OPINION OF ADVOCATE GENERAL STIX-HACKL

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I — Introduction

1. In 1997 and 1998 the Netherlands was struck by an epidemic of classical swine fever (hereinafter 'CSF'). To eradicate the epidemic the Netherlands Government adopted veterinary measures; it additionally implemented exceptional market support measures.

2. Under Community law the Community can make a financial contribution to certain expenses incurred by the Member States in the veterinary field, in particular where those expenses have accrued in the process of eradicating a disease such as CSF.

3. The Netherlands Government submitted claims for 1997 and 1998 respectively, requesting a Community contribution to the expenditure it had incurred for the purpose of eradicating CSF. The Commission considers certain expenditure ineligible for reimbursement. As far as reimbursable expenditure in the veterinary field is concerned, it adopted two decisions [2] (hereinafter 'the contested decisions') by which it fixed the total amount of the Community contribution to the expenditure incurred by the Netherlands in the year in question. In that context it assessed both the eradication strategy pursued by the national authorities and the compensation awarded to the livestock farmers before concluding that additional costs had arisen in that regard which could not be charged to the Community budget. The Commission accordingly decided to reduce by 25% the Community contribution to the expenditure notified by the Netherlands.

4. The Kingdom of the Netherlands has claimed that the two decisions should be

2 — Commission Decision 2000/362/EC of 25 May 2000 on the total amount of Community aid for the eradication of classical swine fever in the Netherlands in 1997 (notified under document number C(2000) 1385) (OJ 2000 L 129, p. 33); Commission Decision 2001/739/EC of 17 October 2001 on the total amount of Community aid for the eradication of classical swine fever in the Netherlands in 1998 (notified under document number C(2001) 3110) (OJ 2001 L 277, p. 28).

annulled inasmuch as the Commission has applied a flat-rate 25% reduction to the expenditure at issue in each case. The Netherlands Government takes the view that such a reduction is devoid of legal basis. It further takes the view that the Commission proceeded on the basis of incorrect information and, what is more, assessed that information erroneously. The contested decisions were also disproportionate and could not be reconciled with the principle of the protection of legitimate expectations. Lastly, insufficient reasoning was given for those measures.

II — Relevant legislation

5. The provisions of Article 3(3) and (5) of Council Decision 90/424/EEC of 26 June 1990 on expenditure in the veterinary field, [3] most recently amended by Council Decision 2001/572/EC of 23 July 2001, [4] (hereinafter 'Decision 90/424') are taken as the basis for the contested decisions.

6. Under Article 3(1) of Decision 90/424, the provisions of the said article apply in the event of the occurrence of a disease such as CSF in the territory of a Member State.

7. Article 3(2) provides:

'The Member State concerned shall obtain a financial contribution from the Community for the eradication of the disease, on condition that the measures applied immediately comprise at least the isolation of the holding from the time of suspicion and, following official confirmation of the disease:

— the slaughter of animals of susceptible species which are affected or contaminated or suspected of being affected or contaminated, and their destruction,...,

— the destruction of contaminated feedingstuffs and contaminated equipment, where the latter cannot be disinfected in accordance with the third indent,

— the cleaning, disinsectisation and disinfection of the holdings and of the equipment on the holdings,

— the establishment of protection zones,

3 — OJ 1990 L 224, p. 19.
4 — OJ 2001 L 203, p. 16.

— the imposition of suitable measures to prevent the risk of the spread of infection,

— the establishment of a waiting period to be observed after slaughter before re-stocking of the holding,

— swift and adequate compensation of the livestock farmers.'

Under Article 3(3) of Decision 90/424 '[t]he Member State concerned shall, without delay, inform the Commission and the other Member States of the measures applied in accordance with Community legislation on notification and eradication and the results thereof. The situation shall be examined as soon as possible within the Standing Veterinary Committee, hereinafter referred to as the "Committee", set up by Decision 68/361/EEC. The specific financial contribution by the Community shall be decided in accordance with the procedure laid down in Article 41, without prejudice to the measures provided for in the context of the common organisation of markets concerned.'

8. The amount of the Community financial contribution is determined on the basis of Article 3(5) of Decision 90/424 which provides that '[w]ithout prejudice to market support measures to be taken as part of the common organisation of markets, the financial contribution by the Community, divided if necessary into several tranches, must be:

— 50% of the costs incurred by the Member State in compensating owners for the slaughter, destruction of animals and, where appropriate, their products, for the cleaning, disinsectisation and disinfection of holdings and equipment and for the destruction of the contaminated feedingstuffs and contaminated equipment referred to in the second indent of paragraph 2,

— where vaccination has been decided upon in accordance with paragraph 4, 100% of the cost of supply of the vaccine and 50% of the costs incurred in carrying out that vaccination.'

9. Decision 90/424 is therefore designed to enable the Community to contribute to the costs incurred by the Member States for the eradication of certain animal diseases. That contribution is motivated by the idea that swift measures adopted by a Member State following an outbreak of such a disease on its territory are, ultimately, for the benefit of all Member States.

10. Measures to combat animal diseases may, in principle, be attributed to the common agricultural policy as well as to health policy. They do, after all, play a role in securing a balance on the agricultural markets concerned but may also assume characteristics associated with health policy where the disease presents a risk to human health. [5]

11. Pigmeat production is subject to a market organisation regime which can be supplemented by exceptional market support measures in the event of an outbreak. Provision is additionally made for both preventive and curative measures in the veterinary field. The control of CSF is *inter alia* the subject-matter of Council Directive 80/217/EEC [6] (hereinafter 'Directive 80/217'), now superseded by Council Directive 2001/89/EC. [7]

12. Article 9 of Directive 80/217, as amended by Council Directive 91/685, provides, as far as is relevant here:

'1. Immediately after the diagnosis of classical swine fever has been officially confirmed in pigs on a holding, the competent authority shall establish a protection zone with a radius of at least three kilometres around the outbreak site, which shall itself be included in a surveillance zone of a radius of at least 10 kilometres.

...

4. The following measures shall be applied in the protection zone:

(a) a census of all the holdings shall be made as soon as possible;...

(b) the movement and transport of pigs on public or private roads shall be prohibited...;

(c) trucks and other vehicles and equipment, which are used to transport pigs or other livestock or material which may be contaminated (e.g. feedingstuff,

5 — Hence the reason for the Amsterdam Treaty creating a separate basis of competence in Article 152(4) EC, by way of derogation from Article 37, as regards measures in the veterinary and phytosanitary fields.

6 — Council Directive of 22 January 1980 introducing Community measures for the control of classical swine fever (OJ 1980 L 47, p. 11). That directive was amended by Council Directive 80/1274/EEC (OJ 1980 L 375, p. 75), Council Directive 81/476/EEC (OJ 1981 L 186, p. 20), Council Directive 84/645/EEC (OJ 1984 L 339, p. 33), Council Regulation (EEC) No 3768/85 (OJ 1985 L 362, p. 8), Council Directive 85/586/EEC (OJ 1985 L 372, p. 44), Council Directive 87/486/EEC (OJ 1987 L 280, p. 21), Council Directive 91/685/EEC (OJ 1991 L 377, p. 1) and Council Decision 93/384/EEC (OJ 1993 L 166, p. 34).

7 — Council Directive of 23 October 2001 on Community measures for the control of classical swine fever (OJ 2001 L 316, p. 5).

manure, slurry, etc.) and which are used within the protection zone, shall not leave...;

(d) no other species of animal may enter or leave a holding without the authorisation of the competent authority;

(e) all dead or diseased pigs on a holding shall be notified to the competent authority, which shall carry out any investigations necessary to establish the presence of classical swine fever;

(f) pigs may not be removed from a holding in which they are kept for 21 days after the completion of the preliminary cleaning and disinfection of the infected holdings as provided for in Article 10; after 21 days, authorisation may be given to remove pigs from the said holding...;

...

8. By derogation from paragraph 4(f)..., the competent authority may authorise that pigs be moved from the holding to be transported to a rendering plant for rendering or to a place where the pigs are slaughtered in order to be burned or buried....

All necessary precautions shall be taken to avoid the risk of spreading the virus during such transport, in particular by cleaning and disinfecting the truck after the transport.

9. Where the prohibitions provided for in paragraphs 4(f) and 6(f) are maintained beyond 30 days because of an outbreak of further cases of the disease and as a result problems arise in keeping the pigs, the competent authority may, following a reasoned application by the owner, authorise removal of pigs from a holding within the protection or surveillance zone, as the case may be,...

All necessary precautions shall be taken to avoid the risk of spreading the virus during such transport, in particular by cleaning and disinfecting the truck after the transport.'

13. Under Article 14b of Directive 80/217 each Member State is to draw up a contingency plan on the basis of certain criteria, specifying the national measures to be implemented in the event of an outbreak of CSF. The plans had to be submitted to the Commission not later than 1 January 1993 for examination and, following any amendment that might be necessary, approval.

14. One item of horizontal legislation to which reference should also be made is Council Directive 92/119/EEC. [8]

III — The contested decisions

A — *Decision 2000/362*

15. Case C-293/00 concerns Decision 2000/362 (hereinafter 'the first contested decision'). [9]

16. That decision provides as follows:

'*Article 1*

The total amount of Community financial aid for the eradication of classical swine fever in 1997 in the Netherlands is hereby fixed at EUR 109 937 795.

Article 2

The balance of EUR 35 507 928 shall be paid as appropriations become available.

Article 3

This Decision is addressed to the Kingdom of the Netherlands.'

17. The recitals in the preamble thereto read as follows:

'(1) Outbreaks of classical swine fever occurred in the Netherlands in 1997. The appearance of the disease represents a serious danger to the Community pig herd. With a view to the speedy eradication of the disease the Community is able to contribute to expenditure incurred by the Member State.

8 — Council Directive of 17 December 1992 introducing general Community measures for the control of certain animal diseases and specific measures relating to swine vesicular disease (OJ 1993 L 62, p. 69).

9 — See footnote 2.

(2) On 22 June 1998 the Netherlands presented an application for reimbursement of all the expenditure incurred in the country in 1997. This application was replaced by a new application lodged on 2 June 1999.

(3) The Commission adopted Decisions 98/25/EC and 1999/18/EC on Community financial aid towards the eradication of classical swine fever in the Netherlands. These Decisions provided for the payment of two initial advances amounting to EUR 74 429 868.

(4) The total amount of Community aid must now be fixed.

(5) The Commission has checked to see whether all Community veterinary rules have been observed and all the conditions for Community financial assistance have been met.

(6) As a result of these checks, not all of the expenditure submitted could be accepted as eligible. This position was confirmed in a report by the Court of Auditors.

(7) The Commission's initial comments were officially notified to the Netherlands authorities on 13 January 1998.

(8) Further comments and the method for calculating the eligible expenditure were officially notified to the Netherlands authorities on 5 May and 29 October 1999.

(9) The Standing Veterinary Committee has not given an opinion; the Commission therefore proposed these measures to the Council on 17 February 2000 in accordance with Article 41 of Decision 90/424/EEC, the Council being required to act within three months.

(10) However, the Council has not acted within the required time-limit; these measures should now be adopted by the Commission.'

18. The Kingdom of the Netherlands has claimed that the decision should be annulled in so far as the Community financial contribution fixed for the eradication of CSF in the Netherlands in 1997 has been reduced by 25%.

B — *Decision 2001/739*

19. Case C-501/01 concerns Decision 2001/739 (hereinafter 'the second contested decision'). [10]

20. That decision provides as follows:

'*Article 1*

The total amount of Community financial aid for the eradication of classical swine fever in the Netherlands in 1998 is hereby fixed at EUR 6 277 156.

Article 2

The amount referred to in Article 1 shall be paid after adoption of the present Decision.

Article 3

This Decision is addressed to the Kingdom of the Netherlands.'

21. The recitals in the preamble thereto read as follows:

'(1) An epidemic of classical swine fever occurred in the Netherlands in 1997 and in 1998. The appearance of the disease represents a serious danger to the Community pig herd. With a view to the speedy eradication of the disease the Community is able to contribute to the expenditure incurred by the Member State.

(2) In relation to the outbreak of classical swine fever which occurred in 1997 the Commission adopted Decision 2000/362/EC on the total amount of Community aid for the eradication of classical swine fever in the Netherlands in 1997. This Decision provided for the payment of a total amount of EUR 109 937 795.

(3) On 10 September 1999 the Netherlands presented an application for reimbursement of all the expenditure incurred in the country in relation to the outbreaks of classical swine fever in 1998. At the request of the Commission, the Netherlands provided further information on this matter on 6 December 1999, 7 February 2000 and 21 April 2000.

10 — See footnote 2.

(4) The Commission has checked to see whether all Community veterinary legal provisions have been observed and all the conditions for Community financial assistance have been met.

(5) As a result of these checks, not all of the expenditure submitted could be accepted as eligible. This position is consistent with the special report on classical swine fever issued by the Court of Auditors and with Decision 2000/362/EC.

(6) The Commission's comments on the application submitted by the Netherlands were officially notified to the Dutch authorities on 11 December 2000.

(7) The total amount of Community aid for the expenditure related to the outbreaks of classical swine fever in the Netherlands in 1998 must now be fixed.

(8) Pursuant to Article 3(2) of Council Regulation (EC) No 1258/1999, veterinary and plant health measures undertaken in accordance with Community rules shall be financed under the Guarantee Section of the European Agricultural Guidance and Guarantee Fund. For financial control purposes, Articles 8 and 9 of Regulation (EC) No 1258/1999 apply.

(9) The Standing Veterinary Committee has not given a favourable opinion. The Commission therefore proposed these measures to the Council on 19 June 2001 in accordance with Article 41 of Decision 90/424/EEC, the Council being required to act within three months.

(10) However, the Council has not acted within the required time-limit. These measures should now be adopted by the Commission.'

22. The Kingdom of the Netherlands has claimed that the decision should be annulled in so far as the Community financial contribution fixed for the eradication of CSF in the Netherlands in 1998 has been reduced in the form of a 25% reduction in the compensation paid to livestock farmers.

C — *Background to the two decisions*

23. It is common ground that the Netherlands authorities submitted an application to the Commission in 1998 for a Community financial contribution in excess of NLG 884 million to expenditure incurred in relation to veterinary measures taken in 1997. The application relates to measures for controlling the 1997 outbreak of CSF which were implemented in the same year.

24. Under Decision 90/424 Member States can, in principle, expect to obtain 50% co-financing in respect of the costs they have incurred, which are described in greater detail in that decision. In the case at issue, however, the Commission has reduced the Community financial contribution by 25%.

25. It is also common ground that the application submitted by the Netherlands authorities in the same circumstances but in relation to 1998 concerned some NLG 63 million. Approximately NLG 22.5 million of that amount was compensation for livestock farmers. The Commission has reduced the Community financial contribution to the abovementioned expenditure likewise by 25%.

26. The specific reasons for the flat-rate reduction in the Community financial contribution to the expenditure incurred in 1997 by the Netherlands can be found in the correspondence attached to the application in the corresponding action. [11] The Commission first of all criticises the manner in which the measures designed to eradicate the disease are implemented — the 'technical objections' — and secondly, as an entirely separate consideration, regards compensation paid to livestock farmers overall as excessive — the 'objections of a financial and administrative nature'.

27. The technical objections essentially focus on the Netherlands inability to meet the conditions required for Community co-financing in particular in the light of a failure to fulfil the requirements under Directive 80/217. In that context the Commission cites the absence of a contingency plan, the delay in establishing the presence of the disease, the excessive number of animal movements in the protection zone together with an insufficient guarantee of hygiene, the suspension of preventive clearing measures and a failure to set up protection zones.

28. The objections of a financial and administrative nature are levelled against the — in the Commission's view — excessive, and therefore inappropriate, compensation paid to livestock farmers. The manner in which the value of the livestock was established was, it claims, unsatisfactory: animals had changed category during the evaluation process; the weight of the feedingstuff had likewise been overestimated; compensation was paid several times over for some animals.

29. The reasons for the reduction in the Community contribution to the expenditure incurred in 1998 can likewise be found in the correspondence attached to the application in the corresponding action. [12] The objections raised by the Commission in that instance are of a financial and administrative nature alone: the Netherlands auth-

11 — See, in particular, the Commission's letter of 29 October 1999 to the Netherlands Government, Annex 7 to the application.

12 — See, in particular, the Commission's letter of 11 December 2000 to the Netherlands Government, Annex 3 to the application.

orities had not made sure that the compensation paid in respect of sows was consistent with the actual number of sows on the relevant holdings. Furthermore, there was a significant discrepancy between the compensation in question and the standard rates applying at that time. In the case of holdings with fattening pigs, the weight of those animals was overestimated by 12.2% whilst in holdings which had been cleared the Commission established a 17% discrepancy in the estimated weight of the feedingstuff over and above the weight of the feedingstuff recorded at the destruction plants. The total amount of compensation paid to the livestock farmers had increased by 15.5% by reason of an 'indexation system'.

30. The Netherlands Government raises five pleas in law against each of the contested decisions. By its first plea in each case, it argues that the Commission has assessed the facts erroneously. The other pleas relate to alleged errors in law. In that respect the Netherlands Government objects first to the Commission's decision in principle to effect a flat-rate reduction of the Community contribution and secondly to the calculation of and grounds for that flat-rate reduction.

31. It therefore appears appropriate first of all to examine the extent to which the Commission is able to verify compliance with the conditions for payment of a Community contribution laid down in Article 3(2) of Decision 90/424 and the consequences in law that may ensue from a Member State's failure to satisfy those conditions.

IV — The Commission's powers of verification

32. The legal basis for the flat-rate reductions at issue is a matter raised — albeit in rather a different manner — in each of the two cases. The second plea on this matter raised in each of the two cases should therefore be assessed jointly.

A — *Arguments of the parties*

33. The *Netherlands Government* takes the view that the application of a (flat-rate) financial correction is not permitted under Decision 90/424. It is further of the opinion that implementation of the measures laid down by Article 3(5) of Decision 90/424 gives rise to an entitlement whereby a Member State may obtain a 50% financial contribution from the Community towards the expenditure incurred. That decision, it claims, does not lay down any further conditions. In view of the severity of the crisis which gave rise to these proceedings and the complexity of the resulting situation, it was inevitable that errors in fact and erroneous assessments would be established subsequently; however, those errors were not such as to give rise to corrections.

34. Moreover, applying a flat-rate financial correction without an express legal basis in Decision 90/424 was contrary to the requirement of legal certainty.

35. The *Commission* draws attention to the fact that fulfilment of the conditions laid down in Article 3(2) of Decision 90/424 is the prerequisite for obtaining a financial contribution from the Community. Since those conditions had been met neither entirely nor in part in the cases at issue, it was permissible for it to reduce the Community financial contribution by the amount which had accrued as a result of the failure to meet those conditions.

B — *Legal assessment*

36. Having adopted various measures to eradicate CSF which had broken out in its territory in 1997, the Netherlands applied for Community co-financing of those measures, that is to say for 1997 and 1998 respectively, in accordance with Decision 90/424.

37. The Netherlands entitlement to a contribution towards its costs arises indisputably from Article 3(2) of Decision 90/424, which provides that '[t]he Member State concerned shall obtain a financial contribution from the Community for the eradication of the disease, on condition that the measures applied immediately comprise at least the isolation of the holding from the time of suspicion and, following official confirmation of the disease,...' a series of additional measures described in greater detail.

38. However, on examining the respective applications, the Commission concluded that the expenditure declared is derived in part from a failure to comply with the relevant provisions of Community law and from inappropriate decisions taken as part of the national policy to combat the disease. The Commission thus took the view that such additional costs may not be charged to the Community budget.

39. In a special report [13] the Court of Auditors was itself critical both of the approach adopted by the Commission during the 1997/98 swine fever crisis and of the implementation of certain measures by the Member States. As regards Netherlands policy, it came more or less to the same conclusions as the Commission.

40. On completion of a preliminary procedure the Commission decided to apply a 25% reduction when fixing the Community financial contribution. This is indisputably a flat-rate reduction. The Commission defends that decision by explaining that it had not been possible, in view of the scale and complexity of the crisis, to determine with precision which additional costs charged to the Community budget had accrued as a result of shortcomings at national level.

13 — Special Report No 1/2000 on classical swine fever, together with the Commission's replies (OJ 2000 C 85, p. 1).

41. Such action by the Commission is reminiscent of a flat-rate correction within a procedure for the clearance of EAGGF accounts. A procedure of that kind does, however, have a clear legal basis, namely Regulation (EEC) No 729/70 of the Council, [14] which has been superseded by Council Regulation (EC) No 1258/1999. [15] Article 1(2)(b) and Article 3(1) of Regulation No 729/70 accordingly provide that the EAGGF Guarantee Section is to finance intervention intended to stabilise the agricultural markets, undertaken *according to Community rules* within the framework of the common organisation of agricultural markets. Article 5(2)(c) of that regulation as amended by Council Regulation (EC) No 1287/95 [16] lays down the rules governing the procedure to be applied by the Commission where it finds that expenditure has not been effected in compliance with Community rules.

42. However, this case does not concern expenditure in relation to the common agricultural policy, which would have to be financed in its entirety under the Guarantee Section of the EAGGF; on the contrary, it concerns veterinary expenditure, only half of which is, in principle, chargeable to the EAGGF pursuant to Decision 90/424.

43. It should be noted in this regard that the first contested decision relating to the expenditure incurred in 1997 makes no reference to Regulation No 729/70. It differs in that respect from the second contested decision in that the eighth recital in the preamble to that second decision refers to Article 3(2) of Regulation No 1258/1999, under which veterinary and plant health measures undertaken *in accordance with Community rules* are to be financed under the Guarantee Section of the EAGGF, and also provides that financial control is governed by the provisions of Articles 8 and 9 of Regulation No 1258/1999.

44. In the light of those facts, a potential question is whether the Commission has a legal basis for checking that the expenditure effected, at least as regards 1997, is compatible with the relevant rules of Community law.

45. However, that question can go unanswered as the Netherlands Government in any event intimated clearly at the hearing that, rather than calling into question the Commission's powers of verification, it was essentially challenging the legal consequences — namely the flat-rate corrections — ensuing from the Commission's findings which it in any case regarded as erroneous.

46. Even if the Netherlands Government were to question the Commission's powers of verification generally, the very fact that veterinary measures do not fall within the scope of Regulation No 729/70 does not, in my view, indicate that the first contested decision is devoid of a legal basis inasmuch as it establishes a flat-rate reduction of the Community financial contribution.

14 — Regulation of the Council of 21 April 1970 on the financing of the common agricultural policy (OJ, English Special Edition 1970(I), p. 218).

15 — Council Regulation of 17 May 1999 on the financing of the common agricultural policy (OJ 1999 L 160, p. 103).

16 — Council Regulation of 22 May 1995 amending Regulation (EEC) No 729/70 on the financing of the common agricultural policy (OJ 1995 L 125, p. 1).

47. Article 10 of Decision 90/424 which establishes the entitlement to the contribution provides, after all, that '[t]he appropriations required for measures as referred to in this chapter shall be decided each year as part of the budgetary procedure', Article 9(1) of the decision expressly providing that on-the-spot checks can be carried out by the Commission 'to ensure, *from a veterinary point of view*, that the measures adopted have been applied' (my emphasis). Moreover, Article 3(3) of the decision provides that '[t]he Member State concerned shall, without delay, inform the Commission and the other Member States of the measures applied *in accordance with Community legislation* on notification and eradication and the results thereof' (my emphasis). It is clear from those provisions that Decision 90/424 itself assumes — albeit implicitly — that the Commission enjoys power to check not only whether there is procedural regularity but also whether the expenditure has been effected by the paying agencies of the Member States in accordance with Community law.

48. At this juncture it can therefore be established that the Commission was entitled to verify compliance of the national veterinary measures with the relevant provisions of Community law as regards 1997 and 1998 alike. Thus, the Commission did not subject payment of the financial contribution to any additional conditions by making it conditional on compliance with the provisions of Directive 80/217 in particular.

49. However, the legal consequence that can ensue from a failure to meet the relevant requirement of Community law still has to be clarified.

50. At the hearing the Netherlands Government did not contest the argument *per se* that a failure to satisfy the conditions for payment of a Community contribution may have repercussions in law; it did, however, submit that such repercussions are dependent on the presentation — by the Commission, of course — of evidence showing a distinct infringement of Community law. In that context the Netherlands Government referred to the discretion enjoyed by the Member States and the errors of assessment inevitably made when tackling a disease.

51. It is sufficient at this point to note that failure to satisfy the conditions necessary for payment of a Community contribution to veterinary expenditure incurred by the Member States can, in principle, only lead to a refusal to grant such a contribution. On that basis, if the Commission finds that conditions of that kind have been met neither in full nor in part, it has the power to exclude the expenditure in question from co-financing.

52. Where the Commission seeks to reduce the Community contribution to expenditure incurred by a Member State to reflect the financial consequences most probably ensuing from the infringements, this measure is in any event a rather lenient legal consequence for the Member State concerned.

53. I therefore see distinct parallels with the Court's position on the permissibility of flat-rate corrections in respect of agricultural expenditure: the basis for those corrections is the Commission's working document No VI/216/93 [17] (annexed to the 'Belle Group report'). This document sets out guidelines to be followed when financial corrections must be applied in relation to a Member State. For difficult cases the report makes provision for a flat-rate method: '[a]s the systems audit approach has become more widely applied, the EAGGF has had recourse increasingly to an assessment of the risk which a systems deficiency presents. By the very nature of *ex post* auditing, it can rarely be established at the time of audit whether a claim was valid when paid... The loss to the Community funds must therefore be determined by an evaluation of the risk to which they were exposed by the control deficiency, which may concern as much the nature, or quality, of the controls operated as the quantity of controls effected....'.

54. The Belle Group report codifies a long-standing Commission practice the principle of which has not been criticised by the Court. [18] In this respect the Court has concluded that 'where it proves impossible to establish with certainty the extent to which a national measure which is incompatible with Community law has caused an increase in the expenditure entered under a budgetary item of the EAGGF, the Commission has no choice but to disallow... all the expenditure in question... If, then, in its function of clearing the accounts the Commission, instead of refusing the entire expenditure, endeavours to draw up rules to differentiate according to the degree of risk posed to the EAGGF by different levels of defective supervision, the Member State must show that those criteria are arbitrary and unfair.' [19]

55. The fundamental difficulty with flat-rate corrections under agricultural policy, [20] which is also relevant here in the veterinary field, lies in finding a practicable

17 — This document has since been superseded by a further working document, Commission document No VI/5330/97 of 23 December 1993.

18 — See only Case C-50/94 *Greece* v *Commission* [1996] ECR I-3331; Case C-242/96 *Italy* v *Commission* [1998] ECR I-5863; and Case C-243/97 *Greece* v *Commission* [2000] ECR I-5813.

19 — Case C-50/94 *Greece* v *Commission* (cited in footnote 18), paragraph 26 et seq.

20 — See the Commission's opinion in Case C-50/94 *Greece* v *Commission* (cited in footnote 18), paragraph 24: '[The Belle Group report] criteria constitute a common basis of agreement in that, if it proves impossible to determine the amount of the adjustments precisely, a middle way is chosen by withholding a flat-rate amount, thus making it possible both to respect Community law and the sound management of Community resources and to comply with the understandable wish of the Member States to avoid excessive and disproportionate adjustments.'

approach between excluding expenditure from financing — a measure regarded as disproportionate — and releasing the Community budget of the burden of additional costs incurred by reason of defective national measures.

56. The Court did not cite the absence of legal basis or the failure to observe the requirement of legal certainty when it criticised the flat-rate corrections that the Commission is in the habit of determining. On the contrary, it proceeded from the premiss that the criteria on which flat-rate corrections are based lead to a shift in the burden of proof in favour of the Commission; thus the Member State concerned has to show that those criteria are arbitrary and unfair.

57. Although there are no such criteria as regards veterinary expenditure, that does not mean, however, that the flat-rate corrections established by the Commission in the contested decisions are devoid of a legal basis but — in accordance with the case-law cited above — in fact that more stringent requirements must be imposed on the Commission as regards giving reasons for the chosen rates of correction.

58. A flat-rate correction cannot, ultimately, be valid unless it is shown that it is impossible to establish with certainty the extent of the increase in expenditure caused by a national measure which does not meet the requirements of Community law. In circumstances such as those arising in these cases, it is clearly impossible to assess with sufficient certainty how CSF would have developed if a different veterinary policy, consistent with Community law, had been pursued. As regards the 'objections of a financial and administrative nature', the discretion enjoyed by the Member State likewise makes it impossible to determine with precision the additional costs incurred as regards the payment of adequate compensation to livestock farmers. Consequently, I do not see any objection in principle to applying flat-rate corrections in these cases.

59. It is, as yet, to be determined whether the Commission established the respective percentages for the flat-rate correction on the basis of relevant information, thereby inferring that the national measures are insufficient to satisfy the conditions under Article 3(2) of Decision 90/424, and whether it gave sufficient reason for that percentage rate.

60. I conclude that the second plea raised in each of the two cases, inasmuch as it relates to the alleged absence of a legal basis, and the fourth plea in each case alleging a failure to observe the principle of legal certainty must be rejected as unfounded.

V — The Commission's individual complaints and their legal consequences

61. The Netherlands considers the contested decisions to be unlawful because in

adopting them the Commission had relied on incorrect information (first plea in each case) and because the conclusions it had drawn from that information were legally incorrect (second plea in each case). It furthermore claims that the decisions are disproportionate (third plea in each case) and are vitiated by an inadequate statement of reasons (fifth plea in each case).

62. Since the parties themselves make a distinction between technical objections and objections of a financial and administrative nature, the pleas mentioned will be examined separately in relation to each type of objection. However, it appears expedient to begin by focusing on fundamental considerations relating to the intensity of the review by the Court and the sharing of the burden of proof.

A — *Preliminary remarks*

63. Legal assessment of the approach taken by the Commission gives rise to a number of issues. It must be noted first of all that the basis for the entitlement to a Community contribution to national expenditure, namely Article 3(2) of Decision 90/424, contains a number of vague legal concepts such as 'measures applied immediately', preventive measures and 'swift and adequate compensation'. Defining those legal concepts is a matter of interpretation which falls to the Court and which does not in itself present a problem. However, where the criterion for assessing whether the conditions mentioned in Article 3(2) of Decision 90/424 are met is sought in particular in Directive 80/217, it must be noted that although that directive indeed has contributed to harmonising veterinary policy in the Member States with regard to CSF, the Member States continue none the less to enjoy a broad margin of discretion as regards the choice of measures to be adopted. In the cases at issue here it is not disputed, for example, that Community law does not contain any obligation to slaughter animals as a preventive measure. It is likewise agreed that it is in principle for the Member State to determine the amount of compensation to be paid to the livestock farmers — within the limits of what is considered adequate of course.

64. In the light of those circumstances it is clear that the focus of the cases at issue will be the interpretation of Decision 90/424 and Directive 80/217 as well as the limits of the discretion enjoyed by the Member States.

65. It is striking in this regard that in assessing the relevant measures adopted by the Netherlands Government the Commission was influenced by considerations of expediency, thereby exceeding the requirement simply to verify that Community rules are observed by national authorities. The Commission thus infers a failure to satisfy the conditions necessary to obtain a financial contribution not only from a direct

infringement of Community law but also, and primarily — for example, in the debate on the suspension of preventive slaughter operations — from a lack of expediency in the national measures.

66. To establish the scope of judicial review, it is crucial to ascertain whether the Commission took sufficient account of the margin of discretion enjoyed in this matter by the Member State concerned. Indeed, it is not for the Court to rule on the veterinary policy that should have been pursued. On the contrary, it has to confine itself to assessing whether or not the Commission has made a manifest error of assessment. The need for such a restricted review is a direct result of the discretion enjoyed by each Member State individually in defining its strategy for eradicating the disease on the one hand and in determining the compensation to be paid to the livestock farmers on the other. [21]

67. The scope of the judicial review conducted by the Court has a direct effect on the sharing of the burden of proof in that it is for the Member State to demonstrate that the Commission has committed a manifest error of assessment. If the Member State does not furnish such evidence relating to the Commission's findings, it cannot for that matter challenge the resulting decision by claiming that the cases to which the Commission referred were isolated cases from which it was impossible to draw general conclusions.

68. Reference is additionally had to the case-law on the clearance of EAGGF accounts, under which 'it is the Member State which is best placed to collect and verify the data required for the clearance of EAGGF accounts; consequently, it is for the State to adduce the most detailed and comprehensive evidence that it has made checks or that its figures are accurate and, if appropriate, that the Commission's assertions are incorrect'. [22]

69. Should it come to light in these proceedings that the objections raised by the Commission are not manifestly unfounded — whether by virtue of an incorrect interpretation of Community law or of erroneous findings of fact — it would ultimately be necessary to verify that the legal consequences, determined by the Commission in the form of a flat-rate reduction of the Community financial contribution, do not give rise to any objection as regards their severity in the light of the

21 — It can be inferred effortlessly from the consistent case-law of the Court that a restricted review is to be conducted in matters where the Community institutions — or the Member States — are granted a broad margin of discretion. See, for instance, in the pharmaceutical field which is similar to the veterinary field: '... it is settled case-law that where a Community institution is called upon to make complex assessments it enjoys a wide measure of discretion, the exercise of which is subject to a judicial review restricted to verifying that the measure in question is not vitiated by a manifest error or a misuse of powers and that the competent authority did not clearly exceed the bounds of its discretion' — Joined Cases T-74/00, T-76/00, T-83/00 to T-85/00, T-132/00, T-137/00 and T-141/00 *Artegodan and Others* [2002] ECR II-4945 with reference to Case C-405/92 *Mondiet* [1993] ECR I-6133, paragraph 32; Case C-180/96 *United Kingdom* v *Commission* [1998] ECR I-2265, paragraph 97; and Case C-120/97 *Upjohn* [1999] ECR I-223, paragraph 34.

22 — See, most recently, Case C-157/00 *Greece* v *Commission* [2003] ECR I-153, paragraph 17.

principle of proportionality and the requirement to state reasons.

70. I have already pointed out that flat-rate corrections should, in principle, be permitted. [23] However, since in this case the flat-rate reductions are not decided on the basis of criteria defined in advance — such as those contained in the Belle Group report — more stringent requirements must be imposed as regards their justification, in particular when it comes to examining proportionality. A fact that must be borne in mind in this connection is that the Commission itself enjoys a certain measure of discretion pursuant to the case-law. [24]

B — *Technical objections raised by the Commission (Case C-293/00)*

1. Introductory observations

71. The Commission has raised technical objections only in respect of 1997. In that connection it criticises the strategy pursued by the Netherlands Government to eradicate the disease.

72. A manifest error of assessment on the part of the Commission in this context could arise from its reliance on manifestly incorrect facts or on a manifestly erroneous interpretation of the relevant legislative provisions. I will first turn my attention to that issue.

23 — See above, at point 49 et seq.

24 — See, to this effect, the Opinion of Advocate General Geelhoed in Case C-375/99 *Spain* v *Commission* [2001] ECR I-5983, point 24.

73. However, the Netherlands Government for its part criticises the actual rate of the reduction which the Commission has decided to apply to the financial contribution. In this regard it is essentially claiming that the Commission has acted in breach of the principle of proportionality (third plea in each case) and of the requirement to state reasons (fifth plea in each case). Since its arguments in this context do not differ from its arguments concerning the objections of a financial and administrative nature, I shall examine the third and fifth pleas raised in the two cases together in my observations on the latter objections.

2. The finding and assessment of fact by the Commission

74. By its first plea the Netherlands Government objects in both sets of proceedings to the Commission's findings of fact. By its second plea it also criticises in particular — beyond the alleged absence of a legal basis — the Commission's assessment of the law. Although the Netherlands Government does not contest the findings made by the Commission as a result of its on-the-spot inspections, it none the less claims essentially that those findings relate to isolated cases. It maintains that the Commission wrongly sought to generalise the results in order to substantiate the contested financial correction. Inasmuch as the Commission has regard to the relevant legislation, it adds, the application of the financial correction at issue can originate only from an erroneous interpretation of that legislation.

75. As the arguments put forward by the Netherlands Government to support its second plea in each case are restricted to repeating the criticisms expressed in relation to the first plea in each case, I should like to examine the two pleas jointly since they are, obviously, closely connected.

(a) Essential arguments of the parties

— Absence of a contingency plan

76. The *Netherlands Government* concedes that there was no contingency plan within the meaning of Article 14b of Directive 80/217 at the time of the outbreak of CSF. However, it regards this as a formal omission which has not impinged on the effectiveness with which swine fever was tackled. It adds that the Draaiboek Varkenpest ('Swine Fever Scenario'), which existed at the time of the outbreak in the Netherlands, met the criteria for a contingency plan. It was not until later that the rules laid down in that document were submitted as a contingency plan (with the abovementioned 'scenario' attached) to the Commission which went on to approve them on 30 March 1999.

77. In view of the resulting legal consequences, the Netherlands Government considers the Community financial contribution to be unconnected with the drawing-up of a contingency plan.

78. The *Commission* notes that the absence of an approved contingency plan at the time of the outbreak is not subject to dispute. It is inconsequential that the Netherlands authorities had dealt with the CSF outbreak in accordance with the contingency plan in place for foot-and-mouth disease since that contingency plan could not take account of the special features of pig farming in the Netherlands, namely the high density of the pig population and the large number of holdings. It goes on to observe that it had not been notified of the existence of the 'scenario' prior to the outbreak. It is also apparent from the rejoinder that the Commission considers a contingency plan to be vital, given that a plan of that kind had, in its view, reduced the risk of any shortcomings in controlling the disease.

79. The need for a contingency plan is clear from Article 14b of Directive 80/217. In drawing up such a plan, the Commission claims, suitable measures to prevent the risk of the spread of infection are imposed for the purposes of the fifth indent of Article 3(2) [of Decision 90/424].

— Alleged delay in official confirmation of the CSF outbreak

80. The *Netherlands Government* challenges the allegation that there was a delay in official confirmation of the CSF outbreak. The Commission had only reached that conclusion after the fact in view of information subsequently received.

81. The *Commission* recalls that the CSF outbreak was officially confirmed at 12 noon on 4 February 1997. Thirty-six holdings, it claims, had already been infected by that time, 18 of which since January. Had the disease been detected earlier and appropriate measures undertaken immediately, the disease would have affected a smaller number of holdings.

82. The Commission also submits that on the morning of 3 February 1997 a suspected outbreak of swine fever was recorded. Nevertheless, the competent authorities had waited until 12 noon on the following day to confirm the disease officially and had waited a further 12 hours to impose the transport ban. Such failure to act had significantly increased the risk of spreading the disease.

83. Although the Commission concedes that detecting swine fever on a holding is fraught with difficulty, it none the less points out that the symptoms detected and the fact that the disease was present in areas of Germany with which the Netherlands maintains active trade relations should have prompted the Netherlands authorities to notify the suspicion more swiftly and to set in motion the official means of investigation necessary under Article 4 of Directive 80/217.

84. From a legal point of view, the Commission notes that the necessary measures must be implemented with immediate effect pursuant to the introductory sentence of Article 3(2) of Decision 90/424. According to its findings, however, the transport ban was not imposed immediately. Furthermore, the presence or suspected presence of swine fever was not notified immediately to the competent authority, contrary to Article 3 of Directive 80/217.

— Animal movements in the protection zone

85. The *Netherlands Government* asserts that it did everything in its power to minimise the number of animal movements within the protection zone. Transport bans had been imposed pursuant to Directive 80/217 and it had been decided to impose additional transport bans. Compliance with those bans was monitored strictly. The Commission failed to acknowledge the fact that a substantial proportion of the animal movements were necessary to meet the requirements of the purchasing policy under Commission Regulation (EC) No 413/97[25] or were justified on veterinary grounds. It wrongly maintained that the hygiene precautions taken were insufficient.

86. The *Commission* maintains that the Netherlands authorities had allowed animals to be transported in tens of thousands of cases, by far exceeding the boundaries defined by Article 9(8) of Directive 80/217.

25 — Commission Regulation of 3 March 1997 adopting exceptional support measures for the market in pigmeat in the Netherlands (OJ 1997 L 62, p. 26).

The hygiene precautions taken during transportation had, it claims, been insufficient. Furthermore, the Netherlands Government had not explained how the Commission's findings regarding the animal movements were erroneous.

87. From a legal point of view, the Commission recalls the fact that under the provisions of Article 9(8) and (9) of Directive 80/217 animal movements in the protection zone are permitted only by way of derogation. In this respect, it concludes, the Netherlands authorities had not fully met the requirement to avoid the risk of spreading the virus. Moreover, the shortcomings established with regard to the cleaning and disinfecting of trucks fell expressly within the scope of Article 9(8) of Directive 80/217.

— Preventive slaughter policy

88. The *Netherlands Government* challenges the claims that it had pursued an illogical slaughter policy. The measures concerned, it explains, were suspended on the advice of veterinary experts. Taking into account the limited spread of the disease at that time, those experts had warned of the risk of losing valuable epidemiological data as a result of applying preventive slaughter measures across the board as well as of the attendant problems in diagnosing and tackling the virus. However, when it became clear in early April 1997 that the progress of the disease gave greater cause for concern than originally thought, it was immediately decided that preventive slaughter should be resumed.

89. The *Commission* regards preventive slaughter as an important means of avoiding the risk of the disease spreading, in particular in areas with a high-density pig population such as in the Netherlands. Yet it acknowledges [26] that Community law makes no provision for an obligation to effect preventive slaughter. It maintains, however, that the discretion enjoyed in this respect by the Member States is restricted to taking the measures which are objectively necessary to control the disease. At the material time, both the Commission and the Standing Veterinary Committee (hereinafter 'the Committee') were aware of the expediency of pursuing a policy of preventive slaughter in high-density areas.

90. The Commission attributes the unchecked spread of the disease in particular to the suspension of preventive slaughter operations. It further maintains that the decision to suspend those measures was not notified to it until March 1997, contrary to the claims of the Netherlands Government that notification was given at the Committee meeting of 19 February 1997.

91. The fact that the Netherlands authorities had started to clear holdings close to

26 — Rejoinder, paragraph 55.

the outbreak sites but then suspended that preventive measure in the period between 13 February 1997 and 14 or 15 April 1997 was not subject to dispute. Moreover, there had been different clearing zones and the preventive clearing measures had not always been carried out within the time allowed.

92. It was apparent from all those factors that the policy of preventive slaughter had not been applied consistently as a means of eradicating the disease. Even though some preventive clearing operations had been carried out, certain holdings had not been cleared in spite of their close proximity to an outbreak site.

93. That inconsistent policy generated considerable additional costs which were charged to the Community budget. To calculate those costs the Commission had reference to a study by the Landbouwuniversiteit Wageningen (the Netherlands). The study describes the repercussions that systematic, preventive clearing might have had on the development of the epidemic and estimates the additional costs charged to the Community budget to be in the region of EUR 69 million.

94. The *Netherlands Government*, on the other hand, points out that the abovementioned study had, above all, highlighted that Community legislation on controlling CSF was outdated in view of modern, intensive pig farming. Where it points to the benefits of preventive slaughter, the study may indeed be of use for revising the legislation in force but not for assessing the measures taken by the Netherlands authorities in 1997 and 1998. Where the Commission had reference to the study in order to demonstrate the causal link between the suspension of preventive clearing measures and the development of the epidemic and to calculate the additional costs, it had to be noted that the study was a simulation relating to foot-and-mouth disease, not to CSF.

95. The *Commission* in that connection emphasises the fact that it has based its objections directly on the relevant provisions of Community law. Thus it claims not to have relied in that context on the simulation set out in the study in question.

96. From the legal aspect, the Commission regards the two-month suspension of preventive clearing in holdings close to infected holdings and the subsequent application of an — in its view — inconsistent policy as a failure by the Netherlands authorities to take account of Article 3(2) of Decision 90/424 and Article 5(2) of Directive 80/217. The authorities had, according to the Commission, also acted in breach of the obligation to inform pursuant to Article 3(3) of Decision 90/424.

— Failure to establish a protection zone

97. At the hearing the parties intimated that they no longer considered it necessary for the Court to rule on that matter.

(b) Assessment

— Absence of a contingency plan

98. I must point out at the outset that the parties concur that there was no contingency plan within the meaning of Article 14b of Directive 80/217 at the time of the outbreak. They do not agree, however, on the impact of that fact in law.

99. The Netherlands Government considers that payment of the Community financial contribution does not presuppose the existence of such a contingency plan. It submits, merely in the alternative, that it had acted in accordance with equivalent plans; the absence of a contingency plan therefore could not be regarded as anything more than a formal omission.

100. The Commission has regard to the requirement laid down by Article 14b of Directive 80/217 that Member States must submit contingency plans for swine fever to the Commission not later than 1 January 1993. Bearing in mind that Article 3(2) of Decision 90/424 associates payment of the Community financial contribution *inter alia* with the requirement that disease-stricken Member States impose suitable measures to prevent the risk of the spread of infection, it deduces from the two provisions that the Netherlands at the time did not meet the requirements to obtain the financial contribution.

101. The wording of Article 3(2) of Decision 90/424, namely that 'following official confirmation of the disease', the Member State concerned is required *inter alia* to impose 'suitable measures to prevent the risk of the spread of infection', definitely seems to support the view held by the Netherlands Government. However, it probably will not be easy to contest that it was not *after* official confirmation of the disease that a contingency plan had to be established and submitted, and consequently the absence of a contingency plan probably will not be regarded as a breach of the fifth indent of that provision. The Commission's interpretation of that provision seems bold at the very least.

102. I should like, nevertheless, to challenge the view adopted by the Netherlands Government that the absence of a contingency plan is merely a formal omission.

The purpose of such a plan, namely to ensure that the central veterinary authorities are ready to respond to outbreaks of infectious diseases, is apparent from *inter alia* a Commission working document.[27] The absence of a contingency plan can at least begin to explain the shortcomings involved in controlling the disease. Its absence can therefore be regarded as an indication that defects exist since the Commission, in conducting its on-the-spot inspections, found further irregularities, in particular as regards the preventive measures to be taken pursuant to the fifth indent of Article 3(2) of Decision 90/424.

103. In this context it is irrelevant that the Netherlands authorities acted in accordance with the contingency plan in place for foot-and-mouth disease because, as the Netherlands Government actually acknowledges in a different context,[28] there are substantial differences between the two diseases. Nor can the existence of the 'Swine Fever Scenario' make any difference to that assessment because it was not approved by the Commission until after the outbreak of CSF in question, which means that there was no guarantee prior to the outbreak that the national authorities would proceed in a manner that would not be subject to criticism.

104. It is for that reason that I consider the Commission not to have made a manifest error in objecting to the absence of a contingency plan.

— Alleged delay in official confirmation of the CSF outbreak

105. Turning to the matter of the time when official confirmation was made, it is more the Commission's legal assessment of the facts, rather than the facts *per se*, and the conclusions it has drawn from the assessment as regards the development of the disease as well as the attendant costs that give rise to differences of opinion between the parties.

106. It is perfectly logical to conclude that the earlier the disease is officially confirmed and the appropriate measures taken to prevent the risk of the disease spreading in accordance with Article 4 et seq. of Directive 80/217,[29] the greater the probability that the outbreak will be swiftly contained. However, the time from which the Netherlands authorities should be criticised for delayed reaction is uncertain.

107. Article 3(2) of Decision 90/424 merely refers to 'measures applied immediately' from the time of suspicion or confirmation of the disease. The measures referred to in that provision are, again, apparent from

27 — 'Health strategies to control swine infectious diseases: European experience'; Commission working document of 30 January 1996 (VI/1715/96), cited in the special report by the Court of Auditors (cited in footnote 13) at paragraph 14, footnote 2.

28 — See above, at point 94, the submissions of the Netherlands Government concerning the study by the Landbouwuniversiteit Wageningen.

29 — This essentially involves imposing a transport ban and, where necessary, carrying out slaughtering operations.

Directive 80/217, Article 3 of which refers to the 'immediate' notification of the presence or suspected presence of swine fever to the competent authorities and Article 4 of which mentions the requirement that the veterinarian 'immediately' set in motion official means of investigation. The further measures to be taken on confirmation of the disease contain comparable unspecific references to time. [30]

108. It must consequently be concluded that the Commission enjoys a certain discretion in assessing whether national authorities have acted sufficiently promptly. The Commission pointed out in particular — without being challenged on the matter by the Netherlands Government — that 18 holdings had already been contaminated by 3 and 4 February 1997, clearly as a result of transporting animals. This means that those cases indeed did arise after notification of the suspected presence of swine fever on 3 February 1997 but none the less before official confirmation of swine fever on 4 February 1997; however, a ban on transportation did not come into effect until 00.00 on 5 February 1997.

109. Indeed, the Netherlands Government is right to point out that Community law does not prescribe a ban on transportation from the time when the presence of swine fever is suspected; nevertheless, a ban of that kind may become necessary in the light of the circumstances of the individual case. The Commission has referred to the fact that the disease was detected in border areas in Germany and the CSF virus identified on 3 February 1997 in a slaughterhouse. In its view, it is possible to infer from identification of the virus in a slaughterhouse that the virus had previously gone undetected in a holding, thereby increasing the risk of the virus spreading.

110. In the light of those circumstances and in view of the absence of a contingency plan — thus allowing doubts to surface over the ability of the Netherlands authorities to react — the Commission was entitled to criticise the Netherlands authorities, without in the process making a manifest error of assessment, for having failed to give official confirmation of the outbreak of the disease — and to impose a transportation ban — with sufficient promptness.

— Animal movements in the protection zone

111. This difference in opinion between the parties concerns, on the one hand, the Commission's legal assessment and, on the other hand, the facts. To justify the number of animal consignments the Netherlands Government has regard to the purchasing scheme under Regulation No 413/97 and to

30 — See, for example, Article 5 of Directive 80/217: paragraph 1 thereof refers to the slaughter without delay of infected livestock; paragraph 2 thereof provides for the possibility of transporting livestock so that it may be slaughtered without delay. Article 8(1)(c) of the directive refers to the requirement to detect 'immediately' any suspicion of swine fever as the purpose of the official surveillance.

considerations of health and hygiene; it contests the claims made by the Commission as regards the hygiene conditions in which those consignments were made.

112. The parties clearly agree that a large number of animal consignments were effected. The Netherlands Government does not dispute the Commission's estimate. [31]

113. Conversely, the Commission does not dispute that those consignments were effected with a view to implementing exceptional market support measures in the form of the purchasing scheme under Regulation No 413/97. Its first complaint in this regard is, on the contrary, concerned with the fact that a large number of animal consignments were authorised without giving any consideration to whether the market support measures could in fact be implemented by means of a smaller number of consignments.

114. The Commission's approach raises the issue of the extent to which the requirements of Directives 80/217 and 90/425/EEC [32] as regards animal consignments may also be applied in the context of implementing Regulation No 413/97. The tension existing between the two sets of rules cannot be measured because the purchasing scheme under Regulation No 413/97 involves animal consignments whilst Directive 80/217 seeks to limit such animal movements, on account of the risk of spreading the disease, by imposing a ban to be applied across the board [33] unless the relevant authorisation is obtained. [34]

115. However, that apparent contradiction is not insuperable provided that, when authorising the movement of animals, the Member State requires that the hygiene standards laid down in Directive 80/217 be met.

116. The criticism that the Commission levels against the Netherlands authorities is clearly that although they had provided for a restriction (of one movement per holding within a two-week period), when granting authorisation they had failed to apply that restriction, which fully reflects the purpose of Directive 80/217.

31 — The Commission maintains that animal consignments were authorised in several tens of thousands of cases; see point 86 above.

32 — Council Directive of 26 June 1990 concerning veterinary and zootechnical checks applicable in intra-Community trade in certain live animals and products with a view to the completion of the internal market (OJ 1990 L 224, p. 29). This directive is the legal basis for the computer-based system for recording the movement of animals within the Community (ANIMO). See paragraph 24 et seq. of the special report by the Court of Auditors (cited in footnote 13).

33 — Article 9(4) as amended by Council Directive 91/685/EEC of 11 December 1991 amending Directive 80/217/EEC introducing Community measures for the control of classical swine fever (OJ 1991 L 377, p. 1): 'The following measures shall be applied in the protection zone:... (b) the movement and transport of pigs on public or private roads shall be prohibited.... (f) pigs may not be removed from a holding in which they are kept for 21 days after the completion of the preliminary cleaning and disinfection of the infected holdings....'.

34 — Article 9(8) as amended by Directive 91/685 (cited in footnote 33): 'By derogation from [paragraph] 4(f)..., the competent authority may authorise that pigs be moved from the holding to be transported to a rendering plant for rendering or to a place where the pigs are slaughtered in order to be burned or buried....'.

117. The Netherlands Government does not dispute the number of animal movements or the deviation from its own guidelines. On that basis, the allegation of inconsistency with regard to the objectives of Article 9 of Directive 80/217 appears to be valid.

118. As regards the Commission's second allegation that shortcomings had been found in the hygiene arrangements for animal transportation, it need only be stated that the Commission relied in that respect on a report compiled by the Netherlands Ministry of Agriculture. [35]

119. I therefore conclude that the Commission did not commit a manifest error of assessment when it relied on Article 9 of Directive 80/217 to object to the number of, and hygiene conditions applying to, animal consignments effected with a view to implementing exceptional market support measures.

— Preventive slaughter policy

120. Suspension of the policy of preventive slaughter, an incomprehensible measure in the Commission's view, is one of the main criticisms it levels against the Netherlands authorities since such a measure has reportedly had significant repercussions on the development of the disease. The Court of Auditors and the Commission take the overall view that Member States are not required to slaughter animals as a preventive measure, 'but if they do so, the policy should be soundly based from both the technical and scientific points of view'. [36]

121. The Netherlands Government does not challenge the Commission's findings on this point either, namely that preventive slaughter operations were suspended between 13 February and 14 or 15 April 1997, [37] but it does challenge the legal consequences drawn from those findings.

122. Community law does not in effect impose any obligation to slaughter livestock as a preventive measure following an outbreak of CSF. Under Article 5(2) of Directive 80/217 Member States can, as a preventive measure, remove pigs which are not infected or suspected of being infected from holdings so that they can be slaughtered without delay in specialised establishments. However, the fifth indent of Article 3(2) of Decision 90/424 associates payment of the Community financial contribution with 'the imposition of suitable measures to prevent the risk of the spread of infection'. [38] Here it is unclear whether the measures applied by the Netherlands authorities can be classified as suitable

35 — *De uitbraak van klassieke varkenspest in Nederland. Eindeevaluatie*, 30 March 1998.

36 — Loc. cit., paragraph 46.

37 — However, the actual time that the Netherlands authorities informed the Commission and the other Member States of the measure is subject to dispute; see point 90 above.

38 — By contrast, the first indent of Article 3(2) of Decision 90/424, which the Commission invokes in its defence, appears to be irrelevant as it explicitly concerns the slaughter of animals affected or suspected of being affected by the disease.

preventive measures. The Commission considers that they cannot, citing the suspension of the clearing measures, which was incomprehensible in its view, and the alleged shortcomings involved in their resumption.

123. Although it is undisputed that there was no obligation to remove and slaughter pigs as a preventive measure, experience has shown — albeit not undisputedly — [39] that such a preventive measure is an effective way of tackling outbreaks of swine fever in high-density areas, which include the entire territory of the Netherlands. [40] It is therefore uncertain, in the light of that information, what the restrictions are as regards the discretion enjoyed by the Member States in choosing the strategy for tackling the problem.

124. In my view, a distinction must be drawn between the objections relating to the suspension of preventive clearing measures and the objections concerning the implementation of subsequent clearing measures.

125. As regards the suspension of preventive clearing measures, the Commission is less critical of the decision *per se* than of the arrangements by which it was implemented, in particular the failure in the Committee to discuss the arguments supporting suspension, which were unconvincing in its view.

126. The Netherlands Government is, in my view, right to point out that it was in principle free to choose whether or not to order preventive clearance. That freedom of choice existed even in spite of the high-density pig population as the ability to weigh up the situation clearly depends on the intensity of the disease, but this can be ascertained only after a period of time.

127. Nevertheless, the Netherlands Government has not maintained that the Commission unduly encroached on that margin of discretion in adopting its decision. The Commission voiced its preference for preventive clearance, but instead of addressing the policy actually pursued, its complaint concerned the twofold shift in policy effected in disregard of the Committee.

128. The Commission would have committed a manifest error of assessment had it criticised the suspension *per se*, expressing its own misgivings on that measure. However, this proposition cannot be inferred from the observations submitted by the parties.

129. The failure to give express notification of the reversal in policy that had been carried out — following suspension of the preventive clearing measures — is not dis-

39 — Special report of the Court of Auditors (cited in footnote 13), paragraph 46.

40 — See exclusively Table 5 concerning the regional concentration of pigmeat production in Belgium, Germany, Spain and the Netherlands in the special report by the Court of Auditors (cited in footnote 13).

puted by the Netherlands Government; it does, however, have reference to the information provided and claims that it was possible to conclude that the measures in question had been suspended in spite of the absence of express notification.

130. However, that approach cannot be considered consistent with the spirit and purpose of Article 3(3) of Decision 90/424. The requirement that the Member State concerned give information concerning 'the measures applied in accordance with Community legislation on notification and eradication and the results thereof', as laid down in that provision, is clearly designed in particular to enable the Committee to examine the situation. Such examination — and the associated coordination of the Member States' respective veterinary policy — cannot be undertaken if changes in policy in the relevant Member State are not notified or if they could, at best, be inferred indirectly from other information.

131. Thus the Commission has not committed a manifest error of assessment in criticising the failure to notify suspension of the preventive clearing measures.

132. As regards the resumption of preventive clearance, the Commission is critical both of the — in its view — delay in part in carrying out that measure and of the arrangements by which it was implemented. The Netherlands Government does not dispute that the preventive clearing measures were not carried out as effectively as possible once they had been resumed.

133. It is apparent from the observations made by the Netherlands Government that clearance was initially resumed only within a limited area because of overburdening at rendering plants. Even though Community law does not lay down requirements as regards defining the clearance area or the period to be observed between completing disinfection measures on an infected holding and undertaking preventive clearing measures on neighbouring holdings, it can still be noted that the effectiveness of the preventive clearance policy has been compromised on account of the capacity shortages in rendering plants in the Netherlands. The situation is compounded by the fact that the multiple changes in the policy in question do not point towards its consistency. The Commission's objections cannot, on that basis, be described as manifestly erroneous in law.

134. I will come back to the matter of the financial consequences of that objection in assessing proportionality and in examining the plea concerning the failure to fulfil the obligation to state reasons.

135. Here I should like to conclude that the Netherlands Government has not managed to demonstrate that the Commission's decision was erroneous with regard to the facts taken as the basis for the preventive clearing operations. The Commission's legal assessment does not suggest a manifest error of assessment; the Commission has not, in particular, incorrectly assessed the discretion conferred on the Member States.

— Interim conclusions

136. The technical objections raised in the first contested decision do not indicate a manifest error of assessment by the Commission. I therefore propose that the Court should reject as unfounded the first and second pleas raised on that matter in Case C-293/00.

C — *Objections of a financial and administrative nature (Cases C-293/00 and C-501/01)*

137. The Commission has raised objections of a financial and administrative nature in the contested decisions. Those objections relate to the compensation paid to livestock farmers, which cannot, in the Commission's view, be regarded as 'adequate' within the meaning of the final indent of Article 3(2) of Decision 90/424.

138. Before turning my attention to the facts which the Commission relies on in support of the plea alleging lack of adequacy, I consider it appropriate first of all to look at the interpretation to be given to the legal concept in question, which is the main subject-matter of the second plea raised by the Netherlands in each case.

1. Interpretation of the concept of 'adequate compensation'

(a) Essential arguments of the parties

139. In its second plea the *Netherlands Government* asserts in the two cases with regard to the Commission's alleged errors in law that a 25% financial correction can only be explained by an incorrect interpretation of the relevant legislation.

140. The Netherlands Government points out that the concept of 'adequate compensation' for livestock farmers is not defined in law either in Directive 80/217 or in Decision 90/424 or in any other instrument of Community law. Thus, it claims, it falls to the Member States to apply that concept. The limits of their discretion in this regard are apparent only from the spirit and purpose of the relevant legislation, namely Directive 80/217 and Decision 90/424 in this instance. Payment of the Community financial contribution under Article 3(2) of Decision 90/424 is conditional solely on the swift and adequate compensation of the livestock farmers following official confirmation of the outbreak. The compensation, it concludes, is therefore intended to meet the objective of the relevant legislation, namely of controlling CSF, which was also indisputably the case in the Netherlands.

141. The *Commission* likewise assumes that the Member States enjoy a certain discretion to determine adequate compensation for livestock farmers. However, it adds that the exercise of such discretion must not be manifestly unfair. To be adequate, compensation must first be in line with the target prices set on a weekly basis by the chief expert at the Dienst Landbouwvoorlichting (hereinafter 'the DLV'). In the two cases in point, however, it maintains that those prices were systematically exceeded with no apparent explanation. The Commission, it claims, could conclude correctly from those considerations that the compensation paid was manifestly unfair and, consequently, was not 'adequate'.

(b) Legal assessment

142. Whilst the Netherlands Government considers that the Member States alone are competent to determine the compensation in question, the Commission considers that it may carry out checks into the amount of compensation paid by relying on the undefined legal concept of adequacy.

143. It should first be stated that, as a condition for payment of a Community financial contribution under Decision 90/424, the concept at issue constitutes a concept of Community law the interpretation of which is subject to review by the Court.

144. I can agree with the Netherlands Government that payment of compensation and the amount of such compensation are, in principle, a matter for the Member States. The requirements of Decision 90/424 are confined to the swiftness and adequacy of the compensation paid.

145. However, I cannot concur with the Netherlands Government's view that any compensation granted, provided that it is not too small an amount, is capable of pursuing the objectives of the veterinary measures since it encourages livestock farmers to become involved in the preventive clearing measures and other measures to control the disease. Were that view correct, Article 3(2) of Decision 90/424 would have to require sufficient rather than adequate compensation.

146. Adequate compensation within the meaning of Article 3(2) of Decision 90/424 is not therefore simply sufficient compensation but compensation the amount of which does not, basically, exceed the loss actually suffered by the livestock farmer concerned in view of all the circumstances of the case. The discretion enjoyed by a Member State is therefore restricted by the need to establish a connection between the compensation paid and the damage actually suffered.

147. It is unclear which criterion should be taken, in practice, as the basis for assessing the adequacy of the amount of compensation granted. In that regard the Commission and, indeed, the Court of Auditors [41] have demanded that explanations be given for rates systematically higher than the standard compensation rates set. That demand appears all the more justified as unduly generous compensation for livestock farmers in itself involves a risk of irregularities and threatens to upset the balance on the meat markets for a long time, which would be of no benefit in terms of controlling the disease.

148. Against that background, I consider it not just acceptable but indeed necessary that the Commission check adequacy when raising its objections of a financial and administrative nature. Contrary to the opinion expressed by the Netherlands Government, the Commission did not require in this context that the target price be observed; it merely demanded a logical explanation for the manifestly systematic higher rates.

149. I therefore conclude that the Commission's view that the concept of 'adequate compensation' does not permit payment of unlimited levels of compensation to livestock farmers is not erroneous in law.

41 — Special report (cited in footnote 13), paragraph 53.

2. The finding and assessment of fact by the Commission

(a) In Case C-293/00

(i) Main arguments of the parties

150. The *Netherlands Government* does not dispute that there has not always been sufficient verification of compliance with the requirements to furnish proof, which is the prerequisite for granting compensation to livestock farmers. However, efforts had been made to ensure that compensation applications were supplemented where necessary. The Commission did not wish to take account of the corrected information.

151. The Netherlands Government explains in particular how, on the one hand, the compensation payments — *inter alia* in view of the value of the livestock — were not excessive and, on the other hand, how animals could not legitimately have been transferred from one category to another in order to increase the amount of compensation.

152. The Netherlands Government further points out that the findings made by the Commission during its inspections were unrepresentative and consequently could not justify the financial correction that was decided.

153. The *Commission* gives a detailed account of its objections of a financial and administrative nature. It mentions that independent experts from the DLV had fixed the rates for calculating compensation, which were generally consistent with the market prices at that time, but these rates were not applied in practice.

154. The value of livestock was, it contends, overestimated almost as a matter of course, whether in the context of a flat-rate compensation payment or compensation calculated by weight. The expert had classified certain animals under a category which was more favourable in terms of compensation. The weight of the feedingstuff had been overestimated in a number of cases. In some instances, compensation had been paid twice for the same animal. Standard compensation was subsequently supplemented by flat-rate compensation for some 600 holdings containing sows which had been cleared as a preventive measure. In some cases, compensation was likewise paid twice for the same piglets: first by virtue of the purchasing policy coming under the exceptional market support measures and secondly by applying a notional rate of 4.73 piglets per sow in order to determine the compensation to be paid in each instance.

155. The Commission rejects the objection levelled against it that the cases it cites were unrepresentative. It argues that its checks covered 7% of the total amount of all compensation payments and up to 25% of the compensation paid at the height of the outbreak. The irregularities which had been found could not be considered in isolation; overestimation had been found in 24% of the compensation cases reviewed.

156. In response to the criticism that it had failed to take account of the revised information supplied by the Netherlands Government, the Commission argues that the information in question bore no relevance to the contested decisions. It also observes that the corrected amount of expenditure notified is greater than the original amount, thus supporting the argument that the objections had not been taken into account.

157. The Commission also looks at the role of the experts and, without questioning their independent status as such, complains that the systematic deviation from the market prices has not, for the most part, been explained in writing.

158. With regard to the discrepancies in the number of animals between the censuses carried out by veterinarians and expert evaluations, the Commission rejects the argument that the censuses carried out by veterinarians have produced inaccurate figures. That argument, it maintains, is contrary to the wording and the spirit and purpose of Article 4 of Directive 80/217.

(ii) Legal assessment

159. The objections of a financial and administrative nature raised by the Commission concern the calculation of compensation for farmers whose livestock has been slaughtered. They appear to be of special importance inasmuch as the financial consequences of the practice in question adopted by the national authorities lend themselves to precise calculation.

160. The significance of the objections is all the more apparent as the Netherlands Government — over and above the matter of interpretation already discussed — not only disputes the cases cited by the Commission but also questions their representativeness.

— General

161. As to the entirety of the objections of a financial and administrative nature raised by the Commission, the Netherlands Government maintains in particular that the Commission has failed to take account of subsequent corrections and has, furthermore, relied on isolated instances without providing sufficient reasons for the generalised approach adopted in its conclusions.

162. As regards the data on which the Commission relies in relation to any subsequent corrections, I consider it sufficient to point out that the Commission had explained — and has not been contradicted on the matter — that the corrections made by the Netherlands Government predominantly concerned information which bore no relevance to the contested decision or that the corrected figures were significantly higher than those originally provided.

163. The objection that the Commission has, unacceptably, generalised its conclusions is likewise unconvincing. It should be recalled in this context that the Commission can express its objections only by reference to the documents forwarded by the relevant Member State and on the basis of the findings of spot checks. In view of the rule on the sharing of the burden of proof, mentioned above,[42] it is for the Member State to furnish proof that the cases cited by the Commission were isolated cases from which it is impossible to conclude that general shortcomings exist. The contested Commission decision cannot be considered erroneous solely by reason of the arguments that the Commission based its objections on isolated cases.

— Overestimated value of livestock in certain cases

164. Here the Commission's objection is basically that although standard compensation rates had been set for some categories of pig in the Netherlands, the experts

42 — See above at point 67.

still disregarded those rates in a significant number of cases without providing any coherent explanation for their action. [43]

165. The Netherlands Government certainly is not questioning the alleged overvaluation of livestock in some cases; however, it considers those cases to be unrepresentative. It must therefore be examined whether the Netherlands Government has succeeded in showing that the cases cited by the Commission are unrepresentative.

166. It has asserted that, when stating the reasons for its objections, the Commission took into account only those estimates which were greater than the standard rates. That criticism appears to be inconclusive precisely because estimates which fall below the standard rates appear to be normal in that the standard rates relate to the maximum weight of each category of animal.

167. Moreover, two further sources confirm that there are a significant number of cases in which the estimate of the value of livestock was greater than the standard rates. On the one hand, both the Netherlands Government and the Commission have reference to a report by accountants (Moret) Ernst & Young which in any event confirms that the weight of the livestock has been overestimated in a number of cases, a conclusion which does not substantially differ from the Commission's own assessment. On the other hand, the Netherlands Government has regard to a report by the accounting services of the Netherlands Ministry of Agriculture [44] which, although in particular criticising the conclusions drawn by the Commission in some cases, still concludes that the weight of the livestock has been overestimated in a significant number of cases.

168. The Commission added that it had reviewed a not insignificant number of cases. [45] Throughout the procedure the Commission was always able to explain what was involved in the random checks and to compare its own estimates with the figures produced by other authorities.

169. In the light of those considerations, the Commission cannot have committed a manifest error of assessment.

— The unaccountable reassignment of animals to another category

170. Here the Commission fundamentally objects to the fact that in some cases the

43 — See again the special report of the Court of Auditors (cited in footnote 13) at paragraph 53.

44 — *Rapport inzake de status per medio 2000 van het beheer over de financiele afwikkeling van de Klassieke Varkenpest 1997 en 1998.*

45 — See above, point 155.

experts have reassigned animals to other categories that are more favourable from the point of view of compensation. In the view of the Netherlands Government, no evidence has been adduced to support the argument that certain livestock farmers are given preferential treatment, and it criticises the Commission's estimates.

171. The Commission has relied on specific cases to support its allegation. It was therefore for the Netherlands Government to demonstrate in particular that the allegation did not apply to the cases cited by the Commission. Whilst it referred generally to the evaluation procedure, it failed to furnish the appropriate evidence.

172. Moreover, the Netherlands Government expressly acknowledges that the basis for the Commission's considerations — that is to say, the inconsistency between the number of animals subject to estimate and the number of animals recorded on the holdings — is a valid one.[46] However, it was unnecessary, in its view, to carry out a precise census of the animals on the holdings — for example, during inspections or screening visits. Nevertheless, the Commission is, in my view, right to set great store by counting as accurately as possible the animals on holdings, because a census of that kind is the basis for establishing a comprehensive record of all livestock when subsequently taking measures to control the disease.

46 — See, for instance, the application at paragraph 181 thereof.

173. Thus the Netherlands Government was not able to refute the Commission's objection.

— Overestimated weight of feedingstuffs

174. The Commission's objection concerning the weight of feedingstuffs was essentially that the difference between the estimated quantities and the quantities that had actually been weighed came to as much as 43%. The Netherlands Government expressly challenges that percentage but does not at the same time categorically deny that the quantity of animal feedingstuffs had in fact been overestimated.

175. The Commission points out that the difference between the estimated weight and the actual weight of feedingstuffs cannot be explained by their consumption because the 43% mentioned relates to holdings which were cleared on the day that the estimate was made.

176. Against that background the Commission's objection does not appear to be unfounded and I do not see any reason to suppose that the Commission has based its arguments in this context on incorrect facts.

— Payment of double compensation

177. The report by the Netherlands Ministry of Agriculture cited by the Netherlands Government [47] confirms at least one case of double compensation.

— Establishment of a system for double compensation

178. On this matter the Commission essentially criticises the additional expenditure incurred as a result of flat-rate compensation paid to holdings with sows which have been cleared as a preventive measure.

179. The Netherlands Government justifies the notional 4.73 piglets per sow by the need to compensate for the lost breeding value of sows. The Commission, by contrast, claims with good reason that allowance can be made for that factor in estimating a sow's value.

180. It should be pointed out that the report by the Netherlands Ministry of Agriculture [47] likewise indicates that considerable additional expenses are incurred in connection with that system.

181. Besides that criticism, the Commission is critical in individual cases of the compensation paid for piglets — under the exceptional market support measures but also under the flat-rate compensation scheme at issue. The exchange of views prompted by File No 76 does not indicate any error on the part of the Commission in this context since the Commission took undisputed information, such as the total weight of the animals concerned, as the basis for its calculation and concluded that compensation was paid in respect of a significant number of animals as if they were fattening pigs when they were in fact piglets.

— Summary and conclusion

182. The Commission's objections of a financial and administrative nature were based on facts that do not point to a manifest error of assessment by the Commission. That view is underpinned by the Court of Auditors which generally reached similar conclusions following its own inspections. [48] The Netherlands Government has not successfully undermined the Commission's objections.

47 — Cited in footnote 44.

48 — Special report (cited in footnote 13), paragraph 53 et seq.

183. Therefore, the first plea raised in Case C-293/00 must be rejected also with regard to the objections of a financial and administrative nature.

(b) In Case C-501/01

(i) Main arguments of the parties

184. The *Netherlands Government* alleges that the Commission has drawn general conclusions regarding the fixing of compensation for affected livestock farmers from a mere six compensation cases.

185. Following a review of those six cases [49] the Netherlands Government establishes that none of the cases individually bears out all of the Commission's objections. [50] In five out of the six cases the irregularities, it claims, are of little significance, that is to say, only one or two objections at most would be valid; the complaint about overcompensation resulting from indexation applies to just one case. This shows, according to the Netherlands Government, that the allegation of repeated and systematic irregularities cannot be substantiated by one single fact.

49 — Case 1: UBN 420903 Van Dongen; Case 2: UBN 1599297 Bergen; Case 3: UBN 546148 Van Aar; Case 4: UBN 596284 Gerrits-Van Den Berg; Case 5: UBN 1756494 Boxtel; Case 6: UBN 1714759 Nooijen.

50 — See, in particular, point 24 above.

186. The *Commission* contends that its conclusions are based on a review of all the cases where pig farmers were compensated in 1998 for the slaughter of their livestock. It had merely consolidated its conclusions by referring to six cases which were representative in terms of their temporal and factual relevance.

(ii) Legal assessment

187. It follows from the contested decision and from the Commission's letter of 11 December 2000 that the Commission takes the following objections in essence as the basis for applying a 25% reduction to the expenditure notified by the Netherlands Government for compensating livestock farmers: inconsistency between the number of compensation claims and actual animal numbers with regard to gilts; application of rates exceeding the standard rates by 9.4% on average in compensating for sows; overestimation of the weight of livestock by 12.2% on holdings comprising fattening pigs alone; overestimation of the weight of feedingstuffs by 17% on holdings cleared on the day that the estimate was made; 15.5% increase in compensation by reason of an indexation system.

188. The Netherlands Government contests each of those objections and also

voices objections to the method used of drawing general conclusions from specific cases.

189. On the first objection, it is sufficient to state that it was not taken into consideration in calculating the additional costs involved in compensating livestock farmers; hence there is no need to examine its accuracy.

190. As to the second objection concerning the regular application of rates exceeding the standard rates, I should like to refer to my previous observations on the same objection raised in Case C-293/00. [51] It must additionally be stated that the Commission based that objection on the total number of compensation payments for sows rather than on individual cases. The Netherlands Government has proved that there was justification for exceeding the standard rates in only one out of the six cases. [52] It has not therefore been able to show that the Commission relied in that regard on incorrect facts. The Commission also found irregularities in the livestock evaluations in all six cases but the Netherlands Government was unable to explain them. In so far as those individual cases confirm the conclusions drawn on all the compensation cases, there is no indication that the Commission has made a manifest error of assessment.

191. As regards the third objection concerning the overestimated weight of fattening pigs, it must be noted that the Commission likewise relied in that context on the report compiled by accountants (Moret) Ernst & Young. It concluded as a result that the weight recorded when the animals were destroyed was 12.2% less than the weight cited for compensation purposes, which, it concludes, indicates that the weight and/or the value of the animals has been overestimated. Using the examples of the 16 individual cases cited by the Netherlands Government, the Commission proves that in 10 cases there was a discrepancy in excess of 10% between the two sets of figures relating to weight and in a further four cases a discrepancy of between 5 and 10%. It cannot be directly inferred therefore that the facts underlying its objections on this matter are erroneous.

192. As to the fourth objection on the overestimated weight of feedingstuffs on holdings where the estimate in question took place at the same time as clearing, it should be observed that the Netherlands Government does not in principle dispute that the weight has been overestimated to some extent — albeit to a lesser extent than argued by the Commission — but attributes this measure to practical difficulties. Nevertheless, different calculation methods do not explain the different approaches to the scale of overestimation. Here the Commission considers, rightly, that the percentage overestimation has to be expressed in relation to the actual weight, that is to say, the weight established when the feedingstuffs are destroyed. The Commission cannot therefore be considered in this regard to have committed a manifest error of assessment.

51 — See above, point 164 et seq.

52 — In the case of Van Dongen (cited in footnote 49).

193. As regards the fifth objection concerning the additional costs involved in operating the system for reviewing estimates, it should be pointed out first of all that the Netherlands Government has not demonstrated that notification of that system was given. Furthermore, it is clear from the arguments of the parties that the Commission found discrepancies between the number of animals estimated by veterinarians and the actual number of animals in each of the compensation categories. The Netherlands Government does not dispute this point and provides general explanations [53] without actually being able to explain why the discrepancies almost systematically turned out in favour of the livestock farmers. Thus the Commission has not relied in this respect either on manifestly incorrect facts.

194. It must consequently be noted that the Commission has not based its objections on isolated cases. On the contrary, it has examined individual cases in conjunction with the results of comprehensive, critical assessments of the compensation payments made in 1998 and has subsequently drawn conclusions on whether there may have been shortcomings. The submissions of the Netherlands Government are to be accepted only inasmuch as they point to the fact that not all the objections apply to all the cases specifically addressed. However, the Netherlands Government has not been able to demonstrate that the Commission relied on manifestly erroneous facts.

53 — It refers, in particular, to incorrect estimates by veterinarians and to customary fluctuations in livestock.

3. Proportionality and reasons for the legal consequence established

195. Since the reasons for the reductions decided by the Commission are closely connected to whether each of those reductions can be regarded as proportionate, I should like to address the pleas raised on those matters in the two cases jointly. I should point out that the substance of the relevant arguments raised by the parties in each case is essentially the same.

196. By contrast, the two pleas must be assessed separately within the confines of the respective case: it must be noted that the two cases differ in terms of the number and severity of the objections expressed by the Commission.

(a) Main arguments of the parties

(i) Proportionality

197. In Case C-293/00 the *Netherlands Government* considers that the shortcomings established by the Commission (or the circumstances which it describes as such) in

implementing measures to control CSF are unconnected with the financial correction applied.

198. It adds that the Commission failed to take account of the particular complexity of the situation in the Netherlands. The Commission had, moreover, relied on a small number of unrepresentative cases to draw its conclusions on all the measures taken in 1997 to control CSF.

199. The Netherlands Government asserts as a subsidiary point that, even in the context of clearing EAGGF accounts, a 25% correction must be applied only if a Member State has not operated any system of verification whatsoever or has done so but in a highly defective manner, and if there is evidence of widespread irregularities and negligence in tackling fraudulent and irregular practices.

200. The *Commission* submits that the additional costs charged to the Community budget and arising from 2 out of the 10 alleged shortcomings are estimated at a minimum of EUR 79 million. The financial correction effected represented a mere 42% of those additional costs; the remaining 58% was charged to the Community budget.

201. In Case C-501/01 the *Netherlands Government* considers the correction applied to be disproportionate by comparison with the Commission's objections regarding the fixing of compensation paid out to livestock farmers in 1998. Taking unrepresentative, isolated cases as the basis for making a general correction was, in any event, disproportionate. Even comparison with the procedure for clearing EAGGF accounts did not offer an explanation for the rate of correction applied, especially as the Commission had not raised any technical objections, unlike in 1997.

202. The *Commission* emphasises that it was still the same CSF that was encountered. The objections of a financial and administrative nature had remained the same; thus it appeared justified to apply an identical rate of correction for the two periods in question. It also asserts here that the amount refused is far less than the additional costs charged to the Community budget and arising from the disputed shortcomings. Making a comparison with the procedure for clearing EAGGF accounts

was of no advantage to the Netherlands because the Court has consistently held that the Commission could exclude unjustified expenditure outright from the financing.

(ii) Obligation to state reasons

203. In both cases the *Netherlands Government* considers that insufficient reasoning has been given for the contested decisions and that, in that respect, there has been a failure to fulfil the obligation to state reasons under Article 253 EC. The Commission had failed in particular to mention the legal basis which it had used to apply the 25% financial correction. Nor had it explained how it came to consider it necessary to reduce the Community financial contribution. It had been all the more necessary to provide detailed reasons for the second contested decision as the Commission had not previously expressed any misgivings about the indexation system operating in the Netherlands.

204. The *Commission* challenges all alleged non-compliance with the obligation to state reasons. It points out that the scope of that obligation hinges on the extent to which the person to whom the decision is addressed was involved in the creation of that decision. It recalls that the drafting of the contested decisions was preceded by a considerable volume of correspondence between the Commission and the Netherlands Government. For that reason, it concludes, just a brief statement of reasons is sufficient in accordance with the case-law.

205. In Case C-293/00 the Commission adds that it set out all complaints, including those on the new estimate, in a letter of 18 November 1999 from Mr Coleman, Director-General of the Health and Consumer Protection DG, to Mr Bot, Permanent Representative of the Netherlands. That letter is, it claims, sufficient in itself to fulfil the obligation to state reasons.

206. The Commission applies that argument *mutatis mutandis* to Case C-501/01, referring in that case to a letter of 11 December 2000 from Mr Coleman.

(b) Legal assessment

207. Given that the scope of the objections in the two cases differs, it seems appropriate to examine separately whether or not the principle of proportionality has been observed and the obligation to state reasons fulfilled.

(i) In Case C-293/00

— Proportionality

208. Assuming that a correction is permissible after all, the Netherlands Government in any event considers there to be a discrepancy between the amount of the reduction determined by the Commission and its objections to the policy pursued by the Netherlands Government.

209. I have already expressed an opinion on whether a flat-rate correction is, in principle, permissible; I therefore refer in that regard to my observations above. [54]

210. In the light of the above points, there can be no doubt that the Commission must be afforded broad discretion in determining the consequences of a failure to comply with Community rules in the establishment of national veterinary measures.

211. However, when exercising that broad discretion the Commission continues to be subject to the proportionality requirement: there must be a reasonable connection between the consequence on which it decides and the nature, severity and scale of the irregularities established. That requirement is intended to ensure that any arbitrary conduct in the application of a flat-rate correction is rendered impossible. [55]

212. It seems in any event unhelpful to draw parallels with the criteria set out in the Belle Group report for the application of the correction rates since those rates relate to the total expenditure of the Member State, whereas the correction rates at issue here can be applied only to half of the total expenditure.

213. In the circumstances of this case the Commission provided comprehensive documentation of the shortcomings in the national veterinary policy and of their probable financial consequences. It should be observed that in order to calculate those financial consequences the Commission had reference not only to a study by the Landbouwuniversiteit Wageningen but, in fact, for the objections of a financial and

54 — See above, point 49 et seq.

55 — Where the Commission enjoys a broad margin of discretion in this context, the Court, conversely, has a restricted power of review, namely as regards the manifest error of assessment. In a different context (non-contractual liability of the Community) the Court has already held that 'in order for the principle of proportionality to be infringed in a manifest and serious manner,... there must be an error so serious that the conduct of the institution may be said to verge on the arbitrary' (see, for instance, Joined Cases 116/77 and 124/77 *Amylum and Tunnel Refineries* [1979] ECR 3497, paragraph 19).

administrative nature, to its own assessments as well.

214. The study conducted by the Landbouwuniversiteit Wageningen into the financial consequences with regard to the technical objections provides a useful scale. That study is complemented by the Commission's own assessments on the objections of a financial and administrative nature which, assuming that those objections are correct in their substance, do not differ in essence from the figures mentioned by the Netherlands Government in the written procedure.

215. It should also be pointed out that the financial consequences calculated by the Commission are clearly greater than the correction actually made, which leads me to conclude that the Commission took due account of the inevitable errors made by the Member State concerned in exercising its discretion and of the particular complexity of the CSF outbreak in question.

216. I therefore conclude that the allegation that the 25% reduction in issue in Case C-293/00 is disproportionate is unfounded.

— Statement of reasons

217. As far as the obligation to state reasons is concerned, reference must be had to the case-law which the Commission rightly cites and under which '[i]n the particular context of the preparation of decisions relating to the clearance of accounts, the statement of reasons for a decision must be regarded as sufficient if the Member State to which the decision was addressed was closely involved in the process by which the decision came about and was aware of the reasons for which the Commission took the view that it must not charge the sum in dispute to the EAGGF'. [56]

218. That case-law appears to be applicable to the circumstances of this case.

219. The Court has consistently held that 'the extent of the duty to state the reasons on which a decision is based, laid down in Article 190 of the EC Treaty, depends on the nature of the act in question and on the context in which it was adopted'. [57] In this context the Court also points out in settled case-law that although the statement of reasons required must disclose in a clear

56 — Case C-27/94 *Netherlands* v *Commission* [1998] ECR I-5581, paragraph 36.

57 — Case C-54/91 *Germany* v *Commission* [1993] ECR I-3399, paragraph 10. See, most recently, Case C-334/99 *Germany* v *Commission* [2003] ECR I-1139, paragraph 58, in proceedings concerning the ECSC Treaty.

and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the Court to exercise its power of review, it is not required to set out all the relevant points of fact and law.

220. In this case it is not disputed that the Commission informed the Netherlands authorities without delay of the results of its inspections and obtained their opinion on them. It is also common ground that the Commission stated the reasons for the intended corrections prior to adopting the decision, in the letters of 13 January 1998 and 29 October 1999 for example.

221. The Kingdom of the Netherlands was therefore closely involved in the process by which the first contested decision came about and was aware of the reasons for which the Commission took the view that it could deduct the sums in dispute.

222. I conclude that since the contested decision — considered in that light — met the requirements of Article 253 EC, this plea must also be rejected as unfounded.

(ii) In Case C-501/01

223. It must first be stated in this context as well that I consider a flat-rate correction permissible in principle. However, it is uncertain whether the rate of correction chosen by the Commission can be explained. I have already stated clearly that the discretion that the Commission undoubtedly enjoys in this regard is restricted inasmuch as the Commission may not act in an arbitrary manner. [58]

224. In this connection the Netherlands Government points out, rightly in my view, that the situation in 1998 is significantly different from that prevailing in 1997 in that the disease reached its climax in 1997 whereas by 1998 it was merely a question of eradicating the disease in a limited number of holdings. The Commission has taken this point into consideration in so far as it criticises the strategy pursued by the Netherlands Government in relation to 1997 alone.

225. However, I — unlike the Netherlands Government — consider it impossible to infer from the above consideration that the Commission's objections concerning the policy adopted at the start of the outbreak of swine fever in the Netherlands in 1997 do not retain any relevance in relation to the situation prevailing in 1998. The Commission's criticisms in relation to 1998 admittedly relate solely to compensation for livestock farmers; clearly, however, had there been no strategic errors at the start of the CSF outbreak, it would have been possible, under certain conditions, to

58 — See above at point 211.

prevent the disease from spreading on a scale known only too well and the expenditure incurred in 1998 might, as a result, have been avoided altogether.

226. Following that line of argument, it would have been logical to rule out altogether the charging of expenditure incurred by the Member State concerned in the second year of the disease or, at least, to establish a clear connection between the reduction which had been determined for 1998 and the technical objections raised in relation to 1997. The Commission — visibly — did not do that, confining itself instead to reducing the expenditure relating to compensation for livestock farmers in view of objections exclusively concerning 1998.

227. As already mentioned, the Netherlands Government did not succeed in undermining the Commission's objections as to the facts. [59] Here it merely remains, therefore, to ascertain whether the Netherlands was able to show that the Commission had made a manifest error of assessment in its choice of rate of correction.

228. It must be noted here that the additional financial burden associated with each of the complaints regarding 1998 fluctuates, according to Commission calculations, between 9.4 and 17%. It is apparent from an internal Commission working document [60] that the Commission established that livestock and animal feedingstuffs had been overvalued by in the region of 28%. The Netherlands, however, clearly did not have an opportunity to give an opinion on those calculations.

229. At this juncture it is important to recall the more stringent requirement to state reasons which I have already mentioned. [61] It is accordingly essential to examine whether the Commission provided sufficient reasoning for its choice of rate of correction. Whether it did actually do so is questionable in my view. First it should be noted that the Commission confined itself to addressing events in 1998 — for example, in its letter of 11 December 2000 from Mr Coleman notifying the basic objections to the 1998 expenditure — in stating the reasons for its objections and ultimately, therefore, for the correction it had decided to apply to the Community financial contribution. Thus, a reference at the hearing to the need for consistency in this regard between the two contested decisions cannot in itself be considered sufficient to satisfy the requirement in question. The proportionality of the correction applied in relation to 1998 can be assessed only by means of the criteria clearly used by the Commission to draw up its complaints.

230. The Netherlands Government additionally argued [62] — and indeed was not

59 — See my observations in point 71 et seq. above.

60 — Annex 1 to the rejoinder.

61 — See above, point 57.

62 — Application, paragraph 35, and Annex 7 thereto.

contradicted on the matter — that the Commission had originally proposed a 15% correction. The abovementioned additional financial burden associated with each of the Commission's objections is, in effect, near to that percentage if it is borne in mind that the objections do not apply in their entirety to each case of compensation. [63] However, by letter of 11 December 2000 the Commission then envisaged a 25% correction *without* making any reference whatsoever to circumstances or information [64] capable of justifying this change to its original proposal. However, the categorical failure to state the reasons for such a fundamental change impedes the Member State in question considerably as regards the exercise of its rights of defence. [65] Making such a change without stating the reasons for it seems an arbitrary measure.

231. Mere reference to the working document calculating the additional costs, mentioned above, [66] could not be sufficient in this context since the Netherlands Government clearly did not have an opportunity to state its position on the matter. It should also be observed that that document is an evaluation compiled on the basis of hypotheses that have not been verified.

232. For that reason I take the view that the Commission acted arbitrarily in this regard and thus offended against the principle of proportionality in conjunction with the obligation to state reasons in its second contested decision.

233. I accordingly propose that the action brought by the Netherlands Government should be upheld in this regard and the contested decision in Case C-501/01 should be annulled.

VI — Costs

234. 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.

235. In Case C-293/00, in the light of my earlier remarks concerning the outcome of the proceedings, the Commission's claims to that effect should be allowed.

236. In Case C-501/01, in the light of my above remarks concerning the outcome of the proceedings, the claims to that effect by the Kingdom of the Netherlands should be allowed.

63 — See, to this effect, point 188 above.

64 — For example, the significance of the 1997 objections for assessing 1998.

65 — For the principle of the right to be heard in a procedure for the clearance of EAGGF accounts, see Case C-377/99 *Germany* v *Commission* [2002] ECR I-7421 and my Opinion in that case, in particular point 80 et seq. thereof.

66 — Cited in footnote 60.

VII — Conclusion

237. In view of the foregoing considerations, I propose that the Court should:

— In Case C-293/00

1. Dismiss the action;

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

— In Case C-501/01

1. Annul Commission Decision 2001/739/EC;

2. Order the Commission to pay the costs.