OPINION OF ADVOCATE GENERAL
BOT
delivered on 6 May 2008 [1]

1. By this reference for a preliminary ruling, the College van Beroep voor het bedrijfsleven (Netherlands) asks the Court to interpret several Community provisions linking the payment of export refunds for live bovine animals to compliance with Community rules on the protection of animals during transport.

2. This reference was made in a dispute between Heemskerk BV and Firma Schaap, [2] on the one hand, and the Productschap Vee en Vlees, [3] on the other hand, regarding decisions taken by the latter demanding recovery of the export refund which it considers to have been paid unduly to those two undertakings.

3. Among the questions referred to the Court by the national court are two which are of particular interest in the light of the issue of application of Community law by a national court of its own motion.

4. The national court essentially asks the Court to rule on whether Community law requires a national court, in proceedings such as those in the main action, which is concerned not only with the protection of animals during transport but also with the protection of the financial interests of the European Community, to review, of its own motion, the legality of a national administrative measure by having regard to pleas based on Community law, even where such an examination results in the applicant in the main proceedings being placed in a less advantageous position than that in which he would have found himself if he had not brought that action.

5. In this Opinion, I will set out my reasons for taking the view that, in circumstances such as those in the main proceedings, a national court, as a Community court of ordinary jurisdiction, is required to apply Community law of its own motion.

1 — Original language: French.

2 — 'The appellants in the main proceedings'.

3 — 'The Productschap'.

I — Legal framework

A — *Community law*

1. Regulation (EC) No 1254/1999

6. Council Regulation (EC) No 1254/1999 of 17 May 1999 on the common organisation of the market in beef and veal [4] repealed and replaced Regulation (EEC) No 805/68 of the Council of 27 June 1968 on the common organisation of the market in beef and veal. [5]

7. Under the second subparagraph of Article 33(9) of Regulation No 1254/1999, the payment of the refund for exports of live animals is to be subject to compliance with the provisions established in Community legislation concerning animal welfare and, in particular, the protection of animals during transport.

2. Regulation (EC) No 615/98

8. Article 1 of Commission Regulation (EC) No 615/98 of 18 March 1998 laying down specific detailed rules of application for the export refund arrangements as regards the welfare of live bovine animals during transport [6] provides that for the application of the second subparagraph of Article 13(9) of Regulation No 805/68, replaced by the second subparagraph of Article 33(9) of Regulation No 1254/1999, the payment of export refunds for live bovine animals is to be subject to compliance, during the transport of the animals to the first place of unloading in the third country of final destination, with the provisions of Council Directive 91/628/EEC of 19 November 1991 on the protection of animals during transport and amending Directives 90/425/EEC and 91/496/EEC, [7] as amended by Council

4 — OJ 1999 L 160, p. 21.

5 — OJ, English Special Edition 1968 (I), p. 187. Regulation as amended by Council Regulation (EC) No 2634/97 of 18 December 1997 (OJ 1997 L 356, p.13, 'Regulation No 805/68'). Under Article 49(2) of Regulation No 1254/1999, references to Regulation No 805/68 are to be construed as references to that first regulation and should be read in accordance with the correlation table in Annex V of that regulation.

6 — OJ 1998 L 82, p. 19. That regulation was repealed and replaced by Commission Regulation (EC) No 639/2003 of 9 April 2003 laying down detailed rules pursuant to Council Regulation (EC) No 1254/1999 as regards requirements for the granting of export refunds related to the welfare of live bovine animals during transport (OJ 2003 L 93, p. 10). The first subparagraph of Regulation No 639/2003 states that Regulation No 615/98 is to continue to apply to export declarations accepted prior to the application of that first regulation.

7 — OJ 1991 L 340, p. 17.

Directive 95/29/EC of 29 June 1995, [8] and the provisions of Regulation No 615/98.

9. In order to monitor compliance with that condition governing the award of export refunds for bovine animals, Article 2(2) of that regulation provides that every transport of animals leaving the customs territory of the Community must be verified and certified by an official veterinarian.

10. Article 2(2) accordingly provides that an official veterinarian at the exit point must verify and certify that the animals are fit for the intended journey in compliance with Directive 91/628, that the means of transport by which the live animals are to leave the customs territory of the Community complies with the provisions of that directive and that provisions have been made for the care of the animals during the journey in accordance with the provisions of that directive.

11. Under Article 2(3) of Regulation No 615/98, if the official veterinarian at the exit point is satisfied that the requirements of Article 2(2) are met, he is to certify this by the entry 'Checks pursuant to Article 2 of Regulation (EC) No 615/98 satisfactory' and by stamping and signing the document constituting evidence of exit from the customs territory of the Community, either in Section J of the control copy T 5 or in the most appropriate place on the national document.

12. Under Article 5(2) of that regulation, applications for the payment of export refunds must be supplemented by proof that Article 1 of that regulation has been complied with. That proof is to be furnished by the document constituting evidence that the animals left the customs territory of the Community, containing the certification issued at the exit point by the official veterinarian, and, where appropriate, by the report on the checks, containing the findings made upon arrival of the animals by the control authority of the third country of final destination.

13. Moreover, Article 5(3) of Regulation No 615/98 provides that the export refund is not to be paid for animals which died during transport or for animals for which the competent authority considers — in the light of the documents referred to in Article 5(2), the reports on the checks referred to in Article 4 of that regulation and/or all other elements at its disposal concerning compliance with Article 1 of that regulation — that

8 — OJ 1995 L 148, p. 52, 'Directive 91/628'.

Directive 91/628 on the protection of animals during transport was not complied with.

14. It should also be pointed out that that regulation, as stated in the sixth recital in the preamble thereto, contains an explicit provision for the recovery of export refunds which are considered to have been paid unduly in the light of the animal welfare requirement.

15. Article 5(7) of that regulation accordingly provides that where it is established after payment of the refund that Community legislation on the protection of animals during transport has not been complied with, the relevant part of the refund is to be considered to have been paid unduly and is to be recovered in accordance with the provisions of Article 11(3) to (6) 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,[9] replaced by Article 52 of Commission Regulation (EC) No 800/1999 of 15 April 1999, which has the same purpose.[10]

9 — OJ 1987 L 351, p. 1.
10 — OJ 1999 L 102, p. 11.

3. Directive 91/628

16. Under the first indent of Article 3(1)(aa) of Directive 91/628, the Member States are to ensure that space allowances (loading densities) for animals at least comply with the figures laid down in Chapter VI of the annex to that directive in respect of the animals and the means of transport referred to in that chapter.

17. Chapter VI, paragraph 47, B, of that annex covers the loading densities applicable to bovine animals. It sets out for each type of transport and on the basis of an animal's weight a surface area in square metres per animal.

18. Moreover, under Article 5 A(1)(a)(ii) of Directive 91/628, the Member States are to ensure that any transporter is covered by an authorisation valid for all transport of vertebrate animals within the Community, granted by the competent authority of the Member State of establishment or, if an undertaking established in a third country is concerned, by a competent authority of a Member State of the Union, subject to a written undertaking by the person in charge of the transport undertaking to comply with the requirements of the Community veterinary legislation in force.

19. Furthermore, Article 5 A(1)(c) of that directive requires the Member States to ensure that any transporter uses for the transport of animals means of transport that will ensure compliance with Community requirements concerning welfare during transport.

B — *National law*

20. Article 8:69 of the General Law on administrative law (Algemene Wet Bestuursrecht) provides:

'1. The court before which proceedings are brought shall give its ruling on the basis of the application, the documents produced, the preliminary investigation and the consideration of the case at the hearing.

2. The court shall supplement the pleas in law of its own motion.

3. The court may supplement the facts of its own motion.'

21. That provision is applicable to the procedures followed before the College van Beroep voor het bedrijfsleven pursuant to Article 19(1) of the Law on administrative appeals in economic matters (Wet bestuursrechtspraak rechtspraak bedrijfsorganisatie).

II — The dispute in the main proceedings and the questions referred for a preliminary ruling

22. It is clear from the order for reference that each of the appellants in the main proceedings gave notification, on 25 January 2000, of the exportation of 300 in-calf heifers to Morocco and applied for an export refund under Regulation No 800/1999.

23. The 600 in-calf heifers, together with 40 in-calf heifers belonging to another undertaking, were loaded on the same day onto the Irish vessel *MV Irish Rose* ('the vessel') at Moerdijk (Netherlands) for transport to Casablanca (Morocco).

24. The official veterinarian who checked the vessel at the point of exit certified that vessel by attesting on the T 5 control copy

that the conditions of Article 2 of Regulation No 615/98 had been fulfilled.

25. That vessel, which is registered in Ireland, has been granted authorisation in respect of a surface area of 986 m^2 by the competent authority of the Irish Republic.

26. During a check carried out under Council Regulation (EEC) No 4045/89 of 21 December 1989 on scrutiny by Member States of transactions forming part of the system of financing by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund and repealing Directive 77/435/EEC, [11] a document was found in the administrative files of the appellants in the main proceedings which revealed that the capacity of the vessel for the transport of live animals had been exceeded by 111 bovine animals.

27. A more in-depth investigation, carried out by the General Inspectorate (AID), showed that the official veterinarian had not checked whether the loading density standards set out in Chapter VI of the Annex to Directive 91/628/EEC had been complied with. Moreover, on the basis of a statement by the person attending the animals during the transport to Morocco, the General Inspectorate concluded that the welfare conditions of the bovine animals during that transport, as laid down by that directive, had not been complied with and that the vessel was clearly overloaded.

28. By decisions of 26 March 2004, the Productschap withdrew the refund which had been granted to the appellants in the main proceedings and demanded repayment of the amounts concerned, increased by 10%. It also determined the statutory interest owed.

29. By letters of 13 April 2004, each of appellants in the main proceedings lodged an objection against those decisions.

30. Having heard the appellants in the main proceedings on 6 May 2004, the Productschap adopted the decisions challenged in the main proceedings on 2 and 25 August 2004.

31. By those decisions, the Productschap upheld the decisions to withdraw and recover the export refund, but reduced the amount to be recovered. Considering that

11 — OJ 1989 L 388, p. 18. Regulation as amended by Council Regulation (EC) No 2154/2002 of 28 November 2002 (OJ 2002 L 328, p. 4, 'Regulation No 4045/89').

only the number of bovine animals in excess of the number permitted with respect to the authorised area of 986 m^2 had been transported in breach of the standards laid down by Directive 91/628, including those governing loading density, the Productschap took the view that it was necessary to withdraw and recover the refund granted in respect of the part of the load which was inconsistent with the welfare of the animals.

32. It started from the finding that, pursuant to Chapter VI, paragraph 47, B, of the Annex to Directive 91/628, it was necessary to provide each animal with a surface area of at least 1.70775 m^2. In order to calculate the number of animals transported in breach of that loading standard, the Productschap divided the authorised surface area of the vessel, that is 986 m^2, by the area laid down for each animal. It concluded that the maximum number of animals which could be transported on that vessel was 577.36 and that the vessel in question was thus overloaded by 62 animals.

33. The Productschap then calculated the portion of the refund to be recovered by reference to the excess number of animals transported, on a pro rata basis according to the share of the total consignment attributable to the appellants in the main proceedings. In accordance with that calculation, each of them was required to repay the refund for 29 animals. Moreover, pursuant to Article 5(7) of Regulation No 615/98, in conjunction with Article 5(4) of that regulation, the amount to be repaid was increased by an equal amount.

34. The appellants in the main proceedings appealed against those decisions to the national court. In support of their appeal, they relied on several pleas in law. Essentially they claim, first, that the certification carried out by the official veterinarian is probative in nature and, secondly, that the requirement under Irish law that only an area of 986 m^2 of the vessel could be used for the transport of the animals was not applicable to a transport from the Netherlands to Morocco.

35. Since it was uncertain as to the interpretation of Community law, the national court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) (a) Is an administrative body empowered to decide, contrary to the declaration of the official veterinarian referred to in Article 2(2) of Regulation No 615/98, that the transport of animals to which the official veterinarian's declaration relates is not in accordance with the conditions laid down in Directive 91/628?

(b) If the answer to Question 1a is in the affirmative:

Is the exercise by the administrative body of that power on grounds of Community law subject to specific restrictions, and if so, what are those restrictions?

(2) If the answer to Question 1 is in the affirmative:

When assessing whether there is an entitlement to refunds, for which Regulation No 800/1999, for example, provides, should an administrative body of a Member State determine whether a transport of live animals complies with Community animal welfare legislation by reference to the requirements applicable in the Member State or to those of the State in which the vessel transporting the live animals is registered and which has granted an authorisation for that vessel?

(3) Does Community law require a court or tribunal to conduct, of its own motion, an examination of grounds derived from Regulation No 1254/1999 and Regulation No 800/1999 that is to say, an examination of grounds falling outside the ambit of the dispute as submitted to it?

(4) Is the phrase 'subject to compliance with the provisions established in Community legislation concerning animal welfare' in Article 33(9) of Regulation No 1254/1999 to be understood as meaning that, where it is established that while transporting live animals a vessel was so heavily laden as to exceed the cargo permitted by the relevant welfare legislation, there was a failure to comply with Community animal welfare legislation only in respect of the number of animals by which the permitted cargo was exceeded, or must it be found that that legislation was not complied with in respect of all the live animals transported?

(5) Does the effective application of Community law entail that a court's examination, of its own motion, of compatibility with provisions of Community law prevails over the principle enshrined in Dutch law of administrative procedure that an individual bringing an action must not be placed thereby in a less advantageous position than if he had not brought that action?'

III — Analysis

36. I would point out from the outset that in my view two sets of provisions occupy a central place in this reference for a preliminary ruling.

37. They are, first, the second subparagraph of Article 33(9) of Regulation No 1254/99 and Article 1 of Regulation No 615/98, under which payment of the export refund is subject to compliance with Community legislation on animal welfare and, in particular, the protection of animals during transport. Those provisions lay down a condition governing the grant of export refunds for live animals.[12]

38. Secondly, Article 5(7) of Regulation No 615/98 is also central to these proceedings. That provision seeks, as is shown by the sixth recital in the preamble to that regulation, to ensure the recovery of export refunds which are considered to have been paid unduly in the light of the animal welfare requirement. It thus constitutes the legal basis for decisions taken by competent national authorities to recover from recipients any export refunds which the latter have unduly received, where it is established, following payment of such refunds, that Community legislation on the protection of animals during transport has not been complied with.

39. It is on the basis of Article 5(7) of Regulation No 615/98 and in the light of the condition governing the grant of export refunds referred to in the second subparagraph of Article 33(9) of Regulation No 1254/1999 and Article 1 of Regulation No 615/98 that the Productschap took the decisions which are the subject-matter of the main proceedings. I take the view that the questions referred by the national court must therefore be understood as primarily seeking interpretation of those provisions. According to the interpretation of those provisions given by the Court, the national court will be in a position to determine whether or not the contested decisions are consistent with Community law.

A — *The first question*

40. By its first question, the national court essentially wishes to ascertain whether the second subparagraph of Article 33(9) of Regulation No 1254/1999 and Articles 1 and 5(7) of Regulation No 615/98 must be

12 — See, to that effect, judgments in Joined Cases C-37/06 and C-58/06 *Viamex Agrar Handel and ZVK* [2008] ECR I-69, paragraph 37, and Case C-96/06 *Viamex Agrar Handel* [2008] ECR I-1413, paragraph 46.

interpreted as meaning that the competent national authority in matters relating to export refunds is empowered to decide that a transport of animals has not been carried out in accordance with the provisions of Directive 91/628, although, under Article 2(3) of Regulation No 615/98, the official veterinarian had at the outset certified that that transport complied with the provisions of Directive 91/628. If the answer is in the affirmative, the national court also asks the Court to define the limits of that competence.

41. Like the Netherlands and Greek Governments and the Commission of the European Communities, I take the view that the first part of that question must be answered in the affirmative, for the following reasons.

42. It should first be pointed out that, under both the second subparagraph of Article 33(9) of Regulation No 1254/1999 and Article 1 of Regulation No 615/98, compliance with Community provisions concerning the welfare of live bovine animals during transport, and in particular those contained in Directive 91/628, constitutes a condition governing the grant of export refunds for live animals.

43. According to the second indent of Article 5(2) of Regulation No 615/98, the certification issued by the official veterinarian at the point of exit of the animals from the customs territory of the Community constitutes, together with, where appropriate, the report on the checks containing the findings made upon arrival of the animals by the control authority of the third country of final destination, evidence of compliance with that condition governing the grant of export refunds and it must, on that basis, supplement an application for payment of an export refund.

44. Although presentation of that evidence is necessary for obtaining such payment, it is, nevertheless, not an absolute guarantee of entitlement to payment, as is expressly shown by the wording of Article 5(3) of Regulation No 615/98. I would point out that, under that provision, the export refund is not to be paid for animals for which the competent authority considers, in the light of the documents referred to in Article 5(2), the reports on the checks referred to in Article 4 of that regulation *and/or all other elements at its disposal concerning compliance with Article 1 of that regulation*, that Directive 91/628 on the protection of animals during transport was not complied with.

45. That provision, in a very extensive manner, confers on the paying bodies the power to rely on any element which has some

bearing on the welfare of the animals [13] and is capable of showing that Directive 91/628 has not been complied with, in order to justify a refusal to pay the export refund applied for. The certification issued by the official veterinarian at the point of exit of the animals from the Community customs territory is therefore necessarily relative in nature, in that it may be rebutted, prior to payment, by other evidence.

46. The Court recently endorsed and clarified that analysis in its judgment in *Viamex Agrar Handel*. In particular, it took the view that presentation by the exporter of the documents referred to respectively in Articles 2(3) and 3(2) of Regulation No 615/98 'does not constitute irrefutable proof of compliance with Article 1 of that regulation, or of compliance with Directive 91/628. That evidence is sufficient only in so far as the competent authority does not have at its disposal elements in the light of which it may find that the directive has not been complied with'. [14] The Court deduced from this that 'despite the documents produced by the exporter in accordance with Article 5(2) of Regulation No 615/98, the competent authority may consider, pursuant to Article 5(3) of the regulation, that Directive 91/628 has not been complied with'. [15]

47. In that same judgment, the Court also stated that 'Article 5(3) of Regulation No 615/98 cannot be interpreted as entitling the competent authority arbitrarily to call into question the evidence attached by the exporter to its export refund application.' [16] That is why it circumscribed the competent authority's discretion as to the nature and the evidentiary value of the elements which may be taken into consideration.

48. Accordingly, with regard to the nature of those elements, the Court took the view that 'it is only in the light of the documents relating to animal health referred to in Article 5(2) of Regulation No 615/98, the reports on the checks referred to in Article 4 of that regulation and/or other elements at its disposal concerning compliance with Article 1 of the regulation and having a bearing on animal welfare that the competent authority may conclude that Directive 91/628 has not been complied with.' [17]

13 — See, in that regard, the judgment in *Viamex Agrar Handel and ZVK*, paragraph 41.

14 — Paragraph 34.

15 — Paragraph 44.

16 — Paragraph 38.

17 — Paragraph 39 and case-law cited.

49. Moreover, with regard to the evidentiary value of the elements which may be taken into account, the Court considers that '[t]he competent authority is … required, pursuant to Article 5(3) of Regulation No 615/98, to base itself on objective and specific elements relating to the welfare of the animals which are capable of establishing that the documents attached by the exporter to its export refund application do not prove compliance with the provisions of Directive 91/628 during transportation, and it is for the exporter to show, where appropriate, that the elements relied on by the competent authority to substantiate its finding of non-compliance with Regulation No 615/98 and Directive 91/628 are not relevant.' [18] The competent authority is also 'required to justify its decision by stating the reasons why it considers the evidence presented by the exporter does not enable it to be concluded that Directive 91/628 was complied with.' [19]

50. Ultimately, the competent authority retains a broad discretion as to the existence of and justification for entitlement to payment of the export refund, provided that that authority bases its decision on objective elements having a bearing on animal welfare and adequately justifies its decision not to pay that refund.

18 — Paragraph 41 and case-law cited.

19 — Paragraph 42.

51. I take the view that the same reasoning applies where the competent authority has in its possession, not only prior to payment of the export refund, but also after its payment, proof that Directive 91/628 has not been complied with.

52. To assert the contrary would be tantamount to depriving Article 5(7) of Regulation No 615/98 of effectiveness. As stated above, that article actually constitutes the legal basis for demands for recovery of export refunds which have been paid unduly, where it is established, following payment of the latter, that the Community legislation on the protection of animals during transport has not been complied with. I take the view that all the objective elements having a bearing on animal welfare which are collected during subsequent checks may help to justify a paying body's assessment as to whether or not an export refund initially granted was paid unduly.

53. I would add that any interpretation which conferred on the certification issued by the official veterinarian an evidentiary value which was incapable of being rebutted would be incompatible with the very existence of

the subsequent checks as laid down by Regulation No 4045/89 and would undermine the effectiveness of such checks.

54. According to Article 1(1) thereof, the purpose of that regulation is to make provision for scrutiny of the commercial documents of those entities receiving payments relating directly or indirectly to the system of financing by the Guarantee Section of the EAGGF (European Agricultural Guidance and Guarantee Fund), in order to ascertain whether transactions forming part of that system of financing have actually been carried out and have been executed correctly. Such documents, which are defined broadly in Article 1(2) of that regulation, [20] may, as is the case in the main proceedings, be inconsistent with the official veterinarian's certification and result in the recovery of an export refund which subsequently appears to have been paid unduly.

55. That is why I take the view that the Court's reply to the national court's question should be that the second subparagraph of Article 33(9) of Regulation No 1254/1999 and Articles 1 and 5(7) of Regulation No 615/98 must be interpreted as meaning that the national authority having competence to pay export refunds is empowered to decide that a transport of animals has not been carried out in accordance with the provisions of Directive 91/628, even though the official veterinarian had at the outset certified, pursuant to Article 2(3) of Regulation No 615/98, that that transport complied with the provisions of Directive 91/628. In order to reach such a conclusion, the competent national authority must base its decision on objective elements having a bearing on animal welfare and capable of calling into question the documents presented by the exporter and must adequately justify its decision demanding recovery of the export refund.

B — *The second question*

56. By its second question, the national court essentially asks the Court to rule on whether the second subparagraph of Article 33(9) of Regulation No 1254/1999 and Articles 1 and 5(7) of Regulation No 615/98 must be interpreted as meaning that the competent authority of the Member State of exportation must, with a view to establishing that the Community provisions on animal welfare during transport have not been complied with, take into account the rules in force in that Member State or those in force in the Member State of registration of the vessel which transported the animals.

20 — According to that provision, commercial documents are defined as 'all books, registers, vouchers and supporting documents, accounts, production and quality records, and correspondence relating to the undertaking's business activity, as well as commercial data, in whatever form they may take, including electronically stored data, in so far as these documents or data relate directly or indirectly to the transactions referred to in paragraph 1'.

57. In order properly to understand the origin and meaning of that question, I would point out that, in support of their appeal to the national court, the appellants in the main proceedings argue that the requirement under Irish law that the vessel could transport animals only on an area of 986 m^2 did not apply to transport from the Netherlands to Morocco. Those parties therefore seem to take the view that, in circumstances such as those in the main proceedings, only the less stringent rules in force in the Netherlands were relevant in determining the surface area of the vessel available for the transport of animals.

58. In so far as it is that surface area which serves as a reference for monitoring compliance with the Community requirements relating to loading density laid down in Chapter VI, paragraph 47, B, of the Annex to Directive 91/628, it is important to determine whether, in the case of a transport of animals departing from the Netherlands by means of a vessel registered in Ireland, it is consistent with Community law for the competent authority of the Member State of exportation to take into account authorisation granted on the basis of the Irish rules in determining the surface area of a vessel available for the transport of animals.

59. I take the view that that is indeed the case.

60. I would point out first of all that, under Article 5 A(1)(a)(ii) of Directive 91/628, the Member States must ensure that any transporter is covered by an authorisation valid for all transport of vertebrate animals within the Community granted by the competent authority of the Member State of establishment.

61. With regard in particular to means of transport, Article 5 A(1)(c) of that directive requires in a general manner that the Member States ensure that any transporter uses, for the transport of animals, means of transport that will ensure compliance with Community requirements concerning welfare during transport.

62. In order to check compliance with that obligation in the context of the export refund arrangements, Article 2(2) of Regulation No 615/98 provides, inter alia, that an official veterinarian at the exit point of the animals must verify and certify that the means of transport by which those live animals are to leave the customs territory of the Community complies with Directive 91/628.

63. It should also be noted that, in order to ensure the uniform application of the conditions governing the grant of export refunds,

the Community legislature has made payment of the latter subject to compliance with the Community provisions concerning animal welfare during transport and not to compliance with national rules which may vary from one Member State to another.

64. In particular, as regards the dispute in the main proceedings, entitlement to the export refund is subject to compliance with the Community requirements relating to loading density laid down in Chapter VI, paragraph 47, B, of the Annex to Directive 91/628. I would point out that those requirements are set out for each type of transport and on the basis of an animal's weight as a surface area in square metres per animal.

65. In order to verify that those requirements are actually complied with, the surface area of the vessel which is fit for the purpose of transporting animals must be taken as the basis. However, Directive 91/628 does not contain rules for precisely calculating that surface area. It is, therefore, for the Member States to lay down the rules for determining on a vessel the surface area available for transporting animals. It was under such rules that authorisation for a surface area of 986 m^2 was issued by the competent authority of Ireland to the vessel at issue in the dispute in the main proceedings.

66. In so far as a vessel which has been granted authorisation in the Member State in which it is registered may be required, as in the dispute in the main proceedings, to transport animals from another Member State, the latter State must recognise that authorisation. In such a situation, only application of the principle of mutual recognition prevents, with regard to the same vessel, the surface area available for the transport of animals to be taken into account in order to check compliance with Community requirements relating to loading density from varying according to the Member State of departure. Application in that way of the principle of mutual recognition is therefore suitable for ensuring that, with regard to a transport of animals on the same vessel, entitlement to the export refund is to be determined uniformly whatever the Member State of departure.

67. I therefore propose that the Court should rule that the second subparagraph of Article 33(9) of Regulation No 1254/1999 and Articles 1 and 5(7) of Regulation No 615/98 must be interpreted as meaning that the competent authority of the Member State of exportation must, in order to establish that the Community requirements

relating to loading density laid down in Chapter VI, paragraph 47, B, of the Annex to Directive 91/628 have not been complied with, take into account the rules for determining the surface area of that vessel available for transporting animals in force in the Member State of registration of the vessel which transported the animals, by recognising the authorisation which was issued to that vessel by the competent authority of the latter State.

68. Before examining the third question, which is, together with the fifth question, of particular interest in the light of the problem of the application of Community law by a court of its own motion, it seems to me necessary to answer the fourth question.

C — *The fourth question*

69. It is clear from the answers which I have proposed that the Court should give to the first two questions that I take the view that the Productschap, in its decisions forming the subject-matter of the main proceedings, rightly took into account objective elements arising from subsequent checks which are inconsistent with the certification of the official veterinarian and show that the vessel was clearly overloaded in the light of the Community requirements relating to loading density. It was also correct to take as a reference the authorised surface area of 986 m^2 in order to verify whether those requirements had actually been complied with.

70. I would point out that, in contrast to its first decisions dated 26 March 2004, by which the Productschap sought to recover from the appellants in the main proceedings the entire amount of the export refund which had been granted to them, it finally decided, following objections by the latter, to reduce the amount to be recovered. The Productschap considered that only the number of bovine animals in excess of that permitted for the authorised 986 m^2 had been transported contrary to the rules laid down by Directive 91/628 and it therefore sought to recover from each of the appellants in the main proceedings the export refunds for only 29 animals.

71. In its order for reference, the College van Beroep voor het bedrijfsleven expressed its doubts as to the manner in which the refund entitlement of the appellants in the main proceedings had been determined. It took the view that it was more appropriate to regard the overloading found to exist as resulting in the infringement of the welfare standards relating to all the animals transported, in so far as that overloading affected 640 in-calf heifers and not solely the 62 to which the Productschap refers in the contested decisions. It therefore took the

view that the entire refund paid should have been recovered.

72. That is why the College van Beroep voor het bedrijfsleven essentially asks the Court to rule on whether the second subparagraph of Article 33(9) of Regulation No 1254/1999 and Articles 1 and 5(7) of Regulation No 615/98 must be interpreted as meaning that, where it is established that the Community requirements relating to loading density laid down in Chapter VI, paragraph 47, B, of the Annex to Directive 91/628 have not been complied with, the export refund must be considered to have been paid unduly for all the animals transported or for only the number of excess animals.

73. I take the view that in the case of infringement of such requirements the export refund must, in principle, be considered to have been paid unduly for all the animals transported.

74. As the Greek and Hungarian Governments, as well as the Commission, rightly point out, if the total surface area available on the vessel for the transport of animals divided by the number of animals actually transported does not comply with the surface area per animal laid down in Chapter VI, paragraph 47, B, of the Annex to Directive 91/628, it seems logical to conclude that the Community standards relating to loading density have not been complied with for any of the animals transported. In such a situation, the space available to each animal is reduced since the number of animals on the vessel is greater than that permitted under those standards. In particular, as the Greek Government notes, the overloading of a vessel restricts the animals' physical movements, reduces the amount of space necessary for their comfort, increases the risk of those animals being injured and causes distressing transport conditions for all the animals transported and not only for the number of excess animals.

75. In such a situation, as also in a situation in which it might be found, for example, that there has been an infringement of Community requirements relating to the duration of journeys and rest periods, I take the view that the 'relevant part of the refund' which, within the meaning of Article 5(7) of Regulation No 615/98, should be considered to have been paid unduly and must be recovered is, in principle, the total amount of the export refund initially paid.

76. However, as the Netherlands and Hungarian Governments have cogently noted, it would be necessary to adjust that solution where it were shown that, on account of the way the vessel is fitted out, certain animals were provided during the transport with a surface area satisfying the requirements of Chapter VI, paragraph 47, B, of the Annex to Directive 91/628. That would be the case, for example, if certain animals had been loaded into compartments of the vessel which satisfied those requirements.

77. Having regard to those considerations, I therefore propose that the Court should rule that the second subparagraph of Article 33(9) of Regulation No 1254/1999 and Articles 1 and 5(7) of Regulation No 615/98 must be interpreted as meaning that, where it is established that the Community requirements relating to loading density laid down in Chapter VI, paragraph 47, B, of the Annex to Directive 91/628 have not been complied with, the export refund must, in principle, be considered to have been paid unduly for all the animals transported, unless its recipient furnishes proof that, on account of the way the vessel is fitted out, certain animals were provided during the transport with a surface area complying with those requirements.

78. As I have previously stated, it is apparent from the order for reference that the College van Beroep voor het bedrijfsleven seems, in the light of the documents before the Court, to take the view that, in the main proceedings, the Community standards relating to loading density have been breached with regard to all the animals transported. It follows that the national court takes the view that the competent national authority ought to have sought to recover from the appellants in the main proceedings the entire amount of the export refund initially paid. Moreover, that was the position first adopted by that authority in its initial decisions of 26 March 2004.

79. The national court states, however, that it has doubts as to its power to call into question on that ground the decisions which are the subject-matter of the main proceedings.

80. It notes that Article 8:69 of the General Law on administrative law entails an analysis by the national court of the points at issue which have been brought before it and thereby, in principle, prevents it from considering arguments which fall outside the ambit of the dispute as defined by the parties. That is why it has referred to the Court the third question, concerning the application of Community law by a court of its own motion.

81. Furthermore, the national court explains that it faces a further obstacle under Netherlands law on administrative judicial procedure, namely the principle of the prohibition on *reformatio in pejus*. According to that principle, an appellant must not be placed, following an appeal, in a less advantageous position than that in which he would have found himself if he had not brought that appeal. [21]

82. In that regard, the national court notes that the conclusions which it could draw from the finding that the Productschap incorrectly limited the amount to be recovered from the appellants in the main proceedings would place the latter in a less advantageous position than that in which they found themselves when they lodged their appeal against the decisions of 2 and 25 August 2005. Indeed, they would also lose that part of the refund which the Productschap had not sought to recover from them by those decisions.

83. The national court therefore seeks to ascertain whether, in circumstances such as those in the dispute in the main proceedings, the effective application of Community law requires it to set aside such a national procedural rule. That is the purpose of the fifth question.

84. In the following arguments, I shall examine the third and fifth questions.

D — *The third and fifth questions*

85. By its third and fifth questions, the national court essentially asks the Court to rule on whether Community law requires a national court, in circumstances such as those in the dispute in the main proceedings, to review of its own motion the legality of a national administrative measure in the light of pleas based on the infringement of the second subparagraph of Article 33(9) of Regulation No 1254/1999 and Articles 1 and 5(7) of Regulation No 615/98, including where such a review results in the appellant in the main proceedings being placed in a less advantageous position than that in which he would have found himself if he had not brought the appeal.

21 — That prohibition on *reformatio in pejus* is also contained, albeit implicitly, in Article 8:69 of the General Law on administrative law. An examination of the laws of the Member States reveals that, as in Netherlands administrative law, the principle of the prohibition on *reformatio in pejus* is closely associated with the principle that it is for the parties to delimit the subject-matter of the proceedings (the 'principe dispositif'). Accordingly, whether laid down by legislation or recognised by case-law, the prohibition on *reformatio in pejus* results from the idea that the party bringing an action does so in order to serve and protect his interests as set out and defined in the application submitted to the court. More general considerations are also put forward in different legal systems. Those considerations relate, inter alia, to legal certainty and, in particular, to litigants' expectations concerning the circumstances in which justice is done, expectations which do not allow the worsening of a situation that the use of a legal remedy was, on the contrary, intended to improve.

86. The Netherlands and Greek Governments, like the Commission, take the view that that question should be answered in the negative. The Hungarian Government, for its part, adopts a more qualified position in so far as it initially states that the national court should examine of its own motion the relevant provisions of Community law but then takes the view that the effective application of Community law does not mean that, through that review, it is necessary to set aside the principle enshrined in Netherlands law on administrative judicial procedure that the person bringing an appeal must not be placed in a less advantageous position than that in which he would have found himself in the absence of an appeal.

87. I should state at the outset that I take the view that the Court should answer that question in the affirmative.

88. We have seen that Article 8:69 of the General Law on administrative law is the national procedural provision which limits the scope of the review of legality which may be carried out by the national court.

89. In so far as that provision was at issue in *van der Weerd and Others* [22] and the judgment in that case contains a summary of the case-law on the application of Community law by a national court of its own motion, that judgment will be the starting point for my reasoning. I shall therefore start by describing the context in which that judgment was given and then the Court's decision, before explaining my reasons for taking the view that that judgment does not provide a satisfactory resolution in this case.

90. In *van der Weerd and Others*, the dispute in the main proceedings was between the operators of cattle-breeding holdings and the Director of the national cattle and meat inspection service, and was concerned with decisions taken by the latter. Under the terms of those decisions, all biungulate animals on their holdings were to be treated as under suspicion of being infected by foot-and-mouth disease, on the ground that, since a case of foot-and-mouth disease had been ascertained in the vicinity of their holdings, the possibility could not be ruled out that the animals on those holdings might have been infected by that disease. Accordingly, those animals had to be vaccinated and then slaughtered.

91. In their appeal to the College van Beroep voor het bedrijfsleven, the appellants in the main proceedings sought to challenge the legality of those decisions. The pleas in law raised in support of their appeal did not

22 — Joined Cases C-222/05 to C-225/05 [2007] ECR I-4233.

include certain pleas which had, however, been raised in related cases pending before that court.[23] Those pleas in law consisted in the claim that the Director of the national cattle and meat inspection service was not entitled to take measures to control foot-and-mouth disease based on the result of tests carried out by the ID-Lelystad BV laboratory because the latter had not been authorised to carry them out by Council Directive 85/511/EEC of 18 November 1985 introducing Community measures for the control of foot-and-mouth disease[24] and that he was not entitled to base the measures at issue solely on the content of the facsimile sent by that laboratory.

92. In its order for reference, the College van Beroep voor het bedrijfsleven held that those pleas in law could have an influence on the resolution of the disputes brought before it. It stated, however, that because those pleas had not been raised before it, its national rules of procedure prevented their being taken into account. Indeed, Article 8:69 of the General Law on administrative judicial procedure provides that the court is to give its ruling solely on the basis of the issues which are put before it. While it is true that paragraph 2 of that article states that the court is to supplement the pleas in law of its own motion, that provision means, however, that the court is to put the objections made by the applicant against the contested administrative measure into legal form. Moreover, the analysis which the court is required to make on its own initiative is required only in cases involving the application of rules of public policy, which are construed in Dutch law as those relating to the powers of administrative bodies and those of the court itself, and provisions as to admissibility.

93. In the light of those considerations, the College van Beroep voor het bedrijfsleven sought to ascertain whether it was required under Community law to take into consideration arguments based on that law which had not been put forward by the appellants in the main proceedings. It took the view that the question which arose was whether a national procedural provision meaning that the court cannot examine pleas in law which go beyond the ambit of the dispute rendered the exercise of rights conferred by Community law virtually impossible or excessively difficult.

94. The Court's response started with the traditional observation that 'in the absence of Community rules in the field, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, first, that

23 — Those cases gave rise to the judgment in Case C-28/05 *Dokter and Others* [2006] ECR I-5431.

24 — OJ 1985 L 315, p. 11. Directive as amended by Council Directive 90/423/EEC of 26 June 1990 (OJ 1990 L 224, p. 13, 'Directive 85/511').

such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and, secondly, that they do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)'.[25]

95. As regards, first of all, the principle of equivalence, the Court stated that the relevant provisions of Directive 85/511 could not be considered as being equivalent to national rules of public policy within the meaning of Netherlands law. It inferred from this that application of the principle of equivalence did not mean that the national court is obliged to conduct of its own motion an examination of the validity of the administrative measures in question by having regard to criteria based on that directive.[26]

96. It also noted that 'were those provisions to form part of public health policy, they would have been put forward in the main proceedings essentially in order to take account of the private interests of individuals who had been the object of measures to control foot-and-mouth disease.'[27]

97. As regards, secondly, the principle of effectiveness, the Court first pointed out that it is clear from its case-law that 'each case which raises the question whether a national procedural provision renders the exercise of rights conferred by the Community legal order on individuals impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In that context, it is necessary to take into consideration, where relevant, the principles which lie at the basis of the national legal system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings.'[28]

98. The Court then referred to its judgment in *Van Schijndel and van Veen.*[29]

99. In that judgment, the Court examined the compatibility with the principle of effectiveness of the principle of Netherlands law which provides that the power of the court to raise pleas of its own motion in domestic civil proceedings is limited by its obligation to keep to the subject-matter of the dispute as defined by the parties themselves and to base its decision on the facts put before it.

25 — Paragraph 28 and case-law cited.
26 — Paragraphs 29 to 31.
27 — Paragraph 32.
28 — Paragraph 33 and case-law cited.
29 — Joined Cases C-430/93 and C-431/93 [1995] ECR I-4705.

100. It held that that limitation on the power of the national court was justified by 'the principle that, in a civil suit, it is for the parties to take the initiative, the court being able to act of its own motion only in exceptional cases where the public interest requires its intervention.'[30] The Court added that '[t]hat principle reflects conceptions prevailing in most of the Member States as to the relations between the State and the individual; it safeguards the rights of the defence; and it ensures proper conduct of proceedings by, in particular, protecting them from the delays inherent in examination of new pleas.'[31]

101. The Court concluded that 'Community law does not require national courts to raise of their own motion an issue concerning the breach of provisions of Community law where examination of that issue would oblige them to abandon the passive role assigned to them by going beyond the ambit of the dispute defined by the parties themselves and relying on facts and circumstances other than those on which the party with an interest in application of those provisions bases his claim.'[32]

102. In the case giving rise to the judgment in *van der Weerd and Others*, the College van Beroep voor het bedrijfsleven emphasised the similarity in that regard of the procedure followed before it and the procedure at issue in *van Schijndel and van Veen*. The Court therefore applied the reasoning that it had followed in the latter judgment.

103. In order to supplement its reasoning, the Court also explained why its case-law in several judgments conferring on national courts the power to apply Community law of their own motion was not relevant in that case. Those further details are of interest since they show that the Court's position on this matter may be adapted according to the context in which a national procedural provision is to be applied.

104. The Court first referred to the line of case-law beginning with the judgment in *Peterbroeck*,[33] concerning which it states that '[o]ne of those cases can be distinguished by reason of circumstances peculiar to the dispute, which led to the applicant in the main proceedings being deprived of the opportunity to rely effectively on the incompatibility of a domestic provision with Community law.'[34]

30 — Judgment in *van Schijndel and van Veen*, paragraph 21.

31 — Ibid.

32 — Ibid., paragraph 22.

33 — Case C-312/93 [1995] ECR I-4599. In that judgment the Court's answer to the question referred by the Cour d'Appel, Brussels (Belgium), was that 'Community law precludes application of a domestic procedural rule whose effect, in procedural circumstances such as those in question in the main proceedings, is to prevent the national court, seised of a matter falling within its jurisdiction, from considering of its own motion whether a measure of domestic law is compatible with a provision of Community law when the latter provision has not been invoked by the litigant within a certain period'.

34 — Judgment in *van der Weerd and Others*, paragraph 40.

105. It then referred to another line of its case-law which is justified, in its view, 'by the need to ensure that consumers are given the effective protection which Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [[35]] ... seeks to achieve.' [36]

106. Finally, the Court referred to the case-law stemming from the judgment in *Eco Swiss*, [37] which in its view seeks 'to determine whether equal treatment is given to pleas based on national law and those based on Community law.' [38]

107. On the basis of all those considerations, the Court, in its judgment in *van der Weerd and Others*, drew the conclusion that 'the principle of effectiveness does not, in circumstances such as those which arise in the main proceedings, impose a duty on national courts to raise a plea based on a Community provision of their own motion, irrespective of the importance of that provision to the Community legal order, where the parties are given a genuine opportunity to raise a plea based on Community law before a national court.' [39] It added that '[s]ince the appellants in the main proceedings have had a genuine opportunity to raise pleas based on Directive 85/511, the principle of effectiveness does not require the national court to examine of its own motion a plea based on Articles 11 and 13 of that directive.' [40]

108. It is possible to draw from the foregoing the following conclusions for the present case.

109. With regard to the principle of equivalence, I take the view that the reasoning set out by Court in paragraphs 29 to 31 of its judgment in *van der Weerd and Others*, applies by analogy in this case. The relevant provisions of Regulations No 1254/1999 and 615/98, which seek, as we shall see, to safeguard animal welfare and to protect the financial interests of the Community, cannot be regarded as equivalent to national rules of public policy, within the meaning of Netherlands law, which are essentially concerned

35 — OJ 1993 L 95, p. 29.

36 — Judgment in *van der Weerd and Others*, paragraph 40. Accordingly, the Court took the view that the consumer protection afforded by Directive 93/13 means that a national court may assess of its own motion whether or not the term of a contract submitted to it for assessment is unfair (see Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-4941; Case C-473/00 *Cofidis* [2002] ECR I-10875, and Case C-168/05 *Mostaza Claro* [2006] ECR I-10421). See also judgment in Case C-429/05 *Rampion and Godard* [2007] ECR I-8017, which applied that case-law in the context of Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ 1987 L 42, p. 48), as amended by Directive 98/7/EC of the European Parliament and of the Council of 16 February 1998 (OJ 1998 L 101, p. 17).

37 — Case C-126/97 [1999] ECR I-3055. In that judgment the Court held, inter alia, that 'where its domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with the prohibition laid down in Article 85(1) of the Treaty [now Article 81(1) EC]' (paragraph 37).

38 — Judgment in *van der Weerd and Others*, paragraph 40.

39 — Ibid., paragraph 41.

40 — Ibid.

with the jurisdiction of the court, the admissibility of the action and the competence of the administrative authority which adopted the contested decision.

110. The central issue in this case is therefore concerned with the scope of the principle of effectiveness.

111. I take the view that the Court's reasoning in its judgment in *van der Weerd and Others*, in relation to the scope of that principle is irrelevant in a situation such as that in the main proceedings, even though the national procedural provision concerned is, as in the case giving rise to that judgment, Article 8:69 of the General Law on administrative law.

112. Indeed, I take the view that both the purpose of the Community provisions which the national court wishes to apply in the dispute in the main proceedings and the context in which the national procedural provision at issue applies require that the Court consider this case from a different viewpoint.

113. This case has certain specific features which preclude, in my view, the straightforward application of the Court's reasoning in its judgments in *van Schijndel and van Veen* and *van der Weerd and Others*.

114. In that regard, I would point out, first, that the aim of the second subparagraph of Article 33(9) of Regulation No 1254/1999 and of Article 1 of Regulation No 615/98 is to make payment of the refunds for exports of live bovine animals subject to compliance with Community rules concerning animal welfare and, in particular, compliance with the provisions of Directive 91/628. They therefore lay down a condition governing the grant of those refunds.

115. The Court has shown, in its judgment in *Viamex Agrar Handel and ZVK*, that the Community legislature seeks to uphold public-interest requirements such as the protection of the health and life of animals. Accordingly, the Court takes the view that 'the purpose of the general reference made by Regulation No 615/98 to Directive 91/628 is to ensure, for the purposes of the implementation of Article 13(9) of Regulation No 805/68 [now Article 33(9) of Regulation No 1254/1999], compliance with the relevant provisions of that directive on the welfare of live animals and, in particular, the protection of animals during transport.'[41]

41 — Paragraph 29.

116. In the same judgment, the Court recognises that '[t]he link thus made also has the advantage of ensuring that the Community budget does not finance exports made in breach of Community provisions on animal welfare.' [42]

117. The relevant Community provisions in these proceedings thus have a dual purpose, namely, first, the protection of the health and life of animals and, secondly, the protection of the financial interests of the Community.

118. It is in order to ensure that those two objectives are fully realised that Article 5(7) of Regulation No 615/98 supplements the legislation by providing that, where it is established after payment of the refund that Community legislation on the protection of animals during transport has not been complied with, the relevant part of the refund is to be considered to have been paid unduly and must be recovered in accordance with the provisions of Article 11(3) to (6) of Regulation No 3665/87, replaced by Article 52 of Regulation No 800/1999. [43]

119. I would also point out that those two objectives constitute, at the Community level, requirements in the general interest whose importance cannot be denied. [44]

120. Next, it should be noted that, considered as a whole, the Community provisions which the national court wishes to apply of its own motion in the main proceedings do not create rights for the appellants in the main proceedings, but instead impose upon them an obligation, that of repaying an export refund which was paid unduly.

121. The issue here is therefore not to seek to determine whether Article 8:69 of the General Law on administrative law is, as the principle of effectiveness is presently understood, such as to make it impossible or excessively difficult in practice *to exercise rights conferred by Community law*.

42 — Paragraph 24.

43 — In the judgment in Case C-428/05 *Laub* [2007] ECR I-5069, the Court gave its view on the purpose of the recovery procedure referred to in Article 11(3) of Regulation No 3665/87. It stated that '[t]his provision has the aim of ensuring the protection and the proper application of the Community budget in regard to export refunds and, in particular, of ensuring that only those exporters entitled to refunds benefit from them, in accordance with the objective conditions established by the Community legislature' (paragraph 22).

44 — See, in that regard, concerning the objective of the protection of the health and life of animals, the judgment in *Viamex Agrar Handel and ZVK*, paragraphs 22 and 23. With regard to the objective of the protection of the financial interests of the Community, I would refer, inter alia, to Article 280 EC and to Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests (OJ 1995 L 312, p. 1). That regulation introduces a common set of legal rules for all areas covered by Community policies in order to counter acts detrimental to the Communities' financial interests.

122. Accordingly, the principle of effectiveness, in so far as it is protective of the rights conferred directly on individuals by Community law, is not, in this case, the appropriate reference for determining whether the national court is required to set aside a national procedural provision which prevents the application of Community law by a court of its own motion.

123. Nor does it seem relevant to me, in circumstances such as those in the dispute in the main proceedings, to ascertain whether the parties have had a real opportunity to raise a plea based on Community law before a national court.

124. Having regard to the facts giving rise to the dispute in the main proceedings, it is actually evident that the appellants in the main proceedings had no interest in invoking before the national court the issue of whether, under the second subparagraph of Article 33(9) of Regulation No 1254/1999 and Articles 1 and 5(7) of Regulation No 615/98, the export refund must be considered to have been paid unduly for all the animals transported or for only some of them. I would point out, in that regard, that the Productschap had initially sought to recover the total amount of the refund and had then, following objections by the appellants in the main proceedings, limited that recovery to only some of the animals transported. The litigation strategy of the appellants in the main proceedings has thus been to seek to obtain from the College van Beroep voor het bedrijfsleven a further reduction in the amount to be recovered or even to exclude all recovery, by raising other pleas in law.

125. I would add that neither was it in the Productschap's interests to raise arguments which might lead to the calling into question of the method of calculation it used in its recovery decisions adopted on 2 and 25 August 2005.

126. Accordingly, the finding that the parties had a genuine opportunity to raise a plea based on Community law before the national court cannot be decisive in this case.

127. I suggest, therefore, that the Court should adopt another approach, better suited to a context in which the scope of application of Community law by a court of its own motion is not limited, in the words used by the Court in its judgment in *van der Weerd and Others*, to taking into account the 'private interests of individuals', [45] but consists more

45 — Paragraph 32.

fundamentally in safeguarding requirements in the general interest at Community level.

128. Indeed, in circumstances such as those in the dispute in the main proceedings, it is only the national courts, as Community courts of ordinary jurisdiction, which may be prompted to invoke Community law in order to ensure compliance therewith. They thus constitute the last line of defence for correcting a misapplication of Community law by a competent national authority. In other words, only the national courts can restore Community legality.

129. I therefore propose that the Court should hold that the effective application of Community law requires a national court, in circumstances such as those in the dispute in the main proceedings, to review of its own motion the legality of a national administrative measure in the light of pleas based on the infringement of the second subparagraph of Article 33(9) of Regulation No 1254/1999 and Articles 1 and 5(7) of Regulation No 615/98, including where such a review leads to the appellant in the main proceedings being placed in a less advantageous position than that in which he would have found himself if he had not brought the appeal.

130. That position is consistent with the requirement, reiterated on many occasions by the Court, that a national legal rule must not undermine the application or the effectiveness of Community law.[46] It has been expressed in a number of ways by the Court in its case-law, in particular in matters relating to agriculture.

131. Before examining that case-law, it should be stated that, under Article 8(1)(b) and (c) of Council Regulation (EC) No 1258/1999 of 17 May 1999 on the financing of the common agricultural policy,[47] the Member States must, in accordance with national provisions laid down by law, regulation or administrative action, take the measures necessary to prevent and deal with irregularities affecting the transactions of the EAGGF and to recover sums lost as a result of irregularities or negligence.

132. In its judgment in *Deutsche Milchkontor and Others*,[48] the Court, inter alia, interpreted the corresponding provision of Regulation (EEC) No 729/70 of the Council

46 — See in particular, to that effect, the judgments in Case 106/77 *Simmenthal* [1978] ECR 629, paragraph 22, and Case C-213/89 *Factortame and Others* [1990] ECR I-2433, paragraph 20.

47 — OJ 1999 L 160, p. 103. Regulation repealed and replaced by Council Regulation (EC) No 1290/2005 of 21 June 2005 on the financing of the common agricultural policy (OJ 2005 L 209, p. 1).

48 — Joined Cases 205/82 to 215/82 [1983] ECR 2633.

of 21 April 1970 on the financing of the common agricultural policy.[49]

133. It pointed out that 'in the absence of provisions of Community law disputes concerning the recovery of amounts unduly paid under Community law must be decided by national courts pursuant to their own national law subject to the limits imposed by Community law ...'.[50] Those limits are as follows.

134. '[N]ational law must be applied in a manner which is not discriminatory compared to procedures for deciding similar but purely national disputes'[51] and it 'must not affect the scope and effectiveness of Community law'.[52]

135. According to the Court '[t]hat would be the case in particular if the application of national law made it impossible in practice to recover sums irregularly granted. Furthermore, the exercise of any discretion to decide whether or not it would be expedient to demand repayment of Community funds unduly or irregularly granted would be inconsistent with the duty to recover such sums which Article 8(1) of Regulation No 729/70 imposes on the national administration'.[53]

136. The Court recently considered those requirements in its judgment in *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening and Others*.[54] It concluded, in essence, that the national court is required to implement an obligation to recover Community financial assistance which flows from a provision of Community law[55] when it has before it a dispute concerning the repayment of sums lost as a result of abuse or negligence

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

50 — Judgment in *Deutsche Milchkontor and Others*, paragraph 19.

51 — Ibid., paragraph 23.

52 — Ibid., paragraph 22.

53 — Ibid. In its judgment in Joined Cases 146/81, 192/81 and 193/81 *BayWa and Others* [1982] ECR 1503, the Court also stated that an interpretation allowing the competent national authorities to exercise a discretion as to the expediency of demanding repayment of Community funds unduly granted 'would lead to an erosion both of the principle of equal treatment between undertakings from different Member States and of the application of Community law which must, so far as possible, remain uniform throughout the Community' (paragraph 30).

54 — Joined Cases C-383/06 to C-385/06 [2008] ECR I-1561.

55 — Article 23(1) of Council Regulation (EEC) No 4253/88 of 19 December 1988 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 374, p. 1), as amended by Council Regulation (EEC) No 2082/93 of 20 July 1993 (OJ 1993 L 193, p. 20). In its judgment in *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening and Others*, the Court stated that that article 'requires the Member States to recover any amounts lost as a result of an irregularity or negligence without there being any need for authority to do so under national law' (paragraph 40).

and, if need be, to set aside or interpret a rule of national law preventing such recovery. [56]

137. The Court also stated that although under national law principles such as the principle of legal certainty and the protection of legitimate expectations may be taken into consideration by the national court in addition to the principle of legality, that is so only on condition that full account is taken of the interests of the Community. [57]

138. In the light of that case-law, I take the view that, in circumstances such as those in the dispute in the main proceedings, the effective application of Community law means that the national court must take into full consideration the interests of the Community in recovering assistance which has been paid in breach of the conditions governing the granting of that assistance and that it must therefore set aside the procedural principles contained in Article 8:69 of the General Law on administrative law.

139. I consider that safeguarding the general interest requirements consisting in the protection of the health and life of animals and the protection of the financial interests of the Community therefore requires the national court to verify that the competent authority has not exercised any discretion as to the expediency of demanding repayment of Community funds unduly granted.

140. It is true that it is for the competent national authority, where it adopts, under Article 5(7) of Regulation No 615/98, a decision seeking recovery of an export refund paid unduly, to assess in the light of the objective elements available to it whether the 'the relevant part of the refund' to be recovered is the total amount of the refund initially paid or merely a part thereof.

141. Accordingly, the discretion enjoyed by the competent national authority consists, in particular, in determining whether or not the Community legislation on the protection of animals during transport has been infringed, whether that infringement has had an impact on animal welfare and whether it relates to all the animals or merely some of them. [58]

56 — Judgment in Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening and Others, paragraphs 51 and 59.

57 — Ibid., paragraph 52, and case-law cited, and paragraphs 55 and 59.

58 — See, in that regard, the judgment in *Viamex Agrar Handel and ZVK*, paragraph 44.

142. Such discretion is not, however, unlimited and it is for the national court to review whether, in accordance with Article 5(7) of Regulation No 615/98, as the legal basis for the decision to recover the amount paid unduly, that decision actually seeks to recover the 'relevant part of the refund'.

143. In other words, it is for the national court to verify that the competent authority has not transformed the discretion it enjoys into discretion as to the expediency of demanding repayment of Community funds unduly granted.

144. That review by the national court, as the ultimate guarantor of the proper application of Community law, is decisive in safeguarding requirements in the general interest such as the protection of the health and life of animals and the protection of the financial interests of the Community, in so far as it encourages the competent national authority to be more rigorous when adopting its recovery decisions and ensures that Community funds unduly granted are not retained by their recipients. The application of Community law by a court of its own motion therefore constitutes an effective instrument in combating fraud against the financial interests of the Community.

145. I would point out, in that connection, that the argument put forward by the Commission at the hearing that there are other means of protecting the financial interests of the Community, such as the procedure for the clearance of the accounts in the context of the EAGGF, does not appear relevant to me. I take the view that, in so far as Article 5(7) of Regulation No 615/18 requires a recipient to repay the amounts which he has unduly received, the fact that the Community was repaid by the Member State does not, as such, dispense the latter from the obligation to recover such amounts from that recipient. That is, in essence, the position taken by the Court in its judgment in *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening and Others*.[59]

146. In the light of all those reasons, I propose that the court should rule that the effective application of Community law requires a national court, in circumstances such as those in the dispute in the main proceedings, to review of its own motion the legality of a national administrative measure in the light of pleas based on the infringement of the second subparagraph of Article 33(9) of Regulation No 1254/1999 and Articles 1 and 5(7) of Regulation No 615/98, including where such a review leads to the appellant in the main proceedings being placed in a less advantageous position than that in which he would have found himself if he had not brought the appeal.

59 — Paragraph 58.

IV — Conclusion

147. In the light of all the foregoing considerations, I propose that the Court should answer the questions referred by the College van Beroep voor het bedrijfsleven as follows:

'(1) The second subparagraph of Article 33(9) of Council Regulation (EC) No 1254/1999 of 17 May 1999 on the common organisation of the market in beef and veal and Articles 1 and 5(7) of Commission Regulation (EC) No 615/98 of 18 March 1998 laying down specific detailed rules of application for the export refund arrangements as regards the welfare of live bovine animals during transport must be interpreted as meaning that the national authority having competence to pay export refunds is empowered to decide that a transport of animals has not been carried out in accordance with the provisions of Council Directive 91/628/EEC of 19 November 1991 on the protection of animals during transport and amending Directives 90/425/EEC and 91/496/EEC, as amended by Council Directive 95/29/EC of 29 June 1995, even though the official veterinarian had at the outset certified, pursuant to Article 2(3) of Regulation No 615/98, that that transport complied with the provisions of Directive 91/628, as amended. In order to reach such a conclusion, the competent national authority must base its decision on objective elements having a bearing on animal welfare and capable of calling into question the documents presented by the exporter and must adequately justify its decision demanding recovery of the export refund.

(2) The second subparagraph of Article 33(9) of Regulation No 1254/1999 and Articles 1 and 5(7) of Regulation No 615/98 must be interpreted as meaning that the competent authority of the Member State of exportation must, in order to establish that the Community requirements relating to loading density laid down in Chapter VI, paragraph 47, B, of the Annex to Directive 91/628 have not been complied with, take into account the rules for determining the surface area of that vessel available for transporting animals in force in the Member State of registration of the vessel which transported the animals, by recognising the authorisation which was issued to that vessel by the competent authority of the latter State.

(3) The second subparagraph of Article 33(9) of Regulation No 1254/1999 and Articles 1 and 5(7) of Regulation No 615/98 must be interpreted as meaning that, where it is established that the Community requirements relating to loading density laid down in Chapter VI, paragraph 47, B, of the Annex to Directive 91/628, as amended, have not been complied with, the export refund must, in principle, be considered to have been paid unduly for all the animals transported, unless its recipient furnishes proof that, on account of the way the vessel is fitted out, certain animals were provided during the transport with a surface area complying with those requirements.

(4) The effective application of Community law requires a national court, in circumstances such as those in the dispute in the main proceedings, to review of its own motion the legality of a national administrative measure in the light of pleas based on the infringement of the second subparagraph of Article 33(9) of Regulation No 1254/1999 and Articles 1 and 5(7) of Regulation No 615/98, including where such a review leads to the appellant in the main proceedings being placed in a less advantageous position than that in which he would have found himself if he had not brought the appeal.’