OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 24 January 1990 *

Mr President,
Members of the Court,

1. In this case the Government of the Federal Republic of Germany (hereinafter referred to as 'the applicant') seeks the partial annulment of Commission Decision 87/541/EEC of 21 October 1987 amending Decisions 87/468/EEC and 87/469/EEC on the clearance of the accounts presented by the Member States in respect of the European Agricultural Guidance and Guarantee Fund, Guarantee Section, expenditure for 1984 and 1985.[1] The contested section of the decision withholds Community financing from expenditure incurred by the applicant under Commission Regulation No 124/82 of 19 May 1982 laying down detailed rules implementing the system of premiums for maintaining suckler cows[2] and Commission Regulation No 3007/84 of 26 October 1984 laying down detailed rules for the application of the premium for producers of sheepmeat;[3] the expenditure disallowed by the Commission amounted to DM 1 904 356.86 in relation to 1984 and DM 1 779 570.95 in relation to 1985.

2. In respect of the financial year 1984 the amount of DM 1 904 356.86 disallowed by the Commission consisted on the one hand of premiums in the amount of DM 1 681 908.64 to sheepmeat producers in the area covered by the Rhineland Chamber of Agriculture in the *Land* of North Rhine-Westphalia, and, on the other hand, of premiums amounting to DM 222 376.22 for the maintenance of the suckler cow herd paid by the applicant or its agencies in the areas covered by the Rhineland Chamber of Commerce (DM 100 434.60), Bavaria (DM 79 355.74) and the Stuttgart government of Baden-Württemberg (DM 42 585.88). The amount of DM 1 779 570.95 disallowed in respect of 1985 consisted as to DM 1 596 934.47 of premiums to sheepmeat producers in the area covered by the Rhineland Chamber of Agriculture, and of premiums amounting to DM 99 882.52 for the maintenance of the suckler cow herd in that area and amounting to DM 82 753.96 in Bavaria.

Scope of the dispute

3. This is not the first time that the Court has been confronted with an application for the partial annulment of a Commission decision on the clearance of EAGGF accounts. However, the present case displays a number of features which distinguish it from many previous cases. Central to the dispute are not only specific provisions of the agricultural regulations relevant to the sectors in question (governing the substantive and formal conditions for the grant of the premiums and supervision thereof) but also, in a more explicit manner than in other cases, Articles 8 and 9 concerning supervisory and control

* Original language: Dutch.
1 — OJ 1987, L 324, p. 32.
2 — OJ 1982, L 143, p. 20.
3 — OJ 1984, L 283, p. 28.

measures, contained in Council Regulation (EEC) No 729/70 of 21 April 1970, which is the basic regulation on the common agricultural policy.[4] The novelty of this case is to be found in the fact that the dispute does not concern so much the Commission's conclusions from its analysis of individual cases, but rather the consequences drawn by it from an examination of the administrative implementation of a part of the common agricultural policy in certain areas of the Member State in question.

The grounds, which are contested by the applicant, on which the Commission refused to allow Community financing of the expenditure in question are mentioned in the summary report of 21 July 1987 and in addendum 1 to that report dated 25 September 1987, reproduced at paragraph 16 of the Report for the Hearing.

Briefly, the Commission refused to provide financing on the basis of a number of connected factors which first and foremost have to do with the absence of an effective organization and supervision of the manner in which premiums are granted and which, on the other hand, as a secondary matter, are related to the relatively major series, in their opinion, of individual decisions granting premiums which appear to be wrong on a reading of the file and from which the defective organization and supervision is abundantly clear. It goes without saying that the applicant does not share the Commission's viewpoint. In the written procedure the reasons underlying the refusal by the Commission, of which I have given a brief summary, were divided into five headings which I shall now briefly summarize.

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

4. The first ground of refusal is that the Federal Government should have given instructions to the Bundesamt für Ernährung und Forstwirtschaft (Federal Office for Food and Forestry) and/or should have established a system of supervision for the two premiums in question. In respect of both premium systems, they were unable to supply the Commission with data on the number of applications, on the manner in which they were examined, on the sources of errors found, and on the number of decisions to recover monies. The second ground of refusal is the inadequacy, the lack of, or the incorrectness, of instructions given by the *Länder* to the lower level administrative authorities responsible for implementation as regards the administrative controls and on-the-spot checks to be carried out. The third ground of refusal is the inadequacy of the actual supervision by the competent *Länder* or regions of the lower administrative levels responsible for implementation. The fourth ground of refusal is stated to be the absence of administrative controls and on-the-spot checks in the areas where financing was refused with the consequence that even a superficial investigation by Commission officials revealed irregularities in an abnormally large number of cases. The fifth ground of refusal is the absence of written reports on the carrying out of on-the-spot inspections in the agricultural concerns.

Apart from the first ground of refusal, with which I will deal separately (at paragraphs 5 to 7 below), I will approach the grounds of refusal and the applicant's challenges together on a premium-by-premium basis.

The following questions discussed later on in this Opinion (but not in the order indicated) are, it seems to me, legally

relevant points of controversy capable of judicial assessment with regard to both premiums. First, to what extent may the Commission infer minimum standards of management, and above all of supervision, from the specific provisions of Community regulations in conjunction with the basic regulation and Article 5 of the Treaty? Secondly, on the assumption that it may do so, to what extent did the Commission apply a correct minimum standard in this case? Thirdly, to what extent was the Commission entitled to take the view that the applicant did not satisfy the three minimum requirements applied by the Commission in relation to the three given areas. Fourthly, was the sanctioning or in other words the consequent refusal of financing, on the clearance of the EAGGF accounts, in general justified and in this case legitimate? This fourth question which has to do with the Court's case-law on the burden of proof in EAGGF cases, also raises the question of the relationship between the clearance of EAGGF accounts, on the one hand, and the possibility afforded to the Commission of bringing proceedings for a declaration of a failure to fulfil obligations under Article 169 of the Treaty, on the other.

Lack of interest on the part of the federal authorities

5. Since a reason for refusal framed too broadly would elicit the reply from the applicant that it has to observe its federal constitutional structure, the defendant formulated the first ground of refusal in the following manner. Under the German Constitution the federal authorities in one of their manifestations could have formulated the recommendations or general guidelines for discussion with the subordinate authorities competent under the constitution. In that way it would have been possible to satisfy the requirement of Community law that Community rules must be applied in a uniform manner and that there must be efficient supervision. However, the Commission's inspectors are said to have encountered a total lack of interest on the part of the federal authorities, which in its turn is an adequate indication that Community law is being applied incorrectly.

In its rejoinder the applicant points out that organized and systematic cooperation with the administrative authorities competent in the matter on the part of the federal authorities did take place. It points to the existence of rules of implementation, standard forms of application, and to cooperation which is said to have taken place in the drawing up of the 'directives'[5] applicable in the various administrative units. In addition the applicant annexes to its reply the Minutes of a number of discussions between representatives of the federation and the *Länder*[6] and offers to put in evidence a voluminous exchange of correspondence between both levels.

In the rejoinder the defendant argues that, pursuant to Article 42(1) of the Rules of Procedure, the Minutes submitted are produced too late, and could have been disclosed in the application, and even long before that in the discussions between the Commission and the Member State which preceded the decision on the clearance of the EAGGF accounts. Moreover, the

5 — The term 'directives' is placed between quotation marks because the instruments in question current in the German legal order have no connection with the Community law concept contained in Article 189(3) of the EEC Treaty.

6 — Minutes of meetings in the Bundesministerium für Ernährung, Landwirtschaft und Forsten (Federal Ministry for Food, Agriculture and Forestry) of stock and meat representatives of the *Länder*.

defendant states that the Minutes put in evidence do not show that at the meetings in question attention was paid to the need to supervise the premium schemes in question.

6. My evaluation of this point is as follows. There is rightly no dispute between the parties that the internal constitutional arrangements of the Member States are not in principle directly influenced by Community law but that, on the other hand, those arrangements are not and cannot be a pretext for a lesser degree of compliance with Community obligations, including the obligations flowing from Article 5 of the Treaty. The question therefore remains whether the defendant was entitled to base a decision to disallow expenditure, albeit partial, on the fact that on an inspection by its officials no evidence was provided or indication given of discussions or coordination organized at federal level by the Member State or by concertation between the *Länder* for the purpose of implementing Community law in the matter. This is what may be shortly termed 'a lack of interest'.

Irrespective of procedural considerations, the Minutes referred to above cannot change the situation at the material point in time, that is on clearance of the accounts.[7]

7. It follows from the arguments exchanged by the parties in the written procedure and at the oral hearing that even in the Commission's view a lack of interest manifested at federal level or between the *Länder* cannot constitute a *separate* ground for refusal of financing. In so far as this ground of refusal is maintained it merges into the other grounds mentioned above, in particular inadequate supervisory rules adopted by, and in concertation with, the competent *Länder* in the Federal Republic and inadequate supervision of the officials responsible for carrying out checks at local level.

Indeed it seems to me that in a case such as the present one where the federal authorities, so it appears, have no decision-making or implementing powers, the executive power was adequately exercised by the adoption of limited coordinating rules such as those which the defendant referred to in its reply and are mentioned above at paragraph 5.

Owing to the difficulty involved in dealing separately with the various grounds of a refusal by the Commission and their refutation by the applicant, I intend to proceed premium by premium. I shall therefore first discuss the sheepmeat premium, which involves the largest amounts, and then the suckler cow premium. The first premium was disallowed from Community financing only as regards the area covered by the Rhineland Chamber of Agriculture, whereas all three regions mentioned at paragraph 2 above are concerned by the second premium.

Sheepmeat premium

8. The point of departure for the Commission is constituted by the substantive and formal conditions for the grant of the premium in favour of sheepmeat producers. During the material period of time the

7 — Judgment of 7 February 1979 in Joined Cases 15/76 and 16/76 *France* v *Commission* [1979] ECR 321, paragraphs 7 and 8.

following substantive conditions for the grant of premiums were applicable pursuant to Council Regulation (EEC) No 1837/80,[8] Council Regulation (EEC) No 872/84[9] and Commission Regulation (EEC) No 3007/84[10] (see also paragraph 6 of the Report for the Hearing):

(i) with effect from 1 April 1984, that is with effect from the 1984 sales year[11] the producer had to keep at least 10 ewes.[12] In respect of the period from 1 January to 31 March 1984 the minimum number of ewes could be determined by the Member States;[13]

(ii) with regard to the 1985 sales year the producer must have kept the ewes during at least 100 days with effect from 30 April in each year on his farm.[14] In respect of the 1984 sales year there was no such requirement of a minimum period.[15]

On the formal level the following conditions were provided for as regards the premium for sheepmeat producers (see also paragraph 7 of the Report for the Hearing):

(i) apart from the cases in which the special condition laid down in Article 2(2) was satisfied (Member States operating a permanent registration system for changes in sheep flocks) or the condition laid down in Article 3(2) of Regulation (EEC) No 3007/84 (Member States may lay down a shorter period for the lodging of applications within the period from 1 December to 30 April inclusive), applications for the premium must be submitted to the Member States' competent authority between 1 December and 30 April of the following year. The latter date may however be brought forward by the Member States;[16]

(ii) as regards the 1985 marketing year, the producer must have undertaken to observe the period of 100 days, mentioned above as the last substantive condition, with regard to the number of ewes mentioned in his application.[17]

9. In addition to the formal and substantive conditions for granting the premiums, Article 5 of Regulation No 3007/84, mentioned above, is also relevant in connection with the supervisory obligations of the Member States in relation to the year 1985:

'(first paragraph) Before the end of the period of 100 days determined in

8 — Council Regulation (EEC) No 1837/80 of 27 June 1980 on the common organization of the market in sheepmeat and goat meat (OJ 1980, L 183, p. 1).

9 — Council Regulation (EEC) No 872/84 of 31 March 1984 laying down general rules for the granting of premiums to sheepmeat producers and repealing Regulation (EEC) No 2643/80 (OJ 1984, L 90, p. 40).

10 — Commission Regulation (EEC) No 3007/84 of 26 October 1984 laying down detailed rules for the application of the premium for producers of sheepmeat (OJ 1984, L 283, p. 28).

11 — Article 3(5) of Regulation (EEC) No 1837/80 provides that the sales year shall commence on the first Monday of April.

12 — Article 1(1)(a) of Regulation No 872/84.

13 — Article 1(2) of Council Regulation (EEC) No 2643/80 of 14 October 1980 laying down general rules governing the granting of the premium for the benefit of sheepmeat producers (OJ 1980, L 275, p. 6), as amended with effect from the beginning of the sales year beginning in 1984 by the aforementioned Regulation No 872/84.

14 — Articles 2 and 3(2) of Regulation (EEC) No 3007/84.

15 — Regulation (EEC) No 3007/84 mentioned in the previous footnote did not however apply to the 1984 sales year. In the earlier Regulation (EEC) No 2660/80 of 17 October 1980 (OJ 1980, L 276, p. 16), there was no condition as to the period of time for which the sheep had to be kept.

16 — Article 3(2) of Regulation (EEC) No 3007/84.

17 — Article 2(1) of Regulation (EEC) No 3007/84.

accordance with Article 2, the competent authorities designated by the Member States shall ensure administrative supervision supplemented by means of systematic or random inspection visits to check the number of eligible ewes stated in the application for a premium.

(third paragraph) Member States which have implemented a system of monitoring of sheep movements may carry out the controls in another period during the year in which applications are made.'

Furthermore, the Commission relies, both in respect of 1984 and 1985, on the wording of Article 8(1) of the basic Regulation No 729/70, in which it is stated that the

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

satisfy themselves that transactions financed by the fund are actually carried out and are executed correctly',

and on Article 9(1) of that regulation, which states that

'Member States shall make available to the Commission all information required for the proper working of the fund and shall take all suitable measures to facilitate the supervision which the Commission may consider it necessary to undertake within the framework of the management of Community financing, including inspections on the spot'.

10. On the basis of the substantive and formal conditions mentioned above and Article 8(1) of the basic regulation [18] the defendant maintains that the system of control in the area of the Rhineland Chamber of Commerce did not satisfy the following minimum requirements either in 1984 or in 1985: *firstly*, the existence of rules for calculating the number of ewes kept on the farm by the official inspectors, and, *secondly*, a written report on the results of on-the-spot inspections. [19]

When the defendant emphasizes that it is merely referring to minimum requirements, it thereby signifies in my opinion that, in the absence of specific supervisory obligations laid down in the Community rules, it neither can nor seeks to prescribe the entire contents of the supervisory provisions and practices which are in its opinion necessary, but that it expects the Member States or their component States to introduce a

18 — For 1984 the only substantive condition which applied was the condition with regard to the number of animals, in addition to Article 8 of the basic regulation. The fact that as from 1985 (following the entry into force of Regulation (EEC) No 3007/84) there was a more explicit obligation on Member States to carry out on-the-spot checks (*inter alia* in connection with the requirement introduced at the same time to keep ewes during a given period) does not of course mean that the Member States did not previously have to carry out controls on whether the condition as to the number of ewes was satisfied; see on this point Article 4 of Regulation (EEC) No 2660/80, mentioned above in footnote 15, in which the words 'if necessary' precede the mention of on-the-spot inspections but on the other hand the general rule is repeated in Article 5 that the Member States must adopt the necessary provisions in order to recover premiums which have been paid in error. As regards the condition as to the number of ewes, the only condition in 1984, it is moreover difficult to draw a sharp distinction between the organization of administrative supervision and the organization of on-the-spot checks and it is difficult to see how such controls can be arranged otherwise than with the assistance of at least sampling checks on the spot. See two footnotes further on.

19 — At the beginning of the written procedure it seemed that the defendant also required a reliable system for the identification of ewes. In the rejoinder it however acknowledged that the identification of sheep by earmarks is practically impossible. That factor increases the importance of on-the-spot inspections.

minimum number of control provisions which may reasonably be regarded as necessary.

This may be illustrated in connection with the aforementioned first requirement as regards the calculation of the number of ewes. On that point the Commission finds that the authorities should have issued instructions to the officials concerned as to the percentage of farms making applications in which on-the-spot checks should be carried out (by sampling in the Federal Republic of Germany), and how frequently checks have to be carried out (whereby in certain cases provision should be made for a second inspection); and furthermore, as regards administrative checks, they should have been instructed on the factors indicative of unreliability to be taken into account, for example, major changes in the number of animals as opposed to the preceding year.[20] The most important point is therefore *that* there must be rules in these matters which should be applied, and that those rules should provide for a *reasonable* degree of control, regard being had to the Community nature of the financing. In other words no maximum level of control, such as more than one on-the-spot inspection on all farms, is required.

11. With regard to the fulfilment of those minimum requirements in the area covered by the Rhineland Chamber of Agriculture the defendant is categorical. On the occasion of a visit to Bonn by Commission inspectors, of which three weeks notice was given, it appeared that it was not possible to obtain any information from senior officials as to the methods of dealing with the applications, or the number of any on-the-spot inspections, or whether any written reports on those inspections were drawn up, nor could information be obtained on any exchange of information between senior officials and inspectors. Even later, no such information was obtained either on the existence of a system of administrative control or as to on-the-spot inspections. According to the Commission, it was therefore impossible to ascertain to what extent the grants paid out in that area were lawfully made and whether to refuse Community financing could be justified on those grounds.

12. The applicant does not dispute the factual allegations. It merely submits that notice of the Commission's visit was received too late by the relevant department, that is to say there was a failure in the internal organization which, according with the Court's settled case-law, it cannot rely on as an excuse and which does not explain why the information requested by the Commission could not be provided subsequently. Nor does the applicant dispute that the Member States have a general obligation to provide, through the medium of their competent organs, supervisory rules and practices which are laid down by express Community provisions and cause them to be applied by the relevant officials. In relation to the ewe premium relevant to this case, however, no such express provisions were disregarded by the competent authorities in the area concerned.

13. In my opinion the facts mentioned in paragraph 11 above in relation to the

20 — I would observe in this connection that in the case of a condition such as the one under discussion it is difficult to draw a distinction between administrative controls and on-the-spot inspections (see above, footnote 18).

sheepmeat premium in the Rhineland are such that Article 9 alone of Regulation No 729/70 (quoted in paragraph 9 above relating to the Commission's right to make inspections) in itself justifies the withholding of financing for the years 1984 and 1985. In that connection Member States cannot plead the absence of specific supervisory provisions in Community law. The wording of Article 9 of Regulation No 729/70 is perfectly explicit and there is a manifest infringement thereof when there is a total lack of information as to the manner in which it was operated in the relevant area which makes it impossible for the Commission to check (or even to make an 'approximate assessment' [21]) whether the aid was granted in accordance with the relevant Community criteria. In such a case the Court's case-law requires, in order to ensure a correct apportionment of the financial burden of the common agricultural policy implemented by the Member State, the exclusion of the expenditure in its entirety from Community financing. [22] [23] I will come back to this point further on (see paragraph 28, etc. below).

In the treatment of the suckler cow premium, where the factual situation is not so clear, I shall have the opportunity of broaching the question raised in the preceding paragraph as to whether supervisory obligations are expressly provided for in Community regulations, non-compliance with which by the Member States may lead to a refusal to charge expenditure to the EAGGF.

21 — See the Opinion of Mr Advocate General Capotorti of 5 December 1978 in Joined Cases 11/76, 15/76, 16/76 and 18/76 *Netherlands* v *Commission* [1979] ECR 286, at p. 319.

22 — Judgment of 7 February 1979 in Joined Cases 15/76 and 16/76 *France* v *Commission of the European Communities* [1979] ECR 321, paragraphs 28, 32 and 35.

23 — The fact that the administrative provisions of North Rhine-Westphalia laid down a requirement for 10 or seven ewes only in August 1985 and not April 1984, as was required by the amendment to the Council Regulation dealt with in footnotes 11 and 12, another ground for the Commission's decision to disallow the expenditure, does not therefore need to be dealt with separately.

Suckler cow premium

14. In respect of the premium for the maintenance of the suckler cow herd, the following conditions could be inferred at the material time from Regulation (EEC) No 1357/80, as amended by Regulation (EEC) No 1417/81 [24] (see paragraph 2 of the Report for the Hearing):

(i) as a substantive condition, the person applying for the premium must be an individual farmer, that is to say at least 50% of his income must come from farming; [25]

(ii) the applicant must show evidence that for 12 months from the day on which the application is lodged he sells no milk or milk products; [26]

(iii) the suckler cows in respect of which a premium is applied for must belong to a meat-producing breed or come from crossing with such a breed, whereby an annex to the Community regulation lists the excluded breeds; [27]

24 — Council Regulation (EEC) No 1417/81 of 19 May 1981 amending Regulation (EEC) No 1357/80 introducing a system of premiums for maintaining suckler cows (OJ 1981, L 142, p. 4).

25 — Articles 1 and 5(1)(a) of aforementioned Regulation No 1357/80 and Article 3 of Directive 72/159/EEC (OJ 1972, L 96, p. 1).

26 — Article 2(1) and (2) of aforementioned Regulation (EEC) No 1357/80.

27 — Article 5(4) of aforementioned Regulation (EEC) No 1357/80 as amended by Regulation (EEC) No 1417/81.

(iv) the same number of suckler cows as those indicated in the application must be kept on the applicant's farm for at least six months from the same date. [28]

The following formal conditions were in force as regards the premium for suckler cows (see paragraph 3 of the Report for the Hearing):

(i) the applications for the premium had to be lodged before 31 October 1983 [29] and 31 December 1984 [30] respectively, with the competent authority designated by each Member State in respect of the suckler cows which were kept on that day;

(ii) the application had to be accompanied by the undertaking referred to in Article 2(2) of Regulation No 1357/80 (not to sell milk and to keep the animals for six months) together with an undertaking by the producer to observe the terms of the abovementioned regulation together with Regulation No 1224/82 as well as the implementing provisions adopted by the Member State; [31]

(iii) in addition, the application for a premium had to be accompanied by the declarations mentioned in the second subparagraph of Article 1(2) of Regulation No 1244/82 which essentially correspond to the substantive conditions set out above.

28 — Article 2(2) of aforementioned Regulation (EEC) No 1357/80.

29 — Commission Regulation (EEC) No 2795/83 of 6 October 1983 waiving the date in Regulation (EEC) No 1244/82 for submitting applications for premiums for maintaining suckler cows for 1983/84 (OJ 1983, L 274, p. 20).

30 — Commission Regulation (EEC) No 3442/84 of 6 December 1984 waiving the date in Regulation (EEC) No 1244/82 for submitting applications for premiums for maintaining suckler cows for 1984/85 (OJ 1984, L 318, p. 30).

31 — First subparagraph of Article 1(2) of Regulation (EEC) No 1244/82.

15. In respect of the supervisory obligations of the Member States, Article 4(1) of Regulation No 1244/82 is also relevant:

'The competent authorities designated by each Member State shall carry out administrative checks supplemented by random or if necessary systematic field checks:

(a) on the number of suckler cows on the holding farmed by the beneficiary;

(b) on compliance with the undertaking provided for in Article 2(2) of Regulation No 1357/80;

(c) on the accuracy of the declaration provided for in Article 1(2).'

16. On the basis of these conditions for the grant of premiums (see paragraph 14 above) and the supervisory provision (see paragraph 15 above), in conjunction with Articles 8 and 9 of Regulation No 729/70, the defendant states that the system of supervision in the Member States must satisfy the following minimum requirements:

1. In the first place there must, in its view, be specific guidelines for the competent officials as to the breeds which, as defined in the annex to Regulation No 1357/80, as amended by Regulation No 1417/81, qualify for the suckler cow premium in the same way as there should be guidelines for

officials responsible for carrying out on-the-spot checks as to the manner in which the breed of a suckler cow may be determined in case of doubt. That requirement is alleged in the present case not to have been satisfied in the three relevant regions in question. [32]

In that connection the applicant replies that it is not necessary to transpose the annex of an EEC regulation into instructions to officials on the spot who are specialists in the matter. The defendant's response to that contention is that it is apparent from the circulars of the Rhineland Chamber of Agriculture annexed to the applicant's reply that there is a manifest lack of clarity and even contradictions as to the correct demarcation between breeds which are, and those which are not, entitled to the relevant premium.

At the hearing, the defendant's representative however stated that it no longer maintained that point concerning inadequate breed specifications, thus apparently accepting the annexes to the reply as adequate.

17. 2. The second minimum requirement laid down by the defendant for the system operated by the *Länder* is a reliable system for identifying suckler cows, in particular by ear marks or other unmistakable means. Such a system should exist, at any rate for suckler cows in Baden-Württemberg within which the government presidency of Stuttgart falls. [33]

32 — For Baden-Württemberg the assessment is less negative. Some indications were given in the administrative provisions.

33 — It appears from this last-mentioned factor that the Commission was too hasty in invoking this requirement with regard to the government presidency in Stuttgart.

The applicant states that, inasmuch as such a system of identification does exist, by numbers affixed to the ears of suckler cows and also mentioned on the application, that is an obligation imposed by German legislation which goes further than what is required by Community rules. At the hearing, the applicant, nevertheless, acknowledged that individual identification is a supplementary element (in addition to the herd register) enabling the number of animals to be counted and thus ensuring compliance with the relevant Community financing conditions.

The defendant states that no certain method of identification was guaranteed in every case by the actual application of the rules which in themselves were on the right lines in the various regions, and in particular in the area of the Rhineland Chamber of Commerce in Bonn. Thus the administrative provisions of North Rhine-Westphalia require there to be an 'unmistakable form of identification', yet there are no rules to deal with cases in which two animals belonging to the same farmer bear the same number. In such cases it is wrong, in the defendant's view, that there is no provision laying down by what other means of identification the animals may be distinguished and that the other distinguishing features must be mentioned in the application.

Of the individual files which the defendant annexes to its defence there are a number from the region of the Rhineland Chamber of Agriculture in which the same earmark number appears two or three times without the competent authorities raising any objection. The applicant replies in connection with these individual cases that

the numbers in question in fact belonged to different cows which could be distinguished by other features. That is not, however, a genuine answer to the defendant's allegation because it does not prove that the competent official had to investigate such other distinguishing features and did in fact investigate them, quite apart from the fact that the farmer making the application was under a specific duty, in the case of a number appearing several times, to mention certain other distinguishing features.

Nevertheless, it does not seem to me that the defendant's evidence on this point is very conclusive. First, there is no watertight identification requirement in the conditions for the grant of the application, which do not stipulate that the same animals are to be kept for the period of six months, provided that the same number is kept. Secondly, and more importantly, the individual cases referred to appear to warrant the conclusion that there were only a few cases in which the same number was used twice and that by indicating the breed or the cross-breed of the animal in question identification in the file was possible.

18. *3.* Thirdly, the defendant infers from the regulatory provisions relating to the conditions for the grant of the premium that the guidelines operated by the *Länder* ought to have included rules concerning the manner in which the number of suckler cows kept on a farm should be calculated on the spot. In particular, not only the intensity of the on-the-spot checks to be carried out should be provided for (percentage of on-the-farm checks, criteria for the choice of holdings to be visited, and the frequency of visits), but provision should be made for the number of animals on the holding to be compared with the number sold in the preceding year, so that, if there is a substantial reduction in number there will be a presumption that the minimum period during which they must be kept has not been observed, and provision ought at least to be made for the times when on-the-spot checks should take place. On this last point the defendant states that in certain cases the rules should provide for a second visit in order to encourage compliance with the period of six months by a certain 'fear of being caught'.

The applicant refutes the defendant's conclusions on the ground that no specific obligations with regard to the frequency or the intensity of on-the-spot checks may be derived from the regulatory text. As a secondary argument, the applicant states, in connection with the obligation to carry out fresh checks on holdings where an on-the-spot check has already been made that such a lack of flexibility in the rules would undermine the efficiency of a check which in fact relies on its unexpected nature.

The defendant states generally that it does not seek to impose detailed or strict instructions or orders on the Member State, but that it is merely indicating a number of points on which the Member State or the competent body within the Member State must itself lay down rules so that the competent officials know what to go by, the leading officials know what investigations to make and, from their own experience, may be able to suggest adjustments, and so that

the Commission acquire information about the supervisory system and can ascertain its adequacy and gain experience from it of use to other systems. But in particular the defendant stresses that, in areas such as Baden-Württemberg, where on-the-spot checks are only carried out in the first six months, provision should be made for a second inspection in the case of certain holdings in order to ensure actual compliance with the six-month rule.

What matters is that there should be a coherent and logical system of supervision in which a minimum number of rules are laid down as yardsticks for the competent officials. According to the defendant's allegation, which has not been contradicted, no such system existed either in Bavaria or in North Rhine-Westphalia.

In relation to the area covered by the government of Stuttgart the defendant's negative assessment is based on the following factors. Numbers of animals were counted on the occasion of inspection visits which — where the application form was not completed by an official — were carried out shortly after the application, but there was no means of checking whether the number of animals stated were kept during the rest of the requisite six-month period.

19. It seems to me that on the basis of the foregoing the defendant was in fact entitled to take the view that the system of supervision in control in the three regions concerned was inadequate as regards the requirement to keep the same number of animals for a period of six months. However, two more fundamental questions remain open. First, whether the defendant may rely on the absence of a control system in a given region as a reason, in general, for withholding EAGGF financing in connection with the expenditure incurred in that region and, secondly, whether in this case there is an adequate causal link between the absence of a control system, on the assumption that that may be relied on as a reason for withholding financing, and the expenditure excluded from Community financing. The second question which is more concrete will be examined region by region, but having regard all the time to the six control requirements I have mentioned (see paragraph 30 below). I shall deal with the more general first question straight away: it comes down to this: is the Commission in its stated requirement going too far — in inferring supervisory requirements inherent in the regulations and their context — in the direction of the 'unilateral imposition on the Member States (or harmonization) of detailed rules of supervision'. In this connection, particular attention must be paid to the question of mimimum percentages for on-the-spot checks.

20. In its rejoinder, the defendant stated that the principle of equality, not merely between Member States but also between different parts of a federal Member State such as the Federal Republic, required a certain mimimum percentage of cases to be covered by on-the-spot checks; the defendant mentioned the figure of 100% for Ireland, 25% for the United Kingdom and 5% for Italy and the Netherlands, and, on the basis of the equality argument mentioned above together with the requirement that the checks must have a minimum degree of efficiency, put forward

the figure of 5% as the absolute minimum.[34]

At the hearing, the applicant reiterated that the Commission was not entitled to put forward this percentage as an *implied* requirement by arguing that the Commission could have *expressly* incorporated such requirements in its implementing regulations and, moreover, had in fact made use of this power in a decision of 7 July 1989 (not published in the Official Journal). In this decision a percentage of 10% was laid down. In the applicant's view, it may be inferred *a contrario* from this decision that, in relation to the preceding period (the marketing years 1984 and 1985) and in relation to the supervisory obligations not mentioned therein (e. g., a second check in certain individual cases), no such detailed supervisory obligation was imposed on the Member States.

21. The applicant's point of departure is the protection afforded to the Member States in their relationship with the Commission by the principle of legal certainty which, it is argued, in this case prohibits the retroactive imposition of control requirements. Although it is not my purpose to deny that legal certainty also plays a role as between the Member States and the Commission,[35] I wish to emphasize that the starting point for the mutual relationship is constituted by the obligation under Article 5 of the Treaty to cooperate.[36] As regards supervision of the implementation of the agricultural policy, this general obligation, which is laid down in basic Regulation No 729/70 and in the specific regulations in the sector concerned, entails specific obligations both for Member States and for the Commission. The Community task of the Commission and the Member States is the correct and proper utilization of Community resources and the framework within which that task is fulfilled is the clearance of EAGGF accounts, whereby the Member States are involved both in bilateral contacts and by way of a management committee.[37]

Against this background it becomes clear that in the relationship between the Commission and a Member State legal certainty plays a different role than in the relationship between an authority on the one hand and a citizen or taxable person on the other.[38]

In view of the Community responsibility imposed on Commission and Member States for an effective system of supervision, it is not the case that only those supervisory rules expressly laid down in Community provisions are applicable. Thus, it cannot be

34 — The defendant also refers to other Community regulations in which a minimum percentage for checks is expressly laid down. This is Article 5 of Commission Regulation (EEC) No 2835/77 of 19 December 1977 laying down detailed rules for aid for durum wheat (OJ 1977, L 327, p. 9) and Article 4(2) of Commission Regulation (EEC) No 3061/84 of 31 October 1984 on the detailed rules for the application of a system of production aid for olive oil (OJ 1984, L 288, p. 52). According to a press report (Agence 'Europe' of Friday 15 December 1989, No 5154) the Council of Agriculture Ministers accepted a proposal for a minimum percentage of checks by customs officers of 5% in connection with the financially very significant export refunds.

35 — See my Opinion of 4 July 1989 in Case 14/88 *Italy* v *Commission* [1989] ECR 3677, paragraph 15, and the judgment of 14 November 1989 in the same case, paragraph 19.

36 — Same Opinion, paragraphs 11 to 13, and judgment, paragraph 20.

37 — See the Opinion of Mr Advocate General Capotorti of 5 December 1978 in Cases 11/76, 15/76 and 16/76 and 18/76 *Netherlands* v *Commission* [1979] ECR 286, 294 and 295.

38 — See *inter alia* my Opinion in Case 262/87 *Netherlands* v *Commission* [1989] ECR 225, paragraph 12. For these reasons the comparison made at the hearing with the relationship between a prosecuting authority and a private person committing a parking offence is not to the point.

deduced from the decision of 7 July 1989 that prior thereto the Commission, in the absence of express Community rules,[39] was not entitled to apply minimum requirements for the number of on-the-spot inspections. On the one hand, there may have been reasons for not adopting an express minimum number. The Commission's representative mentioned the great psychological resistance of representatives of Member States in the management committee against what they are said to have interpreted as an exaggerated supervision of the Member States and, this I find more convincing, the Commission's fear that the fixing of a minimum percentage would have been interpreted by Member States which apply a much higher percentage as an incitement to relax controls. On the other hand, in the absence of detailed express rules, recourse must be had to the principles of Article 5 and of the basic Regulation No 729/70, which leave real responsibility with the Member States but at the same time confer a real power of management on the Commission, which are both to be exercised in the Community's interest.

22. When the Commission applies an implied provision in the field of controls on the clearance of accounts, legal certainty comes into operation in order to protect the Member States to a degree which is variable according to whether the provision is more or less self-explanatory. When the Commission bases a decision to withhold financing on the total absence of a system of supervision, or the absence of a system enabling answers to be given to the Commission's questions in the context of Article 9(1) of the basic regulation, which in my opinion was the case when the sheep premiums were disallowed — dealt with at paragraph 13 above —, the Member State cannot rely on the 'retroactive' or unexpected nature of the decision as a defence. It is otherwise in cases where the Commission completes a provision, whose objectives and criteria are clear, by choosing one of many possibilities as regards the 'reasonable period' or the 'adequate number of on-the-spot inspections'. As in Case C-10/88 and as in Case 14/88 *Italy* v *Commission*,[40] the reasonable period actually chosen may only be applied to clearances of accounts after notification to Member States (and after discussion with them).

It is not immediately clear which of the two situations in the present case in relation to suckler cow premiums is applicable. On the one hand it may be regarded as a case in which, in relation to an important condition for the grant of premiums, there was no organized provision for on-the-spot inspections in two of the three regions affected, whilst in a third region (the Stuttgart Regierungspräsidium) compliance with the condition was only incidental and not carried out in a satisfactory manner (by means of the collection of applications or by an inspection at the beginning of the period). This was in spite of the fact that an on-the-spot inspection is required in order to satisfy administrative requirements laid

39 — See the judgment of 19 October 1989 in Joined Cases 258/87, 337/87 and 338/87, *Italy* v *Commission* [1989] ECR 3359, paragraph 18, in which the Court departed from paragraph 46 of Advocate General Lenz's Opinion of 7 July 1989.

40 — In Case C-10/88 *Italy* v *Commission* [1990] ECR I-1229, concerning birth premiums for cows, in which I delivered my Opinion on 16 January 1990, I said that the Commission was not entitled to withhold the financing of expenses by reliance on a reasonable period for payment laid down by it because it only notified that period to the Member States after the year to which the relevant sums related. For Case 14/88 I refer to footnote 35 above.

down in Article 4(1) of Regulation No 1244/82 (see above, at paragraph 15). On the other hand this case may be regarded as one in which the Commission requires the Member State, as a condition of financing, to have carried out a number of on-the-spot inspections during the relevant financial year whose number the Commission may establish *ex post facto*.

According to the applicant, no written record of on-the-spot inspections is necessary when those inspections give no grounds for reversing the decision to grant the premiums. Moreover, if the Commission doubts whether on-the-spot inspections have been carried out, evidence that they have can be provided by means of the official's work sheets and expense sheets.

It seems to me that the Commission's allegation in two of the three regions concerned, namely Bavaria and the Rhineland, goes to a lack of any form of organization for on-the-spot inspections and that the reasons on which the Commission's decision is based in regard to these regions remain valid, subject to the causality question which will be dealt with below (at paragraph 28); (this particularly concerns the Stuttgart Regierungspräsidium because the absence of controls and thus also the question of causality arising in connection therewith are less firmly established).

23. *4.* The fourth control requirement laid down by the defendant is that a written report should be drawn up following on-the-spot inspections. That would enable Commission officials, on visiting the *Länder*, to establish what percentage of farms have been subjected to on-the-spot inspections, the frequency of inspections on the same farm, etc.

This control requirement seems to me to have been correctly applied by the defendant. It is hard to imagine that a Member State, in regard the supervision of the expenditure of its own financial resources, would impose a duty to report on supervisory officials only if they discovered irregularities. Even if that were the case, then such administrative arrangements would not be adequate for controlling the expenditure of Community resources. As regards the sanctioning of individuals infringing Community law, which is closely connected with this problem, the Court has stated that a sanction equivalent to that provided for in the case of infringements of national law is a minimum requirement to be complied with if the effective implementation of Community law does not call for a *stricter* sanction.[41] Regard being had to the need to provide the Commission with all information necessary for it to supervise the proper functioning of Community financing, the control requirement in question appears to me *in this case* to have been properly and correctly applied.

41 — This interpretation follows from the judgment of 21 September 1989 in Case 68/88 *Commission* v *Greece* [1989] ECR 2965, and in this respect, from the words 'in any event' in paragraph 24. See also Mr Advocate General Darmon's Opinion of 29 November 1988, paragraph 10 (Case 94/87 *Commission* v *Germany* [1989] ECR 175), and paragraph 12 of the judgment of 2 February 1989 in the same case.

The Commission was therefore entitled to conclude that this control requirement, which is closely linked with the preceding one, was not satisfied in the three regions in question.

24. 5. According to the defendant, rules should also be laid down at *Länder* level in order to verify that the undertaking not to sell milk or milk products to a dairy during a period of 12 months has been complied with. The applicant replies that no such express control requirement can be inferred from the rules, in view of the fact that it is an easy matter for officials in the course of on-the-spot inspections to verify, for example, from the absence of milk equipment or refrigeration plant, that a holding in receipt of a suckler cow premium is selling no milk during the relevant period. The defendant insists that, for example, provision must be made for delivery lists of neighbouring dairies to be inspected in order to catch possible infringers. Before giving my assessment on this fifth requirement (see paragraph 26 below) I shall now discuss the sixth and final requirement, closely related from the point of view of supervision.

25. 6. The defendant states that there should be rules in order to verify compliance with the requirement that the major part of income must be derived from farming. In that connection the defendant suggested that oral requests should be made for information from farmers or local authorities and that use should be made of sources of information represented by 'third parties', that is to say other sources than the declaration by the applicant himself.

The applicant's first reaction is indeed strongly to the effect that fiscal secrecy makes it impossible to carry out controls on income in that way, and that general principles of administrative law for the protection of the citizen also preclude recourse being had to information from 'third parties'. The defendant replies that the German provisions relied on are not applicable, regard being had to the fact that the protection of fiscal information only applies in relation to information passed to 'unauthorized persons' and not to certain other activities of the State which are dependent for their proper functioning on information as to income; thus, in relation to the supervision of Community expenditure, those provisions cannot be relied upon. On this limited point as regards fiscal secrecy the defendant is, I think, right. In the judgment of 10 January 1980 in Case 267/78 *Commission* v *Italy*,[42] a national rule conferring powers was invoked against the requirements imposed by the Community in the field of controls. But that case involved the separation of powers in the Member State and the secrecy of criminal investigations flowing therefrom which were generally applicable to national officials. To the extent to which, in the internal legal order of the applicant, officials responsible for the supervision or making of national payments have access to fiscal information, such information can and must be also used in order to supervise the expenditure of Community resources.

In connection with information as to other income the applicant also placed reliance on the 'farm dossiers' which are kept for each holding. This is regarded as an unsatisfactory source of information by the defendant since a significant cause of non-compliance with the conditions as to

42 — [1980] ECR 31.

income is precisely the carrying on of another occupation apart from agriculture which is not recorded in the 'farm dossier' which relates only to the agricultural holding.

26. It seems to me that the defendant, as regards the Rhineland Chamber of Commerce in Bonn and the Free State of Bavaria, was entitled to regard the last two control requirements (see paragraphs 24 and 25 above) as not having been complied with. In the first area, there was, however, no indication at all as to how the income condition and the undertaking not to sell were verified, or as to any on-the-spot inspections, which could have ensured detection and acted as a deterrent. Nor are any such indications to be found in the dossiers opened by the Commission officials.[43] The same situation prevailed in Bavaria.

In the area of the Stuttgart Regierungspräsidium it seems to me that the assessment must be different. For there it was provided that applications had to be collected by officials at the applicants' holdings, which would at least involve an initial superficial on-the-spot inspection. Improbably high income, absences on account of significant secondary occupations, or plant needed for the delivery of milk products would then have been evident. As regards these two requirements which by their nature are not simple to verify, it cannot be stated that the applicant in the area covered by the Regierungspräsidium Stuttgart has clearly fallen short of its control obligations, as it has in the two other areas.

27. The discussion of the control requirements in relation to the suckler cow premiums (paragraphs 16 to 26) may now be summarized. The Commission itself has abandoned the first control requirement, as regards the assessment whether the suckler cows belong to a given breed (see paragraph 16 above). As regards the second control requirement with regard to the means of identifying the suckler cows, I have come to the conclusion that the Commission has been unable to prove the existence of this requirement. The third requirement that there should be on-the-spot inspections to ensure that the same number of animals are kept during six months, has in my opinion been correctly applied by the Commission, but there are doubts as to whether in the case of the Stuttgart Regierungspräsidium this requirement was breached to the extent of entailing financial consequences (paragraph 17 to 22). The failure to comply with the fourth requirement that a written report should be kept of on-the-spot inspections was correctly invoked against all of the three regions concerned (paragraph 23). With regard to the fifth and sixth requirements — verification of compliance with the obligation not to sell milk products and the income conditions — the Commission was entitled to regard these as not having been complied with in the case of Rhineland and Bavaria, whilst as regards the Stuttgart Regierungspräsidium non-compliance, with the third requirement too, was less clear cut (paragraphs 24 to 26).

43 — More serious still, in one of these cases it was stated on the application form that the applicant was a 'farmer and employee', but he had nevertheless been in receipt of the benefits for years. Only by chance, (a telephone conversation) did it come to light that he earned more than half of his income as an employee. Even then conclusions were slow to be drawn.

Disallowance of expenditure by the EAGGF as a weapon in the hands of the Commission

28. I now come to a question which, as regards sheep premiums, I regard as having been answered by the Court in its earlier case-law (see paragraph 13 above). To what extent may the Commission attach financial consequences in the form of the disallowance of expenditure to non-compliance with minimum requirements as to verification of the expenditure of Community resources, which are implicitly inherent in specific regulations or may be deduced from the division of competences in the accounts clearance procedure instituted by the basic regulation? This question which I have already referred to as a 'causality question' is concerned with the relationship between the failings found by the Commission to exist in the system of control and the expenditure excluded from Community financing. It is in essence a question of evidence, more particularly a question as to the burden of proof.

In its early judgments on this point the Court pointed to the unresolved questions with regard to the correct functioning of EAGGF accounts clearance [44] and adopted the following strict approach derived from the institutional structure — national implementation and application of Community financed schemes: expenditure incurred in breach of Community law can only be charged to the Commission if the misapplication of Community law can be attributed to a Community institution. [45] In Mr Advocate General Capotorti's Opinion this strict viewpoint was based on two requirements of 'logic'; on the one hand equality as between Member States and between traders based on distributive justice, and on the other hand the incentive effect of a financial risk for Member States, 'against which the Community is not able to intervene *directly* ' [46] with orders or instructions. The direct conclusion drawn by the Court was that in actions for annulment under Article 173 brought against EAGGF disallowance decisions the burden of proof lies with the applicant Member State. [47] In one case, the Court, referring to 'the circumstances of the case', appeared to be prepared to accept that a certain initial success by the applicant Member State in discharging its burden of proof or at least its duty to state its case may be rewarded by a shifting of the burden of proof on to the

44 — Judgments of 7 February 1979 in Case 11/76 *Netherlands* v *Commission* [1979] ECR 245, paragraph 12, and in Case 18/76 *Germany* v *Commission* [1979] ECR 343, paragraph 12: 'it is moreover established that up to the present no specific procedure for attributing liability has been laid down by Community law for the purposes of settling differences between the Community and the Member States. The discharge of the accounts by the Commission thus necessarily entails the attribution of expenditure either to the Commission or the Member State concerned'.

45 — Judgment of 7 February 1979 in Case 11/76 *Netherlands* v *Commission* [1979] ECR 245, paragraph 25. For an example of a decision refusing financing for failure to comply with evidence requirements I would refer to the judgments of 27 February 1985 in Cases 55/83 and 56/83 *Italy* v *Commission* [1985] ECR 683 and 705, paragraph 21. The Court has rejected the subsequent regularization of evidential formalities, as also the replacement of prescribed evidential formalities by others: judgments of 7 February 1979 in Joined Cases 15/76 and 16/76 *France* v *Commission* [1979] ECR 321, paragraph 11, and in Case 18/76 *Germany* v *Commission* [1979] ECR 343, paragraphs 20 and 22. See also in this connection the Opinion of Mr Advocate General Mischo of 1 October 1987 in Case 347/85 *United Kingdom* v *Commission* [1988] ECR 1749, paragraph 46. That expenditure may be disallowed even when it is clear that no substantive irregularity has taken place was confirmed in the judgment of 25 February 1988 in Case 327/85 *Netherlands* v *Commission* [1988] ECR 1065.

46 — Opinion of 5 December 1978 *Netherlands* v *Commission* [1979] ECR 286, at p. 292. Emphasis added.

47 — See for example the judgment of 25 November 1980 in Case 820/79 *Belgium* v *Commission* [1980] ECR 3537, paragraph 15: 'consequently the applicant has not established that the incorrect application of the provisions of ... by the Belgian authorities should be attributed to the Commission'. See also paragraph 19 of the judgment of 21 February 1989 in Case 214/86 *Greece* v *Commission* [1989] ECR 367.

Commission.[48] This has remained an isolated case, but it shows that the Court is not insensitive to the inappropriateness of the strict starting point where there are special circumstances.

By way of comparison it is interesting to look at the alternative, less flexible weapon constituted by an application under Article 169 of the EEC Treaty which results in a sanction. Whilst in such a case the Commission, as applicant, in principle bears the burden of proof of the breach of the law,[49] the Court in its judgment of 22 September 1988 in Case 272/86 held that the applicant had adduced sufficient evidence of irregularities and that therefore it was for the defendant Member State to contest that evidence and the consequences thereof in a substantiated and detailed manner.[50] A certain flexibility is therefore also available as far as shifting the burden of proof is concerned even in proceedings based on Article 169.

29. A somewhat special feature in this case is the largely 'implied' nature of the rules of Community law which the Commission says have been infringed (see paragraphs 21 and 22 above). In such a case, is the Commission entitled to extrapolate from the defective method of granting aid applied, and the not inconsiderable number of files thereby found to be irregular, to the whole region in which the defective method was applied? Or is the Member State's burden of proof, or its duty to state its case, less onerous?

The principle itself of extrapolation has already been recognized by the Court in a number of concrete situations. The most far-reaching variant, which was applied in an extreme case comparable with that of the sheep premiums in the area of the Rhineland Chamber of Agriculture, consisted of disallowing all financing in a case where the Commission was totally unable to ascertain whether the rules were correctly applied.[51] A less far-reaching extrapolation was recognized by the Court in its recent judgment of 21 February 1989 in Case 214/86 *Greece* v *Commission* [1989] ECR 367. In that case the Court saw no objection to the Commission's method of working whereby it applied the (lower) percentage of quality acceptable for intervention, appearing from an analysis of samples, to that portion of the consignment of products offered for intervention from which samples were supplied by the Member State and refused the financing of all other expenditure including all expenditure relating to consignments of which no samples were supplied to the Commission.[52]

It is clear from these two judgments that the Commission, in the clearance of EAGGF accounts, can disallow more expenditure than that relating to individual consignments or cases it knows with certainty are not entitled to Community financing. This state of affairs, brought

48 — Judgment of 12 July 1984 in Case 49/83 *Luxembourg* v *Commission* [1984] ECR 2931, paragraphs 29 to 32, where issue is taken with the Opinion of Advocate General Darmon based on earlier case-law, see p. 2950.

49 — See judgment of 5 October 1989 in Case 290/87 *Commission* v *Netherlands* [1989] ECR 3083, paragraphs 16 to 20, and the Opinion of Mr Advocate General Lenz of 11 July 1989, ECR 3091, paragraph 40.

50 — *Commission* v *Greece* [1988] ECR 4875. Since the Greek Government submitted no evidence to the Court on this point, the Court held that the facts had to be deemed to be established.

51 — I refer here to the *France* v *Commission* judgment, cited above in footnote number 7.

52 — Paragraph 19, and paragraphs 30 to 33 of Advocate General Lenz's Opinion of 22 November 1988.

about by a lack of specific knowledge of actual cases and the need for financial discipline, inevitably leads to a situation where a certain dislocation may occur between the undertaking-Member State relationship and the Commission-Member State relationship. For example, the Member State is not able, in the case of disallowance of expenditure on account of inadequate supervision or incorrect interpretation imputable to itself, to compensate for its failure to recover by demands for repayment from undertakings.[53] Rigour towards Member States thus does not mean rigour towards legal subjects.

30. My decision is that the Commission can and must withhold Community financing, not only when, in relation to a region, there is no indication whether, if at all, a minimum standard of supervision exists over the expenditure of money in the name of the Community — the case of the sheep premium in the Rhineland Chamber of Agriculture —, but also when several significant control requirements have not been fulfilled in a region, which *inter alia* may be apparent from a considerable number of defective dossiers. It is for the Member State to cast doubt on the Commission's statement of reasons, which is inevitably based on suppositions and extrapolations, and to suggest that it is not supported by concrete facts with regard to the supervisory situation in question. The Member State must therefore put forward substantiated and detailed items of evidence. The Member States may also in an appropriate case be allowed to show that a much lower standard is applied towards other Member States or regions.[54]

In the present case, the applicant has in no way been able to cast doubt on the defendant's assessment of the suckler cow premium in the free State of Bavaria and in the area covered by the Rhineland Chamber of Agriculture. In both areas there appears to have been no verification that the required number of animals were kept during the prescribed period, nor as to the fulfilment of the conditions in relation to income and as to the undertaking not to sell milk products. On the other hand for the Stuttgart Regierungspräsidium it seems possible, in line with the judgment cited above in Case 49/83,[55] to hold that, regard being had to 'the circumstances of the case' and the 'implied' nature of the control requirements there is no adequate causal link between the failings found by the Commission in the control system and the expenditure incurred by the Member State. There was nevertheless some, albeit deficient, form of on-the-spot inspection in this area (see above at paragraph 18), so that in my view compliance with the criteria as to income and the undertaking not to sell may be regarded as having been verified to some extent, albeit in an incidental fashion (see above at paragraph 26).

53 — That does not mean to say that the disallowance of expenditure is a 'sanction' imposed on the Member State. In contradistinction to a judgment under Article 171 of the Treaty no moral reproach is implied. The clearance of EAGGF accounts is therefore no more than a decision as to the allocation of a financial burden as between two authorities.

54 — In this case no such argument going to equality was put forward by the applicant. The defendant on the other hand adduced evidence giving the impression that other regions of the same Member State were tested against the same yardstick and found to be satisfactory, whilst some other Member States for the same reasons related to supervision had to accept the disallowance of expenditure in the same sectors.

55 — See footnote 48 above.

Conclusion

31. On the basis of the foregoing I propose that the Court declare Commission Decision 87/541/EEC void in the amount of DM 42 585.88, that is the premium for the maintenance of the suckler cow herd in the area covered by the Stuttgart Regierungspräsidium, and to dismiss the remainder of the application.

Since it should be held that each of the parties has partially failed in its submissions I suggest that the parties should be ordered to pay their own costs on the basis of Article 69(3) of the Rules of Procedure.