goods to have been inspected.

113. As regards the people not resident on Spanish territory, the possibility might have been envisaged of having recourse to administrative or legal proceedings under national law so as to arrange for the competent authority to proceed with such hearings.

114. Any further information thus obtained would have enabled the Commis-

sion or the Spanish Government to justify their respective positions. If no new information had been obtained, the latter could not have been criticised for failing in part to fulfil its legal obligations.

II — The export refunds for beef and veal

A — *The Community legislation*

Regulation (EEC) No 805/68

115. Council Regulation 805/68 of 27 June 1968 establishes a common organisation of the market in beef and veal. [42]

116. Article 18(1) thereof provides that, to the extent necessary to enable the products governed by that regulation to be exported on the basis of quotations or prices for those products on the world market, the difference between those quotations or prices and prices within the Community may be covered by an export refund.

Regulation (EEC) No 2721/81

117. Article 1 of Commission Regulation No 2721/81 of 17 September 1981 on the advance fixing of export refunds for beef and veal [43] states that the export refunds provided for in Article 18 of Regulation No 805/68 are to be fixed in advance for all products in that sector for which such refunds are fixed.

Regulation (EEC) No 2913/92

118. Pursuant to Article 68(b) of Council Regulation No 2913/92 of 12 October 1992 laying down the Community Customs Code, [44] 'For the verification of declarations which they have accepted, the customs authorities may ... examine the goods and take samples for analysis or for detailed examination'.

119. Under Article 70(1) of the Community Customs Code, 'Where only part of the goods covered by a declaration are exam-

42 — OJ, English Special Edition 1968 (I), p. 187.

43 — OJ 1981 L 265, p. 17.

44 — OJ 1992 L 302, p. 1, hereinafter 'the Community Customs Code'.

ined, the results of the partial examination shall be taken to apply to all the goods covered by that declaration'.

120. It is clear from Article 71(2) of the Community Customs Code that, where the customs declaration is not verified, the provisions governing the customs regime under which the goods have been placed are to be applied on the basis of the particulars contained in the declaration.

121. Under Article 78(3) of the Community Customs Code, 'Where revision of the declaration or post-clearance examination indicates that the provisions of the governing customs procedure concerned have been applied on the basis of incorrect or incomplete information, the customs authorities shall, in accordance with any provisions laid down, take the measures necessary to regularise the situation, taking account of the new information available to them'.

B — *The facts*

122. The second financial adjustment made by the Commission relates to exports of beef and veal, one to the Côte d'Ivoire, the other to Benin.

The export of beef and veal to Côte d'Ivoire

123. Rubiato Paredes SA (also referred to hereinafter as 'the exporter'), which exported the goods, received the sum of ESP 20 701 950 by way of an advance on the export refund for 75 548 kg of meat.

124. That payment was based on the exporter's customs declaration mentioning that the meat exported was unboned. The customs officials did not examine the goods and accepted the information entered on the declaration.

125. A subsequent check revealed that part of the goods did not correspond with the declaration. The customs officials discovered 700 kg of offal, whereas the declaration indicated unboned meat.

126. The Commission asked the Spanish customs authorities to open an inquiry. The

exporter amended its declaration and was required to pay back the part of the export refund corresponding to the proportion of the goods wrongly declared, plus 15%.

127. However, it was no longer possible for the goods to be examined.

128. The Commission then informed the Spanish authorities that the consignment was of uniform composition, but those authorities, taking the view that it had not been established that the part of the goods not examined comprised offal, refused to recover the export refund in full.

129. The Commission therefore made a financial adjustment in the Kingdom of Spain's accounts of an amount equal to the total refund paid to the exporter, plus 15%.

The export of beef and veal to Benin

130. The second transaction involved the export of beef and veal by Avícolas El Chico SA (also referred to hereinafter as 'the exporter') to Benin. It attracted the payment of an export refund.

131. On the basis of information given by the EAGGF, the Spanish customs authorities went to the exporter's premises where they found that the goods declared as 'unboned frozen beef and veal, unboned pieces, each piece packaged individually, code 0202 30 90 400' was in fact made up of unboned and frozen neck of beef, in pieces weighing about one kilogram, not wrapped individually.

132. Senpa then immediately suspended processing of the applications for refunds from that company.

133. The company was called on to repay the sum of ESP 11 162 098.

134. The Commission considered, however, that neither the exporter nor the Spanish authorities were able to guarantee that all the goods exported were not in the same condition as the part inspected. It

therefore considered it appropriate to require the exporter to pay back the entire refund received by it.

135. The Spanish administration did not recover the aid, which prompted the Commission to make a financial adjustment.

C — *The application*

The export of beef and veal to Côte d'Ivoire

136. The Spanish Government relies on Article 71(2) of the Community Customs Code, claiming that, where the customs declaration is not checked, its content must be deemed to be accurate unless there is evidence to the contrary. It states that such evidence may derive from a subsequent check disclosing incontestable information such as to overturn the presumption that the particulars contained in the declaration are correct.

137. In this case, the Kingdom of Spain considers that the subsequent check carried out by the Spanish authorities only established that part of the goods did not correspond to what was declared, so that there were not sufficient legal grounds to require reimbursement of the refund in full.

138. It adds that the Commission is not entitled to propose, as it did, that the exporter should be indirectly penalised by forfeiture of all the aid, on the ground that it was untruthful in only part of its declaration, in the absence of any legal provision expressly providing for such a penalty.

139. The Commission considers that the presumption of accuracy contained in Article 71(2) of the Community Customs Code was negated by the exporter itself which, following the inquiry undertaken at the Commission's request, was obliged to amend the declaration. The Commission considers that, since part of the goods exported did not correspond with that document, it was incumbent on the exporter to provide evidence to establish that the remainder of the goods was in order and on the Spanish administration to undertake the necessary inquiries.

140. It also claims that, under Article 70(1) of the Community Customs Code, where the declaration is found to be incorrect after a partial check of the goods, it is incumbent on the exporter to prove that the

findings made should not be extended to the entirety of the goods covered by the declaration.

141. It adds, finally, that the irregularities found are the result of a lack of appropriate control measures to prevent fraud and a lack of the requisite diligence when the irregularities complained of by the Commission were investigated.

142. The Kingdom of Spain replies that all the goods exported were checked and that only part of them did not correspond with the declaration, so that the Commission cannot claim that the irregularities found affect the whole of the goods. It adds that there is no legal basis for the reversal of the burden of proof advocated by the Commission.

143. The Spanish Government states that it fulfilled its obligation of diligence by immediately checking which part of the goods declared did not coincide with the declaration.

144. As recently repeated by this Court, in view of the division of powers between the Community and the Member States in the field of the common agricultural policy, where there is evidence such as to give rise to serious suspicions that Community legislation has been circumvented, such matters call for inspection and investigations by the Member State. [45]

145. I refer again to Article 8 of Regulation No 729/70, which is concerned with the Member States' obligations regarding inquiries and investigations into the propriety of operations financed by the EAGGF, the financial consequences of irregularities or negligence attributable to national administrations or authorities, and to the case-law of the Court in this area. [46]

146. By letter of 6 April 1993, the Director of the EAGGF informed the Spanish customs authorities that '50% of the goods dispatched in 1992 to Côte d'Ivoire comprised head meat (offal not giving rise to eligibility to refunds)'. It asked the authorities to undertake an inquiry. [47]

147. Clear details raising serious suspicions as to the nature of the goods exported to

45 — See, for example, the judgments in Case C-209/96 *United Kingdom* v *Commission* [1998] ECR I-5655, paragraph 40; Case C-232/96 *France* v *Commission* [1998] ECR I-5699, paragraph 42; Case C-233/96 *Denmark* v *Commission* [1998] ECR I-5759, paragraph 43, and Case C-238/96 *Ireland* v *Commission* [1998] ECR I-5801, paragraph 86.

46 — See paragraphs 49 and 50 of this Opinion.

47 — Annex 15 to the defence.

Côte d'Ivoire by Rubiato Paredes and justifying investigative measures where thus notified to the Spanish authorities.

148. Letters were exchanged by the national and Community administrations and within the Spanish administration, some of which have been produced in these proceedings.

149. Thus, by letter of 6 July 1993, the Spanish authorities stated that the exporter had recognised that, because of a clerical error, 28 boxes of offal representing a total of 700 kg and not qualifying for refunds had been sent as part of the consignment of 75 548 kg of beef and veal. [48]

150. That information was confirmed by another letter from the Spanish customs authorities, dated 1 October 1993, reporting that, according to the exporter, the balance of the goods corresponded to code 0202 30 90 400, which is eligible for refunds. The Spanish authorities added that investigations to determine the exact nature of the meat exported were proceeding. In that letter, the Spanish authorities first gave a brief description of the company Rubiato Paredes and its business and it drew attention to the difficulties encountered in determining *ex post facto* the true nature of the meat exported on the basis of the existing documentation. They concluded by saying that inquiries were continuing. [49]

151. No further document was produced by the Kingdom of Spain.

152. It follows that the Spanish Government has merely repeated the exporter's statements to the effect that part of the exported products did not correspond with the customs declaration, without giving further details as to the nature of the remainder of the goods or evidence as to the reality or nature of the measures taken to determine it.

153. The Commission has also pointed out that the inquiries by the Spanish authorities were incomplete in that they dealt only with the producer's documents recording purchases and sales.

154. In that connection, it should be noted that the Spanish Government states that: 'The Spanish authorities were unable to prove that the remainder of the goods also consisted of offal, and therefore saw no reason to call for the entire aid to be repaid', [50] and indicates that 'An examination of all the goods exported was carried

48 — Ibid.

49 — Ibid.

50 — P. 36, paragraph 2, of the application for annulment.

out in accordance with the customs regulations',[51] without producing the slightest evidence to show, in support of that assertion, that the goods in question had been examined more thoroughly.

155. I consider, therefore, that the Kingdom of Spain has not shown that it undertook sufficiently comprehensive and detailed examinations and inspections to justify the burden of the refund being borne by the Community.

The export of beef and veal to Benin

156. The Kingdom of Spain refers expressly to the observations submitted in relation to the export of beef and veal dealt with in the foregoing section.

157. It adds that the finding of irregularities resulted merely from a check of documents and that it is not permissible for the Commission to use the verification carried out by the Spanish authorities to prove that part of the customs declaration was incorrect whilst not taking account of the finding that there was nothing to show that the declaration was not in order.

51 — P. 10, paragraph 12(2) of the reply.

158. The Spanish Government therefore considers that there is no legal basis for demanding repayment of the entire aid received and that it was entitled to claim reimbursement only of the aid corresponding to the part of the declaration acknowledged to be incorrect.

159. The Commission justifies the financial adjustment made to the Kingdom of Spain's accounts on the same grounds as those put forward in the previous case regarding the inadequacy of the checks and inquiries carried out by the Spanish administration. It states that, following notification by the EAGGF of certain irregularities and of the findings made by the Spanish inspection authorities regarding part of the goods, neither the exporter nor the Spanish customs authorities were in a position to guarantee that the remainder of the goods exported were not in the same state.

160. The Spanish Government claims that its inspection authorities not only confirmed that the code declared was not the correct one for some of the goods exported, but sought to determine what code was appropriate, which prompted them, on finding that a lesser amount of aid was due, to limit their request for reimbursement of the overpayment. It adds that there is nothing in the Community rules to enable a Member State to penalise an economic operator by depriving it of the full amount of the aid.

161. By his abovementioned letter dated 6 April 1993, the Director of the EAGGF asked the Spanish customs authorities to open an inquiry into the meat exports bound for Benin. Photographs attached to his letter show that the goods were not packaged individually, contrary to what was stated in the declaration.

162. For the reasons described above,[52] it was incumbent on the Spanish authorities to undertake detailed investigations as soon as possible.

163. It is clear from the two abovementioned letters from the Spanish customs authorities, dated 6 July and 1 October 1993, that the inquiries made disclose that the exporter was unable to produce the sale contracts or copies of the orders from its customers, which had been placed by telephone, or justification for the codes assigned to the goods exported to various African countries. The information gathered after inquiries addressed to the exporter's suppliers show that most of the goods exported did not comprise individually packaged pieces of unboned meat. Finally, it was stated that the investigations were to continue.

164. No other document has been produced by the Kingdom of Spain.

165. The reasons already given regarding the export to Côte d'Ivoire, for which I suggested that the Court declare that the inspections and inquiries undertaken by the Spanish Government did not meet the requirements of Article 8 of Regulation No 729/70, apply to the conduct for which the Kingdom of Spain is criticised in relation to exports by the company Avícolas El Chico.

166. Contrary to the Spanish Government's assertion, the findings of the Spanish authorities cannot be divided into two parts and accepted only so far as they relate to the irregularities committed by the exporter. My view is that the checks made were inadequate.

167. The checks carried out by the Spanish inspection authorities highlight the exporter's inability to prove that the export transactions conformed with the Community rules but, it having been demonstrated that some of the goods exported did not correspond to the customs declaration, the Spanish authorities have not established that they sought to determine exactly what the remainder of the goods comprised.

168. The Spanish Government's inaction in that respect was not the result of any evidence such as to prove either that the export transaction in question complied with Community law or that the inquiries

52 — See paragraphs 49, 50 and 144 of this Opinion.

undertaken by it under Article 8 of Regulation No 729/70 were complete and diligent, and therefore the financial adjustment imposed by the Commission on Spain is justified.

III — Aid for the processing of citrus fruit

A — *The Community legislation*

Regulation (EEC) No 2601/69

169. Council Regulation No 2601/69 of 18 December 1969, as amended, in particular, by Regulation (EEC) No 2483/75 [53] and by Regulation (EEC) No 1123/89, [54] provides for special measures to encourage the processing of mandarins, satsumas, clementines and oranges. [55]

170. That regulation established a system of financial compensation designed to encourage the processing of certain varieties of oranges under contracts ensuring regular supplies to the processing industries at a minimum purchase price to the producer. [56]

171. Article 1 of Regulation No 2601/69 provides that measures undertaken in accordance with the rules laid down in Article 2 with a view to ensuring that mandarins, satsumas, clementines and oranges are put to a use more in keeping with their commercial characteristics, by having greater recourse to processing, are to qualify for assistance from the Guarantee Section of the EAGGF under the conditions and procedures laid down in Article 3.

172. Article 2(1) of Regulation No 2601/69 provides:

'The measures referred to in Article 1 shall be based on contracts between Community producers and processors. Such contracts shall be concluded before the beginning of each marketing year, shall specify the quantities to which they relate, the intervals between deliveries to processors and the price to be paid to the producers. As soon as they have been concluded, the contracts shall be sent to the competent authorities of the Member States in question who shall be responsible for checking the quality and quantity of deliveries to the processors.'

53 — Council Regulation of 29 September 1975 (OJ 1975 L 254, p. 5).

54 — Council Regulation of 27 April 1989 amending Regulation (EEC) No 2601/69 with the respect to the processing and aid scheme and amending the rules for applying the intervention thresholds for certain citrus fruits (OJ 1989 L 118, p. 25).

55 — OJ, English Special Edition 1969 (II), p. 586.

56 — Second recital in the preamble to Regulation No 2601/69.

173. According to Article 2(2), for deliveries under those contracts, a minimum price is to be fixed before the beginning of each marketing year which the processors must pay to producers.

174. According to the first and last subparagraphs of Article 3(1) of Regulation No 2601/69,

'Member States shall grant financial compensation to those processors who have concluded contracts in accordance with the provisions of Article 2.

...

The amount of such financial compensation shall be fixed before the beginning of each marketing year.'

175. Regulations Nos 2601/69 and 1123/89 were repealed with effect from 12 November 1993. [57]

57 — Articles 13 and 14 of Council Regulation (EC) No 3119/93 of 8 November 1993 laying down special measures to encourage the processing of certain citrus fruits (OJ 1993 L 279, p. 17).

B — *The facts*

176. The third financial adjustment imposed on the Kingdom of Spain relates to contracts for the processing of citrus fruits.

177. At the beginning of 1994, the EAGGF inspectors undertook inquiries regarding financial compensation intended to encourage the processing of citrus fruit, which had been paid in advance by the Spanish administration.

178. Following a visit to the processor Vital Schneider (hereinafter 'the processor'), the inspectors found that 78 contracts concluded with the producers of citrus fruit had been postdated by several days.

179. The date of 9 February 1993 had been replaced by 13 February 1993: the transaction in question was subject to the minimum price applicable on the latter date, which was lower than the price previously agreed.

180. The price mentioned in the contracts concerned, which had not been changed, was ESP 1 985/100 kg.

181. Before 12 February 1993, the minimum price payable to producers in order to obtain financial compensation was ECU 12.84/100 kg, corresponding to ESP 2 023.62.[58]

182. As from that date, the minimum price was altered to ECU 12.56/100 kg, corresponding to ESP 1 979.49.[59]

183. By letter of 18 July 1994, the Commission informed the Spanish authorities that fraud might be suspected.

184. After examining the matter, the Spanish administration concluded that the facts disclosed did not justify reimbursement of the aid paid. Despite the explanations given, the Commission applied a financial adjustment to all the aid received by the beneficiary in respect of the 78 contracts whose date had been amended.

58 — Article 1 of Commission Regulation (EEC) No 87/93 of 19 January 1993 derogating from Regulations (EEC) No 1423/92 and (EEC) No 1423/92 and (EEC) No 3115/92 concerning the minimum purchase price for lemons and oranges delivered for processing and the amount of the financial compensation after processing of such products applicable in Spain until the end of the 1992/1993 marketing year (OJ 1993 L 12, p. 15).

59 — Article 1 of Commission Regulation (EEC) No 278/93 of 8 February 1993 derogating from Regulation (EEC) No 3115/92 fixing, for the 1992/1993 marketing year, the minimum purchase price for oranges delivered for processing and the financial compensation payable after processing and from Regulation (EEC) No 1562/85 with regard to information to be supplied to the Commission (OJ 1993 L 33, p. 8).

C — *The application*

185. The Kingdom of Spain maintains that the producer fulfilled the conditions laid down for eligibility for financial compensation. In its view the Community rules laid down two conditions, which had been met: the price fixed in the sale contract between the producers and the processors was to be equal to or greater than the minimum price in force during the marketing year concerned; the fruit covered by the contract had to be actually processed into fruit juice.

186. It considers that it is for the parties to decide in their absolute discretion the date on which they reach a final agreement. They cannot in its view be criticised for determining the date of the contract having regard to the legal conditions for awarding Community aid, provided that date is not later than that of performance of the contracts and is not intended to achieve a result contrary to Community law.

187. The Spanish Government rejects the Commission's view that the processor changed the date in the contract to secure the minimum price in force whilst at the same time benefiting from the aid provided for as at the initial date of signature of the contracts, which was of a higher amount. It maintains that, on the contrary, the processor received aid of a lower amount, corresponding to the contracts concluded after 12 February.

188. In support of its decision, the Commission contends that the change to a date of a contract made in order to secure an advantage deriving from a change of price in a Community regulation adopted after the contract was concluded cannot attract Community financing.

189. It considers that a change of that kind is fraudulent since it enables an economic operator to benefit from aid which he would not have been entitled to on the date initially fixed, the contract price at that time being lower than the minimum price in force. In its view, that course of conduct caused harm to the Community in so far as the processor was seeking to obtain financial compensation illegally.

190. The Kingdom of Spain, relying on a teleological interpretation of the applicable rules, states that the aim of Regulation No 2601/69 was to facilitate the disposal of oranges produced by the Community and it therefore encouraged greater demand for oranges by giving financial assistance to producers provided that they paid a reasonable minimum price. In its view, to accept the Commission's reasoning would be tantamount to granting aid when contracts complied with the prescribed requirements merely by chance and not where the operator consciously sought to benefit from it.

191. The Kingdom of Spain considers that it is lawful for a processor to amend his contracts with a view to receiving aid and that, until such time as the contracts have been delivered to the authorities, there is nothing to prevent the contracting parties from negotiating and adjusting the contracts to suit their particular aims.

192. The objection raised by the Kingdom of Spain raises the delicate question of defining the meaning of fraud in a case like the one before the Court.

193. The question must be asked whether the change by the contracting parties themselves to the date entered in a contract, with a view to obtaining certain Community aid, the payment of which is influenced by the level of the contractual price and the date on which the contract was concluded, [60] constitutes fraud.

194. In other words, may the substitution of a new date for the date mentioned in the contract, in order to allow the contracting parties to enjoy the more favourable terms of new rules, be considered as an infringement of those rules?

195. Let us first dispose of the Commission's criticism of the Kingdom of Spain, which, according to the latter, involved

60 — The reference to the date of conclusion of the contract to determine the temporal application of minimum purchase prices is contained in Article 1 of Regulation No 278/93.

defending the view that the processor recognised having applied for and obtained payment of financial compensation in respect of the period before 12 February 1993, which was of a higher amount than the compensation corresponding to the amended date. According to the Spanish Government, the Commission took the view that the processor had postdated the contracts to justify the price paid to the producers, which was lower than the minimum price laid down for the preceding period, whilst at the same time receiving the higher level of financial compensation corresponding to the latter period. [61]

196. The Commission has not confirmed that position to the Court. It has stated very clearly that the processor's intention, reflected by the 'adjustment' of the dates of the contracts, was to 'be able to benefit from Community aid'. [62]

197. The Commission does not therefore contend that the amendment at issue was intended to legitimise the principle that financial compensation should be paid whilst at the same time the amount disbursed should be higher than that to which the new date created entitlement. It is clear from its reasoning that it merely maintains that the aim of the change of date was to justify payment of financial compensation corresponding to the period after 12 February 1993.

61 — P. 43, paragraph 1, of the application for annulment.
62 — P. 19, paragraph 52, of the defence.

198. It is therefore necessary to examine the question raised by the present application within the limits of the facts as thus stated.

199. The existence of fraud depends, in this case, on the limits which one imposes on the power of the contracting parties — producers and processor — to amend a contract which might attract Community aid.

200. As we have seen, two aspects of the contract, the price and the date, are decisive as far as the grant of financial compensation under Regulation No 2601/69 is concerned. The changes made by the contracting parties in those areas thus enable them to affect the award of aid.

201. I do not, however, consider that that finding alone is such as to justify limiting their contractual freedom in that regard, in the absence of formal Community rules on that point.

202. The limits on the authority of the parties to amend contracts in my view depend on several factors: the aim pursued by the applicable Community legislation, the purpose of the change and the risks of fraud.

203. As regards *the aim pursued by the legislation*, it is common ground that the aim of Regulation No 2601/69 is to remedy the severe difficulties encountered in disposing of Community production of oranges, in particular by increasing Community outlets by greater recourse to processing of such fruit into juice. [63]

204. Such encouragement of processing through regular supplies to the processing industry is subject to the condition that, by the fixing of a minimum purchase price for the producer, the producer receives adequate remuneration. [64]

205. The applicable legislation is therefore designed to encourage processors to accept a certain price level by following the minimum reference price fixed on certain dates by the Community legislature.

206. Like many other economic regulations, this one seeks to encourage specific courses of conduct on the part of economic operators in the field of production or marketing of products by recourse to financial incentives to attain the objectives pursued.

207. It is therefore legitimate for the operators covered by the legislation in question to adjust the way they operate and adopt strategies to benefit from the advantages available under the legislation, provided that their conduct is consonant with those objectives and observes the letter and the spirit of the rules.

208. The fixing of a price by producers and a processor, as at a precise date, albeit a date which is amended by agreement between them, a priori fulfils the conditions laid down by the relevant legislation since the minimum prescribed price is observed on the date chosen by the contracting parties and attains the objectives set by the legislation.

209. In this case, the price, which the parties to the contract did not change, exceeds the minimum level laid down by Regulation No 278/93, which means that, at the same time, there is both an outlet for the production of the fruit concerned and a guarantee that producers will be remunerated for their activity at the legally prescribed level.

210. It is true that the date of the contracts was amended but nobody disputes that, despite the difference of a few days, [65] the marketing year had not started and the contracts at issue had not been performed.

63 — First recital and Article 1.

64 — Ibid., second recital.

65 — It will be remembered that 13 February was substituted for 9 February.

Only the legislative framework had changed, the minimum reference price having been reduced following the adoption of Regulation No 278/93. [66]

211. Having regard to the relevant legislation, the main content of the contracts — products sold and sale prices — therefore seems to me to be consistent with the economic purpose of that legislation.

212. In response to the Commission's argument that the change of date is damaging to the Community in so far as the processor is seeking to obtain aid which was not due on the date initially fixed, it must be stated that financial compensation would nevertheless have been duly paid if the contracting parties had, involuntarily, delayed signing the contracts for a few days or if, having been alerted to the reduction in the minimum price, they had voluntarily deferred the time of signature or chosen to cancel the contracts preparatory to signing at a later date new contracts for the same purpose setting the same price.

66 — It should be noted, in that regard, that the regulation in question was adopted on the day before the contracts at issue were initially concluded and that it was published in the *Official Journal of the European Communities* on the same day. However, its date of entry into force, the third day after publication, was 12 February, which doubtless accounts for the changes made to the contracts in question.

213. By taking that course, using means which the Commission does not object to as improper, the processor would have achieved the same result as was actually achieved in this case.

214. At all events, it is clear that the objectives of disposing of production and maintaining prices are achieved when the reference level for such prices is determined.

215. Can it thereby be conceded that a factor as important as the date of the contract can be *changed* without closely examining the risks of fraud which the change exposes the Community budget?

216. In fact, the date on which a contract is concluded is not comparable to the other factors since, as properly emphasised by the Commission, it is a factor which in part is alien to the contracting parties. They may be able to choose the date of signing an agreement, but care must be taken before admitting that they are entitled to attribute fictitiously to that agreement a date other than that on which they effectively concluded it.

217. Such a change is incontestably fraudulent where it is made by one of the contracting parties without the knowledge of the others.

218. That did not occur in this case since it is undisputed that the producers, by signing, confirmed the new date indicated in the contracts.

219. Even though mutually agreed by the parties, that change would nevertheless be fraudulent if the date specified could not in any circumstances reflect reality. That would be the case if it postdated performance or the commencement of performance of a contract, or if notification of the contract in accordance with certain legal formalities, such as those which determine whether or not certain rights will be available,[67] gave it a definitive date[68] and, by rendering it effective vis-à-vis third parties, took it out of the private sphere of the relationship between the contracting parties to which it was until then confined.

220. Where the date of a contract is changed by agreement between the contracting parties and the change is not put in doubt by such circumstances, as in the present case, it is legitimate to ask whether those parties are entitled freely to choose the date which they wish to attribute to their agreement.

221. It is not then a question of their falsifying reality by fictitiously replacing one date by another, but simply a question of substituting one contract for another, the parties taking the view, to which they are entitled by virtue of the principle of contractual freedom, that, having regard to new developments concerning the conditions for the payment of financial aid, the earlier as yet unperformed contracts should be cancelled and replaced by new ones, with the same parties, the same subject-matter and the same price, but a different date.

222. I think the difficulty of the problem raised on this point by the Kingdom of Spain's objection lies in the ambiguity stemming from the fact that the same documents were retained for contracts

67 — Thus, the last subparagraph of Article 2(1) of Article 2601/69 provides that, as soon as they are concluded, contracts are to be sent to the competent authorities of the Member States involved. It is natural that, once the contract has been forwarded, its date is deemed unalterable.

68 — That is certainly the objective pursued by the national law of certain Member States, as in the case of Article 1227 of the Spanish Civil Code, by virtue of which, according to the Kingdom of Spain, the date of a private document is inoperative vis-à-vis third parties until an event occurs from which it can be inferred that the document could not have been signed at a later date, for example the death of one of the signatories, delivery of the document to an official acting as such or the date of its entry on a public register (paragraph 22 of the reply). A comparable example is to be found in Article 1328 of the French Civil Code, according to which 'Documents not officially attested shall be deemed, vis-à-vis third parties, to be undated until such time as they have been registered, the day on which a person or persons who signed it die or the day on which the substance of such document is recorded in instruments drawn up by officials vested with public authority, such as records relating to the affixing of seals or preparation of inventories'.

which, from a strictly legal point of view, must be regarded as different.

223. In my view, in the absence of legal provisions on this point, there is nothing to prevent the parties to a new contract indicating their wish to substitute that act-in-the-law for another by entering a new date on an old document.

224. Why, moreover, should it not be conceded that contracting parties may agree on a new date for the conclusion of a contract if they are also entitled to resile from a contract — one may no longer wish to sell or the other to buy — on the ground that the timing of the sale is not favourable, and then go on to conclude an identical contract on the ground that the aid granted makes the transaction attractive once more?

225. The lack of any *risk of fraud* is the last factor likely to affect the scope of contracting parties' entitlement to amend a contract.

226. It should be made clear, in that connection, that the Commission has not only put forward no arguments based on provisions of Community law relating to changes to the date of a contract, like the change made in this case, alleging fraudulent conduct, but also has produced no evidence to support the fear that the appraisal by the Spanish authorities of the processor's practices is likely to encourage fraud or detract from the effectiveness of controls.

227. For the sake of completeness, let me add that there is nothing to indicate bad faith on the part of the processor. On the contrary, the producers' signature, whose purpose is to confirm the shared wish to change the date, means that all possible suspicions must be set aside.

228. Consequently, I consider that the financial adjustment made by the Commission in respect of the 78 contracts of 9 February 1993, postdated to the 13th, is not justified and that the decision must, on that point, be annulled.

229. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they are applied for in the successful party's pleadings. However, under Article 69(3), if the parties succeed on some and fail on other heads, the Court may decide that the parties are to bear their own costs. Since the Kingdom of Spain's action has been partially upheld, the Court should give a decision in those terms.

Conclusion

230. In view of the foregoing considerations, I suggest that the Court:

(1) annul Commission Decision 97/333/EC of 23 April 1997 on the clearance of the accounts presented by the Member States in respect of the expenditure for 1993 on the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF), for the financial year 1993, to the extent to which the Commission did not charge to the EAGGF a sum of ESP 58 804 012 corresponding to financial compensation paid in advance by the Kingdom of Spain in respect of the processing of citrus fruits;

(2) dismiss the application for the rest;

(3) order the parties to bear their own costs.