JUDGMENT OF THE COURT (Sixth Chamber)

6 March 2001 *

In Case C-278/98,

Kingdom of the Netherlands, represented by M.A. Fierstra and N. Wijmenga, acting as Agents,

applicant,

v

Commission of the European Communities, represented by H. van Vliet, acting as Agent, with an address for service in Luxembourg,

defendant,

APPLICATION for partial annulment of Commission Decision 98/358/EC of 6 May 1998 on the clearance of the accounts presented by the Member States in respect of the expenditure for 1994 of the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (OJ 1998 L 163, p. 28), in so far as it

* Language of the case: Dutch.

disallows expenditure of NLG 16 378 716.63 incurred by the applicant in connection with the prefinancing of export refunds,

THE COURT (Sixth Chamber),

composed of: C. Gulmann, President of the Chamber, V. Skouris, J.-P. Puissochet, R. Schintgen and F. Macken (Rapporteur), Judges,

Advocate General: S. Alber,
Registrar: H.A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 15 June 2000, at which the Kingdom of the Netherlands was represented by J. S. van den Oosterkamp, acting as Agent, and the Commission by H. van Vliet,

after hearing the Opinion of the Advocate General at the sitting on 19 October 2000,

gives the following

Judgment

1 By application lodged at the Court Registry on 21 July 1998, the Kingdom of the Netherlands sought partial annulment, under the first paragraph of Article 173 of the EC Treaty (now, after amendment, the first paragraph of Article 230 EC), of Commission Decision 98/358/EC of 6 May 1998 on the clearance of the accounts presented by the Member States in respect of the expenditure for 1994 of the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (OJ 1998 L 163, p. 28, hereinafter 'the contested decision'), in so far as it disallowed expenditure of NLG 16 378 716.63 incurred by the applicant in connection with the prefinancing of export refunds.

2 The sum represents flat-rate corrections of 10% for the cereals sector and 5% for the beef and veal sector to the expenditure incurred by the Kingdom of the Netherlands in 1994 in connection with the prefinancing of export refunds in those sectors.

The legal context

3 Under Articles 1(2)(a) and 2(1) of Regulation (EEC) No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy (OJ 1970 L 94, p. 13), the Guarantee Section of the EAGGF finances refunds on exports to third countries granted in accordance with the Community rules within the framework of the common organisation of agricultural markets.

4 Under the first paragraph of Article 8(1) of Regulation No 729/70:

'[t]he Member States, in accordance with national provisions laid down by law, regulation or administrative action, shall take the measures necessary to:

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

— prevent and deal with irregularities;

— recover sums lost as a result of irregularities or negligence.'

5 It follows from Article 8(2) of the same regulation that the financial consequences of irregularities or negligence attributable to administrative authorities or other bodies of the Member States are not borne by the Community.

6 The specific rules governing the Community advance payment system are set out in Chapter 3, Title 2, of Commission Regulation (EEC) No 3665/87 of 27 November 1987 laying down common detailed rules for the application of the system of export refunds on agricultural products (OJ 1987 L 351, p. 1).

7 Article 25 of that regulation provides that where an exporter states his intention to export products or goods after processing or storage and to qualify for a refund, in accordance with Article 4 or Article 5 of Council Regulation (EEC) No 565/80 of 4 March 1980 on the advance payment of export refunds in respect of agricultural products (OJ 1980 L 62, p. 5), admission under those provisions is subject to the lodging with the competent customs authorities of a declaration, known as 'the payment declaration', showing all the particulars necessary for determining the refund.

8 Council Regulation (EEC) No 386/90 of 12 February 1990 on the monitoring carried out at the time of export of agricultural products receiving refunds or other amounts (OJ 1990 L 42, p. 6) lays down certain monitoring procedures to ensure that operations conferring entitlement to the payment of refunds on and all other amounts in respect of export transactions have actually been carried out and executed correctly.

9 Under Article 2 of Regulation No 386/90, Member States are to conduct, first, physical checks on goods in accordance with Article 3, at the time the customs export formalities are completed and before authorisation is given for the goods in question to be exported, on the basis of documents submitted in support of the export declaration, and, second, a scrutiny of the documents in the payment application file in accordance with Article 4.

10 Article 3(1) of Regulation No 386/90 provides that the physical checking of goods at the time of customs formalities on export must take the form of spot checks conducted frequently and without prior warning, and must relate to a representative sample of not less than 5% of the export declarations conferring entitlement to the payment of refunds on and all other amounts in respect of export transactions.

11 Under Article 2(3) of Commission Regulation (EEC) No 2030/90 of 17 July 1990 laying down detailed rules for the application of Regulation No 386/90 as regards physical checks carried out at the time of export of agricultural products attracting refunds or other amounts (OJ 1990 L 186, p. 6), Member States are to take the necessary measures so that it may be shown, where appropriate, that the customs offices have carried out the minimum physical checks referred to in Article 3(1) and (2) of Regulation (EEC) No 386/90.

12 Commission Regulation (EC) No 2221/95 of 20 September 1995 laying down detailed rules for the application of Regulation No 386/90 as regards physical checks carried out at the time of export of agricultural products qualifying for refunds (OJ 1995 L 224, p. 13) was adopted after the time of the facts at issue in the present case. It repeals Regulation No 2030/90. Article 5(1) of Regulation No 2221/95 states that, for the purposes of Article 2 of Regulation No 386/90, 'physical check' is to mean 'verification that the export declaration, including documents submitted in support thereof, and the goods correspond as regards quantity, nature and characteristics'. Article 5(2) states further that a physical check of which the exporter has received express or tacit prior warning may not count as a physical check.

Determination of the corrections (Belle Group Report)

13 The Commission's Belle Group Report (document No VI/216/93 of 1 June 1993) lays down the guidelines to be followed when financial corrections must be applied in relation to a Member State.

14 In addition to three main calculation techniques, the Belle Group Report sets out a flat-rate method for difficult cases:

'As 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....'

15 The Belle Group Report proposes three categories of flat-rate corrections:

'A. 2% of expenditure, where the deficiency is limited to parts of the control system of lesser importance, or to the operation of controls which are not essential to the assurance of the regularity of the expenditure, such that it can reasonably be concluded that the risk of loss to the EAGGF was minor.

B. 5% of expenditure, where the deficiency relates to important elements of the control system or to the operation of controls which play an important part in the assurance of the regularity of the expenditure, such that it can reasonably be concluded that the risk of loss to the EAGGF was significant.

C. 10% of expenditure, where the deficiency relates to the whole of or fundamental elements of the control system or to the operation of controls essential to assuring the regularity of the expenditure, such that it can

reasonably be concluded that there was a high risk of widespread loss to the EAGGF.'

16 The guidelines laid down by the abovementioned report further provide that, where there is doubt as to the correction to be applied, the following points may be taken into account as mitigating factors:

'— whether the national authorities took effective steps to remedy the deficiencies as soon as they were brought to light;

— whether the deficiencies arose from difficulties in the interpretation of Community texts.'

17 As a result of the Belle Group Report, Article 5(2) of Regulation No 729/70 was amended by Council Regulation (EC) No 1287/95 of 22 May 1995 (OJ 1995 L 125, p. 1) to read as follows:

'The Commission, after consulting the Fund Committee,

...

(c) shall decide on the expenditure to be excluded from the Community financing referred to in Articles 2 and 3 where it finds that expenditure has not been effected in compliance with Community rules.

Before a decision to refuse financing is taken, the results of the Commission's checks and the replies of the Member State concerned shall be notified in writing, after which the two parties shall endeavour to reach agreement on the action to be taken.

If no agreement is reached, the Member State may ask for a procedure to be initiated with a view to mediating between the respective positions within a period of four months, the results of which shall be set out in a report sent to and examined by the Commission, before a decision to refuse financing is taken.

The Commission shall evaluate the amounts to be excluded having regard in particular to the degree of non-compliance found. The Commission shall take into account the nature and gravity of the infringement and the financial loss suffered by the Community.

...'

18 Article 2 of Regulation No 1287/95 provides as follows:

'1. This Regulation shall enter into force on the seventh day following its publication in the *Official Journal of the European Communities*.

It shall apply from the financial year beginning on 16 October 1995.

2. Refusal to grant financing as referred to in Article 5(2)(c) of Regulation (EEC) No 729/70 may not relate to expenditure claimed against a financial year prior to 16 October 1992, but without prejudice to decisions regarding the clearance of the financial years preceding the entry into force of this Regulation.'

The facts

19 By letter of 11 January 1994, following audits carried out by the EAGGF at a large number of Community customs offices between June 1992 and November 1993, the Commission called on the Member States to improve the effectiveness of physical checks as soon as possible and by 1 July 1994 at the latest.

20 In 1994, the EAGGF carried out investigations in the Netherlands into the application of the Community arrangements for the prefinancing of export refunds in 1992 and 1993. The investigations concerned *inter alia* the cereals and beef and veal sectors.

21 They included investigations carried out in February 1994 at the Hoofdproduktschap Akkerbouwprodukten (Central Board for Agricultural Products, hereinafter 'the HPA').

22 In the cereals sector, investigations were subsequently carried out at customs offices in Rotterdam, Zaandam and Veendam (Netherlands) and at the premises of the undertakings World Flour, Wessanen Flour and AVEBE BA International.

23 In the beef and veal sector, investigations took place in February 1994 and May 1994 at the Produktschap Vee en Vlees (Cattle and Meat Board), at customs offices in Winterswijk and Nijmegen (Netherlands) and at the premises of the undertakings NVC International BV and Kühne & Heitz NV. The EAGGF decided not to proceed with planned investigations at the premises of a third undertaking in this sector because the Netherlands authorities had opened their own inquiry into that undertaking.

24 After an exchange of correspondence between the Commission and the Netherlands authorities on the results of the investigations, the Commission notified the Netherlands authorities, by letter of 28 July 1995, of the final conclusions of its investigations into the Netherlands control system for the clearance of the accounts in respect of the expenditure for 1993 and 1994 financed by the Guarantee Section of the EAGGF.

25 On 22 September 1995 the Commission drew up the Summary Report on the results of the investigations carried out for the clearance of the accounts of the EAGGF Guarantee Section for 1992, a report which was subsequently amended by communications of 25 October and 20 November 1995 (hereinafter 'the 1992 Summary Report').

26 The Commission set out various complaints in the 1992 Summary Report. However, it stated that, so far as Community prefinancing in respect of 1992 was

concerned, no financial corrections would be applied. With regard to the following years, the Commission reserved its position, which it would determine in the light of further investigations.

27 By official notification of 28 June 1996 concerning the application of flat-rate corrections in respect of 1993 and 1994 (hereinafter 'the 1996 official notification'), the Commission informed the Kingdom of the Netherlands 'of the final conclusions of the investigation into the arrangements and procedures applied by the Netherlands authorities for the control and management of the arrangements for the prefinancing of export refunds'. In that notification the Commission set out the main complaints to which it had already drawn attention, relating in particular to the organisation of physical checks in the Netherlands. It therefore proposed, for 1993 and 1994, flat-rate corrections of 10% in respect of the cereals sector and 5% in respect of the beef and veal sector.

28 Following the 1996 official notification, the Kingdom of the Netherlands submitted a request for conciliation by letter of 6 September 1996, pursuant to Article 2(1) of Commission Decision 94/442/EC of 1 July 1994 setting up a conciliation procedure in the context of the clearance of the accounts of the European Agricultural Guidance and Guarantee Fund (EAGGF) Guarantee Section (OJ 1994 L 182, p. 45). The conciliation body adopted its final report on 13 February 1997.

29 On 3 February 1997, the Commission's summary report on the results of the investigations carried out for the clearance of the EAGGF Guarantee Section accounts for 1993 (hereinafter 'the 1993 Summary Report') was drawn up. On the basis of the Commission's findings, flat-rate corrections of 10% for the cereals sector and 5% for the beef and veal sector were determined for 1993.

30 On 16 July 1997, the Netherlands authorities had discussions with the Commission and asked it to reconsider its position on the corrections in respect of 1994. By letter of 17 July 1997, the Commission made it known, following those discussions, that it saw no possibility of re-examining the financial corrections relating to 1994.

31 On 24 November 1997, the Commission adopted the summary report on the results of the investigations carried out for the clearance of the EAGGF Guarantee Section accounts for 1994 (hereinafter 'the 1994 Summary Report'). In that report the Commission proposes, on the basis of the investigations carried out in 1993 and 1994, the application of flat-rate corrections of 10% for the cereals sector and 5% for the beef and veal sector in respect of 1994.

32 The contested decision was adopted on 6 May 1998 on the basis of the 1994 Summary Report.

33 In May 1996, the Commission carried out investigations at the customs offices in Leyden, Enschede and Sittard (Netherlands) relating specifically to the physical checks provided for in Regulations No 386/90 and No 2221/95 in respect of agricultural products which had been the subject of applications for export refunds in 1994, 1995 and 1996. As a result of those investigations, the Commission noted in a letter to the Netherlands authorities of 18 December 1996, first, that during the investigations carried out in 1993 and 1994 it had been found that the physical checks carried out were still inadequate and, second, that the Netherlands authorities had thereupon decided to make the national instructions more specific and the control procedures stricter. The Commission also indicated in that letter that the positive effects of the measures adopted had been noted during the investigations carried out in 1996.

The first plea in law

34 By its first plea in law, which has three limbs, the Netherlands Government claims that the contested decision was adopted in breach of Regulation No 729/70, as amended by Regulation No 1287/95 (hereinafter 'Regulation No 729/70, as amended').

35 First of all, the Netherlands Government submits that the Commission infringed Article 5(2)(c) of Regulation No 729/70, as amended, inasmuch as the disputed corrections were established on the basis of investigations relating to 1992 and 1993 and were based on a few isolated cases of allegedly unlawful payments found by the Commission.

36 Next, it claims that the contested decision was adopted contrary to the principle of *bona fide* cooperation and the *audi alteram partem* rule, as laid down by Article 5(2)(c) of Regulation No 729/70, as amended. Those principles are also incorporated, it maintains, in the recommendations of the Belle Group Report. However, they were not observed when the contested decision was drawn up.

37 Finally, by the third limb, the Netherlands Government challenges the complaints made by the Commission as regards the effectiveness of physical checks carried out in the Netherlands in the cereals and beef and veal sectors.

38 It must be observed at the outset that only intervention undertaken in accordance with the Community rules in the framework of the common organisation of

agricultural markets is to be financed by the EAGGF (see Case C-253/97 *Italy* v *Commission* [1999] ECR I-7529, paragraph 6).

39 In this context, it must be emphasised that it is for the Commission to prove that an infringement of the rules on the common organisation of the agricultural markets has occurred (see Cases C-281/89 *Italy* v *Commission* [1991] ECR I-347, paragraph 19; C-55/91 *Italy* v *Commission* [1993] ECR I-4813, paragraph 13, and C-253/97 *Italy* v *Commission*, cited above, paragraph 6). The Commission is therefore obliged to give reasons for its decision finding an absence of, or defects in, inspection procedures operated by the Member State in question (Case C-8/88 *Germany* v *Commission* [1990] ECR I-2321, paragraph 23).

40 However, the Commission is required not to demonstrate exhaustively that the checks carried out by the national authorities are inadequate, or that there are irregularities in the figures submitted by them, but to adduce evidence of serious and reasonable doubt on its part regarding those checks or figures (Cases C-54/95 *Germany* v *Commission* [1999] ECR I-35, paragraph 35, and C-28/94 *Netherlands* v *Commission* [1999] ECR I-1973, paragraph 40).

41 The reason for this mitigation of the burden of proof on the Commission is that 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 (Cases C-54/95 *Germany* v Commission, cited above, paragraph 35, and C-28/94 *Netherlands* v *Commission*, cited above, paragraph 41).

42 The evidence adduced by the Netherlands Government against the findings on which the Commission based the contested decision must be examined in the light of those considerations.

The errors allegedly committed in the contested decision

43 The third limb of the Netherlands Government's first plea in law must be examined first.

The cereals sector

44 With regard to the cereals sector, the Netherlands Government disputes, first, the conclusions drawn by the Commission in the 1993 Summary Report from a particular problem which came to light during the physical checking of the declarations made by the undertaking Wessanen Flour, namely, that the national authorities did not know where that undertaking stored the cereals which had given rise to prefinancing. The Netherlands Government claims that that is a particular problem which, as such, is not sufficient to justify the conclusion that the system of control exhibits inadequacies of a general nature.

45 However, making a general reference in a payment declaration to a storage authorisation without indicating the exact location of the goods covered creates a gap in the control system, inasmuch as it is impossible to carry out a check without prior warning unless the precise place of storage is known. In this case, as the Commission stated, without being contradicted by the Netherlands Government, at least one other undertaking received prefinancing up to the beginning of 1994, or even longer, by resorting to that practice. Consequently, the Netherlands Government has been unable to prove that the Commission's finding that the Netherlands control system exhibits shortcomings in that respect is erroneous.

46 It follows that the argument put forward by the Netherlands Government is not sufficient to refute the Commission's complaints.

47 Second, the Netherlands Government disputes the Commission's assertion that the fact that Wessanen Flour and World Flour used the same warehouse without separating their respective stocks created the obvious risk that both would apply for prefinancing in respect of the same products. The Netherlands Government claims that, in the administration of the warehouse, a clear distinction was established between the stocks of each of the owners concerned. It also observes that, at the time of the EAGGF investigation, those undertakings were in the process of merging, so that the verifications made at their premises are not representative of the Netherlands control system.

48 As is apparent from the file, the undertakings in question are two exporters which, at the material time, were still separate in the eyes of the HPA. It is also common ground that, in 1992, they received approximately 40% of the total amount of refunds prefinanced in the Netherlands in the cereals sector.

49 It is also clear that, after the EAGGF had carried out its inspections, the Netherlands authorities altered the stock control procedure so as to be able to distinguish each owner's share of the whole stock present in a warehouse. However, the Netherlands Government does not deny that, before those EAGGF inspections, no distinction was made in that type of situation between the stocks of various owners.

50 In such circumstances, even though the situation of those two exporters was unusual, it is clear from the investigation carried out in relation to them by the EAGGF that, in this instance, the Netherlands control system in the cereals sector did not exclude the possibility of an unlawful payment. It is apparent that the system was not designed in such a way as to enable a check of the prefinanced quantities to be made at any time. Since the Netherlands Government's

statements in no way place in question the Commission's findings in this respect, the argument put forward by the Netherlands Government must be rejected.

51 Third, the Netherlands Government maintains that the Commission erred in finding that the absence of physical checks in the port of Rotterdam at the time when goods were under prefinancing arrangements constituted a serious and unacceptable gap in the control system. It submits that physical checks carried out when the goods enter the warehouse are ineffective and that, in those circumstances, systematic checks assume great importance. It argues that the national legislation provides for a check of the advance-payment declaration on the basis of stock lists and stock management, together with an *ex post facto* administrative check combined with a physical spot check on exportation of the finished product. According to that government, those checks, viewed as a whole, constitute an appropriate control mechanism.

52 It is common ground that the cereals of different undertakings were stored on the site of the port of Rotterdam in 333 interconnected silos and that only one part of those stocks was subject to prefinancing arrangements. It is also common ground that, in such a situation, physical checks of the cereal stocks were of limited value.

53 In those circumstances, if the Commission complains that the Kingdom of the Netherlands failed to carry out the appropriate checks, it is for that Member State to prove that the Commission's assertions are incorrect (Case C-54/95 *Commission* v *Germany*, cited above, paragraph 35, and Case C-28/94 *Netherlands* v *Commission,* cited above, paragraph 41).

54 However, as the Advocate General rightly observed at point 57 of his Opinion, by referring to a general control system which did not apply to the particular situation in the port of Rotterdam the Netherlands Government did not provide the required explanations.

55 It follows that the Netherlands Government's argument cannot be upheld.

56 Fourth, the Netherlands Government maintains that it is incorrect to state, as the Commission did, that no physical checks were carried out in the Netherlands during the prefinancing period. According to that government, the Commission was able to ascertain that they were during its visit to the undertaking AVEBE BA International, which revealed no irregularity.

57 It is sufficient to note in this regard that the inspection report shows that physical checks took place at that undertaking's premises not during the prefinancing period, but only following the export declaration.

58 The Netherland Government's statements therefore cannot serve to refute the Commission's complaint in this regard, so that that government's argument must be rejected.

The beef and veal sector

59 With regard to the beef and veal sector, the Netherlands Government disputes, first, the assertions made by the Commission in the 1993 Summary Report, according to which physical checks were not carried out without warning at the Winterswijk customs office. It contends, on the one hand, that it was only by Regulation No 2221/95 that it was decided that physical checks were to be carried out without warning. That rule has applied only since 1 January 1996. It

did not apply to physical checks carried out before then. The government also contends that the checks carried out at the customs office in question were announced very shortly before they were actually carried out, so that there was in fact little warning. Finally, it maintains that the Commission's criticism is directed only at the Winterswijk customs office.

60 It must first be observed that the announcement of checks cannot be regarded as compatible with the objective of Regulation No 386/90, namely, the carrying out of effective checks (see, to that effect, Case C-242/97 *Belgium* v *Commission* [2000] ECR I-3421, paragraph 41). Accordingly, the Netherlands Government cannot claim that it was only from the time when Article 5(2) of Regulation No 2221/95 entered into force that announced checks could no longer be counted as checks within the meaning of Article 2(a) of Regulation No 386/90.

61 Next, the Netherlands Government's contention that the prior announcement of checks did not entail unacceptable risks must be rejected. Where a trader was in a position to know that a physical check would not take place, substitution of goods could not be ruled out.

62 Finally, with regard to the Netherlands Government's assertion that the findings relating to a single customs office cannot support the conclusion that there are defects in the control system as such, justifying a flat-rate reduction, it is sufficient to note that the EAGGF's investigation reports on the Rotterdam and Veendam customs offices indicate that there were gaps in the checks carried out by those offices, which were similar to those found at Winterswijk.

63 It follows that that argument cannot be upheld.

64 Second, the Netherlands Government disputes the Commission's finding that the checks were superficial. It points out that the Voedselvoorzienings in- en verkoopbureau (Office for the Purchase and Sale of Food Supplies, hereinafter 'the VIB') checked the category, the origin of male animals and the weight of the goods, sealed the boxes containing them and issued a certificate. The customs then checked the seal, the validity of the certificate and the category and weight of the goods. Moreover, the criticism made by the Commission is based only on the check carried out at the Winterswijk customs office.

65 The 1993 Summary Report finds, and no proof to the contrary was adduced by the Netherlands Government, that the seals affixed to the boxes by the VIB were easy to remove, creating a risk of substitution. In the light of that finding, the Commission is entitled to take the view that it was not possible to guarantee that the products subjected to a physical check during the prefinancing period were identical to those which were the subject of the export declaration.

66 As for the rest, the file shows that the checks were found to be superficial not only at Winterswijk but also at Nijmegen.

67 The second argument put forward by the Netherlands Government must therefore be rejected.

68 Third, the Netherlands Government disputes the Commission's assertion that the practice of carrying out checks on the basis of faxed information rather than on the basis of originals of payment declarations creates a risk of fraud. It maintains that the information faxed by the declarant contained all the data essential for

verifying the declaration. It argues that there was no danger that the original of the declaration selected for checking on the basis of faxed information might be altered after the check.

69 However, Article 25 of Regulation No 3665/87 makes it clear that prefinancing is subject to the lodging of the payment declaration.

70 The Netherlands authorities' practice of accepting a fax is clearly not compatible with that provision. It created a risk of unlawful payment of subsidies making it possible, after an inaccuracy had been found during a customs check made on the basis of a fax, for the trader to lodge another declaration containing the correct information.

71 It follows that the Netherlands Government's statements are not sufficient to demonstrate that the Commission's criticisms on this point are unjustified.

72 With regard, fourth, to the Commission's complaint that the examination reports do not give details of the checks carried out, inasmuch as they did not make it possible to determine either what had actually been checked or whether, in particular, a comprehensive physical check had taken place, the Netherlands Government maintains that the requirement to draw up detailed examination reports was introduced only by Regulation No 2221/95, which did not apply to 1994.

73 The Netherlands Government also challenges that complaint in its reply on the ground that it stems from an error made the Commission during its investigation

at the Winterswijk customs office. It maintains that the Commission failed to make a distinction between the files checked on the basis of Regulation No 386/90 and those checked administratively. The former were more detailed than the latter.

74 First, under Article 2(3) of Regulation No 2030/90 Member States are required to draw up appropriate documentation on each check. It follows that the Netherlands Government's argument that the requirement to draw up detailed examination reports arose only on the entry into force of Regulation No 2221/95 cannot be upheld.

75 With regard, second, to the plea referred to in paragraph 73 of this judgment, it is sufficient to point out that it was introduced for the first time at the reply stage, without any explanation for the delay in putting it forward. Consequently, pursuant to Article 42(2) of the Rules of Procedure, it must be rejected as out of time.

76 It follows from the foregoing that the part of the first plea in law directed against the errors allegedly committed by the Commission in the evaluation of the effectiveness of the checks must be rejected.

Failure to comply with the correction procedure

77 By the first limb of its first plea in law, the Netherlands Government complains that the Commission failed to comply with the correction procedure under Article 5(2) of Regulation No 729/70, as amended. It argues that, although

Regulation No 1287/95 did not enter into force until the start of the financial year beginning on 16 October 1995, the amendment made by that regulation to Article 5(2) of Regulation No 729/70 defines the Commission's duty to cooperate in good faith in this field.

78 The Netherlands Government submits, first, that the disputed corrections were established on the basis of verifications relating to 1992 and 1993. The disputed corrections were therefore not based on verifications relating to 1994. However, verifications relating to 1992 and 1993 cannot in any event result in corrections of expenditure incurred during 1994. Since those verifications had already previously led the Commission to propose flat-rate corrections for both 1993 and 1994, the Commission is applying a reduction twice for the same alleged shortcomings. Moreover, in May 1996, the EAGGF carried out a verification in connection with the clearance of accounts for 1994, during which it found that the checks carried out by the Netherlands authorities were generally correct. That finding cannot give rise to reductions such as those disputed in the present case.

79 Second, the Netherlands Government maintains that, in view of the limited number of investigations carried out by the Commission during 1994 and the limited number of irregularities found on those occasions, the Commission cannot take verifications relating to 1994 as a basis for the view that the Netherlands control system as a whole exhibited fundamental deficiencies justifying flat-rate corrections of 10% in the cereals sector and 5% in the beef and veal sector.

80 As a preliminary point, it must be determined whether refusal of financing in connection with the clearance of accounts for 1994 is subject to the requirements referred to in Article 5(2)(c) of Regulation No 729/70, as amended.

81 It must be borne in mind that, even though, as provided in the second subparagraph of Article 2(1), Regulation No 1287/95 applies only to the financial year beginning on 16 October 1995, Article 2(2) thereof provides that refusal to grant financing as referred to in Article 5(2)(c) of Regulation No 729/70, as amended, may not relate to expenditure claimed against a financial year prior to 16 October 1992, but without prejudice to decisions regarding the clearance of the financial years preceding the entry into force of Regulation No 1287/95.

82 In order to give Article 2(2) of Regulation No 1287/95 a useful sense, the correction procedure must be taken to apply to financial years subsequent to 16 October 1992 which were not the subject of a clearance decision prior to the entry into force of that regulation.

83 It follows that, in this case, as far as the clearance of accounts for 1994 is concerned, the Commission was required to implement the procedure referred to in Article 5(2)(c) of Regulation No 729/70, as amended.

84 With regard, first, to the investigations carried out in February, April and May 1994, on which the 1993 and 1994 Summary Reports were based, it should be noted in the first place that they covered the control practices followed by the national authorities up to that time and that the irregularities found therefore also concerned, in part, 1994.

85 The mere fact that the findings of those investigations had already been set out in the 1993 Summary Report did not prevent the Commission from taking them into consideration in the contested decision.

86 Next, as regards the allegation that the Commission applied a reduction twice, it is sufficient to note that the deficiencies found by the EAGGF related both to 1993 and to 1994. Under those circumstances, the Commission was obliged to apply a correction to both financial years.

87 It follows that the Netherlands Government's argument relating to a double penalty unlawfully imposed in respect of the same deficiencies cannot be accepted.

88 Finally, as regards the argument based on the 1996 investigations, the file shows that the latter related to the application of Regulation No 386/80 and therefore to the physical checks carried out by the customs authorities on all exported goods, whereas the 1994 investigations concerned the application of the prefinancing arrangements. The findings of the 1996 investigations cannot refute the results of the 1994 investigations since the subject-matter of the investigations of those two years was not the same.

89 Furthermore, in its letter of 18 December 1996, the Commission again drew attention to the defects in the Netherlands system of physical checks as it existed in 1993 and 1994. The letter shows that it was only following the criticisms expressed by the Commission that the Netherlands authorities took what the Commission considered to be positive steps. Consequently, the verifications resulting from the investigations carried out by the EAGGF in May 1996 in respect of 1994 do not in any way contradict the finding that there were deficiencies in the system of physical checks in place in the Netherlands in 1994.

90 Second, the Netherlands Government's assertion that (a) there was no basis for claiming that the Netherlands control system in general had serious deficiencies justifying the disputed flat-rate reductions and (b) neither the customs offices

checked nor the irregularities found were representative, so that there was no great financial risk for the Community, must be examined.

91 It must first be observed, as has already been noted in paragraph 38 of this judgment, that the object of the procedure for the clearance of accounts is to ensure that the appropriations made available to the Member States have been used in accordance with the Community rules in force within the framework of the common organisation of markets.

92 According to the case-law of the Court, Article 8(1) of Regulation No 729/70, which lays down the obligations imposed on the Member States in this field by Article 5 of the EC Treaty (now Article 10 EC), defines the principles according to which the Community and the Member States are to ensure the implementation of Community decisions on agricultural intervention financed by the EAGGF and combat fraud and irregularities in relation to those operations. That provision imposes on the Member States the obligation to take the measures necessary to satisfy themselves that the transactions financed by the EAGGF are actually carried out and are executed correctly (Case C-2/93 *Exportslachterijen van Oordegem* v *Belgische Dienst voor Bedrijfsleven en Landbouw and Generale Bank* [1994] ECR I-2283, paragraphs 17 and 18, and Case C-235/97 *France* v *Commission* [1998] ECR I-7555, paragraph 45).

93 Next, as already noted in paragraph 40 of this judgment, where the Commission refuses to charge certain expenditure to the EAGGF on the ground that it was incurred as a consequence of infringements of Community legislation which are attributable to a Member State, the Commission is required not to demonstrate exhaustively that the checks carried out by the Member States were inadequate, but to adduce evidence of serious and reasonable doubt on its part regarding those checks. As was stated in paragraph 41 of this judgment, the reason for this mitigation of the burden of proof on the Commission is that 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 its checks have in fact been carried out and, if appropriate, that the Commission's assertions are incorrect.

94 As regards, in the present case, the facts found by the Commission in its 1993 and 1994 Summary Reports, the Commission was able, as may be seen from paragraphs 44 to 76 of this judgment, to adduce evidence of a number of breaches of the rules on the common organisation of agricultural markets, and the Netherlands Government has not shown that the Commission's findings were incorrect. Consequently there are serious doubts as to whether the system of control measures applied was appropriate and effective.

95 Finally, as to the question whether the deficiencies found were such as to justify the application of flat-rate corrections of 10% in the cereals sector and 5% in the beef and veal sector, it must be observed that the number of investigations carried out by the Commission at the premises of customs offices and undertakings was sufficient for them to be representative. It is clear from the documents before the Court that the undertakings selected for the investigations had received 39.67% of the prefinancing granted in 1992 in the beef and veal sector in the Netherlands, whereas the undertakings inspected received 16% of the prefinancing granted for 1994 in that sector. Those documents also show that in the cereals sector the investigations covered 57% of the expenditure. In those circumstances, the investigations carried out in relation to the Netherlands control system were sufficiently representative to permit extrapolation to the system as a whole.

96 On that basis, it cannot be claimed, as the Netherlands Government does, that the investigations were not sufficiently representative because the Commission decided not to examine the situation of a particular undertaking in the beef and veal sector. The file shows that it was at the express request of the Netherlands authorities that the Commission did not pursue the investigation at the premises of the undertaking concerned. The Commission's statement that it was too late, when the national authorities mentioned the problems in relation to that undertaking, to select another undertaking and examine the file held by the paying agency was not challenged by the Netherlands authorities.

97 In such circumstances, the applicant cannot claim that the failure to monitor that undertaking meant that the investigations were not representative (see, to that effect, Case 151/80 *De Hoe* v *Commission* [1981] ECR 3161, paragraphs 17 to 19).

98 Consequently, it has not been shown that the correction procedure was not complied with.

Failure to observe the principle of bona fide *cooperation and the* audi alteram partem *rule*

99 With regard to the objection, raised by the second limb of the first plea, that when the Commission adopted the contested decision it failed to observe the principle of *bona fide* cooperation and the *audi alteram parte* rule, the documents before the Court show that a large amount of information was exchanged by the Commission and the Netherlands authorities before the contested decision was adopted, *inter alia* during the conciliation procedure.

100 As regards, in particular, the fact that the Commission adopted the draft summary report for 1993 without awaiting the report of the conciliation body, the documents before the Court show that in any event the Commission took note of the Netherlands authorities' arguments and examined them, even if it did not find them persuasive.

101 In those circumstances, neither the principle of *bona fide* cooperation nor the *audi alteram parte* rule has been infringed.

102 It follows that the first plea in law must be rejected as unfounded.

The second plea in law

103 By its second plea in law, the Netherlands Government claims that the contested decision was adopted in breach of the principle of legal certainty. The plea has two limbs.

104 In the first limb, the Netherlands Government submits that the Commission decided to make substantial flat-rate corrections in respect of 1994 in breach of the formal promise that the financial consequences would be linked to defects in the national control systems only from 1 July 1994 onwards, a promise which appears both in its letter of 11 January 1994 and in the 1992 Summary Report. In view of the commitments it gave in that regard, the Commission was entitled to impose corrections only on the basis of an investigation carried out after 1 July 1994.

105 In the second limb, the Netherlands Government maintains, on the other hand, that in fixing those corrections the Commission failed to take account of mitigating circumstances, notably improvements made to the national control system and difficulties in the interpretation of the legislation, an omission which is contrary to the Commission's own guidelines as set out in the Belle Group Report.

106 With regard to the argument based on the letter of 11 January 1994, that letter relates only to physical checks on exportation, whereas the disputed financial

corrections are based on the shortcomings found in the application of the refund prefinancing arrangements. It follows that the commitment contained in that letter did not preclude the corrections at issue.

107 As far as the 1992 Summary Report is concerned, in that report the Commission reserved its position with regard to subsequent financial years, so that no commitment can be inferred therefrom.

108 Accordingly, the first limb of the second plea in law must be rejected.

109 With regard to the second limb, relating to the amount of the financial correction, it must be observed, first, that the Commission may go so far as to refuse to charge to the EAGGF the whole of the expenditure in question if it finds that there are no effective control procedures.

110 Second, as already noted in paragraph 38 of this judgment, the EAGGF finances only intervention undertaken in accordance with the Community rules in the framework of the common organisation of agricultural markets. Since, as is emphasised in paragraph 41 of this judgment, it is the Member State which is best placed to collect and check the data required for the clearance of EAGGF accounts, it is the Member State which is required to adduce the most detailed and comprehensive evidence that its data are accurate and, if appropriate, that the Commission's assertions are incorrect.

111 In the present case, the Netherlands Government has not adduced proof that the criteria applied by the Commission were arbitrary and unfair.

112 First, the deficiencies found by the Commission concerned fundamental aspects of the Netherlands control system and the carrying out of checks which play an essential part in ensuring that expenditure is properly incurred. Second, the Commission has shown that, in view of the extent of the deficiencies found to exist, there was a corresponding risk of high losses for the EAGGF.

113 In those circumstances, the Commission was entitled to conclude that there was a considerable risk of loss for the EAGGF, such as to justify flat-rate corrections of 10% for the cereals sector and 5% for the beef and veal sector.

114 Consequently, the Netherlands Government's second plea in law must be rejected.

The third plea in law

115 By its third plea in law, the Netherlands Government submits that, by departing in the contested decision from its own guidelines as set out in the Belle Group Report, without stating the reasons for such a departure, the Commission infringed the principle of equal treatment.

116 As indicated in paragraphs 77 to 97 of this judgment, no proof of infringement of the guidelines set out in the Belle Group Report has been adduced by the Netherlands Government.

117 It follows that the third plea in law cannot be upheld.

The fourth plea in law

118 By its fourth plea in law, the Netherlands Government claims that insufficient reasons are given for the contested decision. It maintains that the decision does not state why the Commission found that the Netherlands control system did not satisfy the requirements of Community law, or on which grounds the financial corrections relating to 1992 and 1993 justified the financial corrections relating to 1994. In addition, the Commission relied on grounds which were incorrect in fact. Furthermore, it failed to state why, notwithstanding its formal promise, it did not take into consideration the improvements in the control procedure, which were introduced after 1993, in fixing the disputed corrections. Finally, the Commission should have stated reasons for its decision not to follow the guidelines in the Belle Group Report.

119 On this point, the Court has consistently held that, in the particular context of the preparation of decisions relating to the clearance of EAGGF 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 (Case C-22/89 *Netherlands* v *Commission* [1990] ECR I-4799, paragraph 18, and Case C-27/94 *Netherlands* v *Commission* [1998] ECR I-5581, paragraph 36).

120 In the present case, the file shows that the Netherlands Government was closely involved in the process by which the contested decision came about. The Commission's doubts concerning the reliability of the Netherlands control system

in the beef and veal and cereals sectors were brought to the attention of the Netherlands authorities several times in writing, discussions took place and the matter was referred to the conciliation body.

121 Moreover, both in the 1996 official notification and in the 1994 Summary Report, which refers to the 1993 Summary Report, the Commission indicated the reasons which led it to refuse clearance of the disputed amount.

122 The statement of the reasons for the contested decision must therefore be held to be sufficient.

123 It follows from the foregoing that the fourth plea in law must be rejected as unfounded.

124 Since none of the pleas in law put forward by the Netherlands Government has been successful, the application must be dismissed.

Costs

125 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Kingdom of the Netherlands has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the Kingdom of the Netherlands to pay the costs.**

Gulmann Skouris Puissochet

Schintgen Macken

Delivered in open court in Luxembourg on 6 March 2001.

R. Grass

Registrar

C. Gulmann

President of the Sixth Chamber