JUDGMENT OF THE COURT (First Chamber)

24 February 2005 *

In Case C-300/02,

APPLICATION for annulment under Article 230 EC, lodged on 21 August 2002,

Hellenic Republic, represented by I. Chalkias and G. Kanellopoulos, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by M. Condou-Durande, acting as Agent, and by N. Korogiannakis, lawyer, with an address for service in Luxembourg,

defendant,

* Language of the case: Greek.

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, K. Lenaerts, N. Colneric (Rapporteur), E. Juhász and M. Ilešič Judges,

Advocate General: P. Léger,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and following the hearing on 16 September 2004,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By its application the Hellenic Republic seeks the annulment of Commission Decision 2002/524/EC of 26 June 2002 excluding from Community financing certain expenditure incurred by the Member States under the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) (notified under document number C(2002) 2281) (OJ 2002 L 170, p. 77, hereinafter 'the contested decision').

2 In that decision the Commission made 'flat-rate corrections for failings in key controls' in the arable crops sector and excluded from Community financing the sum of EUR 103 513 610 for the financial years 1996 to 1999.

3 The specific reasons for those financial corrections were summarised in Summary Report No AGRI 60720/2002-FR-Final of 23 May 2002 on the results of inspections in connection with the clearance of the EAGGF Guarantee Section accounts pursuant to Article 5(2)(c) of Regulation (EEC) No 729/70 and Article 7(4) of Regulation (EC) No 1258/1999 in respect of fruit and vegetables, dairy products, livestock premiums, arable crops, rural development and payment deadlines ('the summary report').

4 The present application relates to three types of correction:

— a correction of EUR 49 385 195 applied for the 1994, 1995, 1996 and 1998 marketing years on account of discrepancies between the declared expenditure and the notified areas eligible for aid;

— a flat-rate correction of 5% applied for the 1998 and 1999 marketing years on account of shortcomings in the establishment of the integrated administration and control system, amounting to EUR 44 591 189;

— a flat-rate correction of 2% applied for the 1998 and 1999 marketing years on account of retentions operated by the agricultural cooperative associations, amounting to EUR 18 200 485.

Legal background

The general legislative framework

5 Article 3(1) of Council Regulation (EEC) No 729/70 of 21 April 1970 on the financing of the common agricultural policy (OJ, English Special Edition 1970 (I), p. 218), as amended by Council Regulation (EC) No 1287/95 of 22 May 1995 (OJ 1995 L 125, p. 1, hereinafter 'Regulation No 729/70') provides that:

'Intervention intended to stabilise the agricultural markets, undertaken according to Community rules within the framework of the common organisation of agricultural markets, shall be financed under Article 1(2)(b)'.

6 Article 5 of Regulation No 729/70 governs the clearance of the annual accounts submitted by national agencies authorised to incur expenditure to that end.

7 Paragraphs 1 and 2 of Article 5 provide as follows:

'1. Member States shall at regular intervals transmit to the Commission the following information concerning the accredited paying agencies and coordinating

bodies referred to in Article 4 and relating to transactions financed by the Guarantee Section of the EAGGF:

(a) statements of expenditure and estimates of financial needs;

(b) annual accounts, accompanied by the information required for clearance and an attestation regarding the integrality, exactitude and veracity of the accounts transmitted.

2. The Commission, after consulting the Fund Committee:

...

(b) shall, before 30 April of the year following the financial year concerned, on the basis of the information referred to in point (b) of paragraph 1, clear the accounts of the paying agencies.

The accounts clearance decision shall cover the integrality, exactitude and veracity of the accounts submitted.

The decision shall not prejudice the adoption of a subsequent decision pursuant to point (c);

(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.

A refusal to finance may not involve expenditure effected prior to twenty-four months preceding the Commission's written communic-ation of the results of those checks to the Member State concerned. However, this provision shall not apply to the financial consequences:

— of irregularities as referred to in Article 8(2);

— concerning national aids, or infringements, for which the procedures referred to in Articles 93 and 169 of the Treaty have been initiated'.

8 The first subparagraph of Article 8(1) of Regulation No 729/70 provides that:

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

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

— prevent and deal with irregularities;

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

9 Article 8(2) of the regulation states:

'In the absence of total recovery, the financial consequences of irregularities or negligence shall be borne by the Community, with the exception of the consequences of irregularities or negligence attributable to administrative authorities or other bodies of the Member States.

The sums recovered shall be paid to the accredited paying agencies and deducted by them from the expenditure financed by the Fund. The interest on sums recovered or paid late shall be paid into the Fund'.

10 Under Article 9(1) of the same regulation:

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

Member States shall communicate to the Commission provisions laid down by law, regulation or administrative action which they have adopted for the application of legal acts of the Community relating to the common agricultural policy insofar as those acts have financial consequences for the Fund'.

11 The conciliation procedure referred to in Article 5(2)(c) of Regulation No 729/70 is governed by 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). Article 1(1) of that decision sets up a Conciliation Body. Under paragraph 2(a) of that article 'the position of the Body shall be without prejudice to the Commission's final decision on the clearance of the accounts'.

12 Article 8(1) of Commission Regulation (EC) No 1663/95 of 7 July 1995 laying down detailed rules for the application of Regulation No 729/70 regarding the procedure for the clearance of the accounts of the EAGGF Guarantee Section (OJ 1995 L 158, p. 6) states that:

'When, as a result of any enquiry, the Commission considers that expenditure was not effected according to Community rules, it shall communicate to the Member State concerned its findings, the corrective measures to be taken to ensure future compliance, and an evaluation of any expenditure which it may propose to exclude pursuant to Article 5(2)(c) of Regulation (EEC) No 729/70. The communication shall make reference to this Regulation. The Member State shall reply within two months, and the Commission may modify its position in consequence. In justified cases the Commission may agree to extend this period for reply.

After expiry of the period allowed for reply, the Commission shall initiate a bilateral discussion, and both parties shall endeavour to come to an agreement as to the measures to be taken. The Commission shall then formally communicate its conclusions to the Member State, referring to Commission Decision 94/442/EC.'

13 Pursuant to Article 8(2) of Regulation No 1663/95, the decisions referred to in Article 5(2)(c) of Regulation No 729/70 are to be taken after an examination of any report drawn up by the Conciliation Body according to the provisions laid down in Decision 94/442.

14 The guidelines for flat-rate corrections were laid down in Commission Document No VI/5330/97 of 23 December 1997 entitled 'Guidelines for calculating the

financial consequences when preparing the decision to clear the accounts of the EAGGF Guarantee Section' (hereinafter 'Document No VI/5330/97'). Where it is not possible, on the basis of the information gathered in an inquiry, to assess the loss suffered by the Community by extrapolating that loss, by way of statistics or by reference to other verifiable data, a flat-rate correction may be proposed. The level of correction applied depends on the seriousness of the deficiencies identified in the performance of the controls.

15 In Annex 2 to that document, entitled 'Financial consequences of shortcomings in the checks carried out by the Member States for the clearance of the accounts of the EAGGF Guarantee Section', the Commission distinguishes between two categories of controls:

'— Key controls are those physical and administrative checks required to verify substantive elements, in particular the existence of the subject of the claim, the quantity, and the qualitative conditions including the respect of time-limits, harvesting requirements, retention periods, etc. They are performed on the spot, and by cross-checks to independent data such as land registers.

— Ancillary controls are those administrative operations required to correctly process claims, such as verification of the respect of time-limits for their submission, identification of duplicate claims for the same subject, risk analysis, application of sanctions and appropriate supervision of the procedures'.

16 In accordance with Annex 2 to Document No VI/5330/97, the Commission applies the following levels of flat-rate corrections:

'When one or more key controls are not applied or applied so poorly or so infrequently that they are completely ineffective in determining the eligibility of the claim or preventing irregularity, then a correction of 10% is justified, as it can reasonably be concluded that there was a high risk of widespread loss to the Fund.

When all key controls are applied, but not in the number, frequency or depth required by the regulations, then a correction of 5% is justified, as it can reasonably be concluded they do not provide a sufficient level of assurance of the regularity of claims, and that the risk to the Fund was significant.

When a Member State has adequately performed the key controls, but completely failed to operate one or more ancillary controls, then a correction of 2% is justified in view of the lower risk of loss to the Fund, and in view of the lesser seriousness of the infringement'.

The rules relating to arable crops

17 Council Regulation (EEC) No 3508/92 of 27 November 1992 establishing an integrated administration and control system ('IACS') for certain Community aid schemes (OJ 1992 L 355, p. 1) created a new integrated system that was applicable inter alia to the financial support scheme in the arable crops sector.

18 Under Article 2 of that regulation:

'The integrated system shall comprise the following elements:

(a) a computerised data base;

(b) an alphanumeric identification system for agricultural parcels;

(c) an alphanumeric system for the identification and registration of animals;

(d) aid applications;

(e) an integrated control system'.

19 Article 7 of that regulation provides that the integrated control system is to cover all aid applications submitted, in particular as regards administrative checks, on-the-spot checks and, if appropriate, verification by aerial or satellite remote sensing.

20 Under Article 8 of the regulation:

'1. Member States shall carry out administrative checks on aid applications.

2. Administrative checks shall be supplemented by on-the-spot checks covering a sample of agricultural holdings. For all these checks, Member States shall draw up a sampling plan.

3. Each Member State shall designate an authority responsible for coordinating the checks provided for in this Regulation.

4. National authorities may, under conditions to be laid down, use remote sensing to determine the area of agricultural parcels, identify crops and verify their status.

5. Where the competent authorities of the Member State delegate some aspects of the work to be carried out pursuant to this Regulation to specialised agencies or firms, they must retain control over and responsibility for that work'.

21 Article 13(1) of Regulation No 3508/92, as amended by Council Regulation (EC) No 2466/96 of 17 December 1996 (OJ 1996 L 335, p. 1), provides:

'1. The integrated system shall apply:

(a) from 1 February 1993 as regards aid applications, an alphanumeric system of identification and registration of bovine animals and the integrated control system referred to in Article 7;

(b) as regards the other elements referred to in Article 2, at the latest from:

— 1 January 1998 in the case of Austria, Finland and Sweden,

— 1 January 1997 in the case of the other Member States'.

22 Article 15(3) of Council Regulation (EEC) No 1765/92 of 30 June 1992 establishing a support system for producers of certain arable crops (OJ 1992 L 181, p. 12) states:

'The payments referred to in this Regulation are to be paid over to the beneficiaries in their entirety'.

23 Pursuant to the third subparagraph of Article 9(2) of Commission Regulation (EEC) No 3887/92 of 23 December 1992 laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes (OJ 1992 L 391, p. 36), as amended by Commission Regulation (EC) No 1648/95 of 6 July 1995 (OJ 1995 L 156, p. 27), in the case of a false declaration made intentionally or as a result of serious negligence, the farmer in question is to be excluded from the aid scheme concerned for the calendar year in question.

Substance

The correction applied for the 1994, 1995, 1996 and 1998 marketing years on account of the differences between the annual declarations of payments and eligible areas

The supposedly correct nature of the expenditure

24 Point B.7.3.1.1 of the summary report states that the Commission staff uncovered enormous differences for the 1994, 1995, 1996 and 1998 marketing years (totalling EUR 49 385 195 in excess expenditure) as a result of comparing the expenditure declared by the Hellenic Republic in its annual declarations with the areas eligible for aid according to the final notification of the base area from the Greek authorities.

— Arguments of the parties

25 According to the Greek Government, the Commission's view that the discrepancies between the annual declarations of expenditure and eligible expenditure constituted real discrepancies and losses for the EAGGF was based on an incorrect interpretation and application of Article 5(2)(c) of Regulation No 729/70 in conjunction with Annex 2 to Document No VI/5330/97. The Commission deducted the corresponding amount from Community financing and charged it to the Hellenic Republic as a financial correction. In its opinion, the Commission did so on the ground that such discrepancies were the purely accounting consequences of the lack of a common data-processing network and that they did not represent amounts corresponding to specific expenditure by the Member State in breach of certain Community rules, to the detriment of the Community's resources. According to the Greek Government, the discrepancies are not real but fictitious and reflect the weaknesses of the management system resulting from the lack of a common and uniform data-processing system.

26 The Greek Government maintains in this regard that:

— either the data are unreliable, and the differences between them are therefore fictitious;

— or they are reliable, in which case the differences between them are real.

27 According to the Greek Government, these two hypotheses cannot coexist, in that unreliable data cannot give rise to differences that are real, as the Commission claims.

28 In any case, in the view of the Greek Government, differences in the data do not necessarily mean that payments in excess of normal correct payments are real, particularly where those data are unreliable owing to the lack of a compatible common data-processing system. It follows, according to the Greek authorities, that the party claiming that the differences are real should adduce proof of its allegations. They contend that the Commission's position, consisting merely in asserting that such differences exist, does not meet that requirement.

29 The fact that the alleged discrepancies are not real is, according to the Greek Government, also proven by the investigations relating to the 1997 harvest carried out by the Greek authorities following the bilateral consultation with Commission staff on 27 March 2001, the conclusions of which the latter considered to be accurate, so that a sum of GRD 24 160 441 768 was not excluded from Community financing for 1997.

30 The Commission observes that the Greek Government recognises the existence of differences between the expenditure paid in accordance with the annual declarations on the one hand and the areas eligible for payments in accordance with the final notification of the base area from the Greek authorities on the other, and that the Greek Government does not dispute the amount of those differences. It points out that the Greek Government presents no other evidence of the amount of the expenditure and the areas, which, according to that government, are accurate and reliable.

31 The Commission notes in this regard that the Greek Government's argument based on 'fictitious differences' consists essentially in claiming that the amount which that government itself declared to have paid to producers is not accurate, or that the areas that it declared as eligible are not accurate or that both data are wrong. Whatever the argument advanced in this connection, according to the Commission it is for the Hellenic Republic to provide the 'accurate' data to the Commission's staff.

— Assessment by the Court

32 It must be pointed out first of all that the EAGGF finances only intervention undertaken in accordance with the Community rules within the framework of the common organisation of agricultural markets (see, in particular, Case C-278/98 *Netherlands* v *Commission* [2001] ECR I-1501, paragraph 38, and Case C-349/97 *Spain* v *Commission* [2003] ECR I-3851, paragraph 45).

33 It should also be noted that it is for the Commission to prove an infringement of the rules on the common organisation of the agricultural markets (see, in particular, Case C-281/89 *Italy* v *Commission* [1991] ECR I-347, paragraph 19). 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 (see Case C-349/97 *Spain* v *Commission*, paragraph 46).

34 However, the Commission is required not to show exhaustively that the checks carried out by the national authorities were inadequate or that the figures they have transmitted are irregular, but to produce evidence of its serious and reasonable doubt regarding such checks or figures (see Case C-54/95 *Germany* v *Commission* [1999] ECR I-35, paragraph 35).

35 The Member State, for its part, cannot rebut the Commission's findings by mere assertions which are not substantiated by evidence of a reliable and operational supervisory system. If it is not able to show that they are inaccurate, the Commission's findings can give rise to serious doubts as to the existence of an adequate and effective series of supervisory measures and inspection procedures (see Case C-253/97 *Italy* v *Commission* [1999] ECR I-7529, paragraph 7).

36 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 that State to adduce the most detailed and comprehensive evidence that its checks have been carried out and its figures are accurate and, if appropriate, that the Commission's assertions are incorrect (Case C-54/95 *Germany* v *Commission*, paragraph 35, and Case C-278/98 *Netherlands* v *Commission*, paragraph 41).

37 It is in the light of those considerations that the evidence supplied by the Greek Government against the findings on which the Commission based the contested decision should be examined.

38 It is common ground that there is a difference between the expenditure paid in accordance with the annual declarations and the areas eligible for payments according to the final notification from the Greek authorities to the Commission of the area on which payments are based.

39 By questioning the correctness of the aid payments on the basis of the contradictory figures submitted by the Greek Government, the Commission presented evidence of grounds for serious and reasonable doubt.

40 Consequently, it was for the Greek authorities to adduce the most detailed and comprehensive evidence that those payments had not been made in infringement of Community law.

41 Contrary to the position adopted by the Greek Government, it can therefore not be maintained that it is for the Commission to prove that the differences are real in that reliable data on the eligible area should be provided by the Commission.

42 The Greek Government has not shown that the payments did not exceed those corresponding to the areas eligible for the aid in question. It merely asserted that the existence of contradictory data does not necessarily mean that the payments in fact exceeded normal correct payments.

43 It follows from the above that the Greek Government has not successfully rebutted the Commission's findings with regard to the differences between the annual declarations of payments and the eligible areas.

The alleged application of a second financial correction for the same reasons

— Arguments of the parties

44 The Greek Government claims that flat-rate corrections have already been applied for the 1994, 1995 and 1996 harvests for the same reasons. It states that flat-rate

financial corrections had already been applied to the Hellenic Republic by Commission Decision 2000/449/EC of 5 July 2000 excluding from Community financing certain expenditure incurred by the Member States under the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) (OJ 2000 L 180, p. 49) on account of the inadequacies of the IACS in the arable crops sector during the period corresponding to the 1994, 1995, 1996 and 1998 harvests. Those flat-rate financial corrections charged to the Member State in question were 2% for the 1994 harvest and, for the 1995, 1996 and 1997 harvests, 5% of the declared expenditure for claims that were the subject of on-the-spot checks and 2% for those that were the subject of verification by means of remote sensing. According to the Greek Government, those corrections were applied on account of inadequacies in and delays in the establishment of the IACS. It maintains that the inadequacies in the IACS included the absence of a common computerised data base. As a consequence, the Greek Government considers that it must be accepted that the flat-rate financial corrections made in connection with the harvests mentioned above also covered the absence of a common computerised data base, which precludes the application of a second financial correction for the same reason.

45 In addition, the Greek Government maintains that the discrepancies found with regard to the 1997 harvest were not taken into account for the present financial correction without it having been clearly established why the differences discovered for the 1997 marketing year, amounting to EUR 77 million, were not excluded from Community financing. The Commission clearly lets it be understood that the discrepancies discovered with respect to the crop years other than 1997 were due to reasons other than the lack of a common data-processing network. According to that government, in order to subscribe to the Commission's point of view it is necessary to accept the least convincing scenario, according to which the differences discovered with regard to the 1994, 1995 and 1996 years are real and payments were actually made in excess of Community payments, whereas those same differences with regard to the 1997 year are due to the lack of a compatible common data-processing system. Consequently those differences are not real and the corresponding amounts are thus not excluded from Community financing. Subsequently, in the 1998 marketing year, the differences discovered are again real and payments in excess of the correct levels are said to have been made.

46 The Greek Government concludes that the contested decision should be annulled in accordance with Article 253 EC on the ground that it does not contain a statement of reasons or, at the very least, that the statement of reasons is inadequate by reason of an error as to the facts, a wrong assessment of the factual evidence and failure to take account of essential factors or, in the alternative, that the said decision should be amended so that the amounts corresponding to the discrepancies mentioned above are not excluded from Community financing.

47 The Commission does not share the opinion of the Greek Government that a double financial correction has been made with respect to the same harvests and for the same reasons. According to the Commission, the previous corrections were founded on the risk of losses for the EAGGF as a result of a series of shortcomings discovered in the system of payment and supervision in Greece, on the basis of Document No VI/5330/97. Subsequently, the Commission staff received from the Hellenic Republic, in application of Commission Regulation (EC) No 658/96 of 9 April 1996 on certain conditions for granting compensatory payments under the support system for producers of certain arable crops (OJ 1996 L 91, p. 46) and of Annex VIII to that regulation, information on the harvests in 1994 and 1996, which enabled them to compare the eligible areas with the payments made and to establish that there were large differences and real losses for the EAGGF. The Commission maintains that the new correction is therefore based on the discovery of certain discrepancies that led to irregular expenditure.

48 As regards the 1997 harvest, the Commission states that the Greek Government provided data and explanations that enabled it to estimate separately the financial impact and the problems actually encountered. Such information should also have been produced for the subsequent years. However, according to the Commission, no explanation or information was provided in that regard. In the absence of other information, the fact that no discrepancy was discovered for 1997 is not a sufficient argument for concluding that there were no discrepancies for the years 1994, 1995, 1996 and 1998.

— Assessment by the Court

49 It should be noted first of all that the complaint based on defects in the statement of reasons in the contested decision as regards the alleged double financial correction is not raised by the Greek Government as a separate plea but appears rather to be linked to the Commission's assessments as a whole. This complaint can therefore not be examined separately.

50 As is made clear in paragraph 32 of the present judgment, the EAGGF finances only intervention undertaken in accordance with the Community rules within the framework of the common organisation of agricultural markets. The Commission is not required to prove that there has been a loss but may simply adduce sound evidence of such loss (Case C-349/97 *Spain* v *Commission*, paragraph 146).

51 In the present case it is common ground, as regards payments not based on the eligible areas, that such evidence has been provided by the Commission and that the Greek Government has not demonstrated that those payments were in order.

52 As regards the 1997 harvest, the Commission rightly maintains that, in the absence of other information, the fact that no discrepancy was discovered for that year is not in itself a sufficient argument for concluding that there were no discrepancies for other years.

53 The corrections already applied for the 1994, 1995 and 1996 harvests were made because of the inadequacy of the IACS and were of a flat-rate nature, whereas the corrections at issue were not applied at a flat rate but on the basis of a precise evaluation of the losses.

54 It is true that it cannot be excluded out of hand that the risks discovered for 1994 and subsequent years which led the Commission to impose a flat-rate correction already included the risk associated with the discrepancies between the eligible areas and the aid payments effected.

55 However, the Commission has shown in detail that the corrections for previous years were not applied on account of such a risk but for other specific reasons.

56 As regards 1994, it is clear from point B.7.3.1.5 of the summary report that the correction applied for that year related only to secondary aspects of the system of supervision and did not cover the lack of a compatible common data-processing system, which is the justification for the present financial correction.

57 The corrections for the 1995 and 1996 marketing years related to the inadequacies in on-the-spot checks and were not applied on account of the lack of a compatible common data-processing system. Indeed, as the Commission contends in its defence without contradiction by the Greek Government, the financial corrections applied for 1995 and 1996 related primarily to shortcomings associated with delays in the performance of checks by remote sensing and on-the-spot checks and with the absence of a cadastre and cross-checks.

58 Those findings have not been rebutted by the Greek Government, which maintains more specifically that the alleged inadequacies also included the lack of a common computerised data base.

59 According to Decision 2000/449, the correction applied for the years from 1996 to 1998 was justified by the risk of losses for the EAGGF as a result of 'IACS shortcomings'.

60 Although, according to Article 2 of Regulation No 3508/92, a common computerised data base is one element of the IACS, the latter also comprises several other elements. The IACS also includes administrative checks, on-the-spot checks and, if appropriate, verification by aerial or satellite remote sensing.

61 Consequently, the corrections imposed by Decision 2000/449 were based on a series of shortcomings. The discrepancy discovered between the payments effected and the eligible areas was not taken into account as such in the previous corrections.

62 Hence, the complaint based on a double financial correction for the same periods and the same reasons must be dismissed.

The Commission's alleged lack of competence *ratione temporis*

— Arguments of the parties

63 The Greek Government claims in the alternative that Article 5(2)(c) of Regulation No 729/70 provides that a refusal to finance may not involve expenditure effected

prior to 24 months preceding the Commission's written communication of the results of those checks to the Member State concerned.

64 According to the Greek Government, from a reading of Article 8(1) of Regulation No 1663/95, the Commission's right to make financial corrections during the period beginning 24 months before the written communication of the results of a control to the Member State concerned presupposes that that written communication of the verifications carried out in the course of the control also includes an evaluation of any expenditure which may be excluded pursuant to Article 5(2)(c) of Regulation No 729/70. Consequently, a communication of the results of the control that does not also include such an evaluation of the expenditure likely to be excluded does not, in the opinion of the Greek Government, fulfil the conditions laid down in the regulations.

65 The Greek Government therefore claims that the present financial correction cannot cover the harvests in the years from 1994 to 1996 and 1998 since, in accordance with Article 5(2)(c), it cannot relate to expenditure effected 24 months before the official notification of the Commission's conclusions regarding the results of the checks carried out by its staff as part of the investigations recorded under numbers 214/99, 219/99 and 1/2000.

66 The Commission replies that the Hellenic Republic cannot benefit from its own failure to provide the Commission with precise data on the years in question in good time. It points out that its staff maintained a permanent dialogue with the Greek authorities as regards the discrepancies in question. In that regard, the Commission mentions in particular its letter of 23 June 1998 (No VI/25149, Greek version: EL 32539, of 24 August 1998), in which it informed the Greek authorities of its intention to exclude certain expenditure from Community financing. In its letter of 5 February 2001 (No VI/003644) the Commission indicated that it intended to propose the exclusion of expenditure for the years from 1994 to 1998 that did not correspond to the areas cultivated.

— Assessment by the Court

67 The fifth subparagraph of Article 5(2)(c) of Regulation No 729/70 provides that '[a] refusal to finance may not involve expenditure effected prior to twenty-four months preceding the Commission's written communication of the results of [the Commission's] checks to the Member State concerned'.

68 Regulation No 1663/95, which is the implementing regulation for Regulation No 729/70, specifies, in the first subparagraph of Article 8(1), what the written communication by which the Commission notifies the results of its checks to Member States must contain (see Case C-170/00 *Finland* v *Commission* [2002] ECR I-1007, paragraph 26).

69 Under that article, that communication is to state the corrective measures to be taken to ensure future compliance, to include an evaluation of any expenditure which the Commission may propose to exclude and to make reference to Regulation No 1663/95.

70 In accordance with the Court's case-law, the Commission is bound, in its relations with the Member States, to respect the conditions it has imposed on itself by implementing regulations (see Case C-170/00 *Finland* v *Commission*, paragraph 34). A failure to observe those conditions may, depending on its significance, deprive of its efficacy the procedural guarantee accorded to Member States by Article 5(2)(c) of Regulation No 729/70, which limits the period for which expenditure can be refused financing by the EAGGF (see in particular, Case C-158/00 *Luxembourg* v *Commission* [2002] ECR I-5373, paragraph 24).

71 The Court must therefore examine whether the letter of 23 June 1998 meets the conditions set out in Article 8(1) of Regulation No 1663/95.

72 In that letter, which made reference to Article 8(1) of Regulation No 1663/95, the Commission indicated to the Greek authorities that it intended to exclude from Community financing part of the declared expenditure relating to a maximum period of 24 months before the date of formal receipt of that letter, in application of Article 7(1) of Commission Regulation (EC) No 296/96 of 16 February 1996 on data to be forwarded by the Member States and the monthly booking of expenditure financed under the Guarantee Section of the Agricultural Guidance and Guarantee Fund (EAGGF) and repealing Regulation (EEC) No 2776/88 (OJ 1996 L 39, p. 5).

73 With regard to the evaluation of expenditure, the Commission indicated to the Greek authorities that that part of the expenditure was to be determined on the basis of the provisions applicable in that regard.

74 It is clear from the case-law that the term 'evaluation' of expenditure, which appears in Article 8(1) of Regulation No 1663/95, should be interpreted, as should its equivalent in the different language versions, as meaning that it is not necessary to state a particular figure for the value of the expenditure in question and that it is sufficient to provide the elements necessary in order to calculate that value at least approximately (see, in particular, Case C-375/99 *Spain* v *Commission* [2001] ECR I-5983, paragraph 16).

75 That literal interpretation is corroborated by the fact that, as recalled in paragraph 36 of the present judgment, it is the Member State which is best placed to collect and verify the data required for the clearance of EAGGF accounts.

76 In this instance, the audit report appended to the said letter of 23 June 1998 and entitled 'Audit report on the clearance of EAGGF accounts — Guarantee Section — arable crops — 1996 and 1997 harvests', refers explicitly, in points 1.3.2, 3.7 and 3.8, to the fact that the data received showed that it was impossible to reconcile the totals resulting from the computerised data with the expenditure declared to the EAGGF during the same period and that essential data were missing. Large differences were discovered.

77 That information is not sufficient, however, to constitute an 'evaluation' within the meaning of Article 8(1) of Regulation No. 1663/95. The report makes numerous criticisms of the short-comings in the establishment of the IACS and the malfunctions uncovered with regard to the 1996 and 1997 harvests. The letter does not indicate that the Commission envisaged a non-flat-rate correction. With regard to these two harvests, the Greek authorities were therefore not able to calculate the amount of any corrections, even approximately. Moreover, the 1994 and 1995 harvests were not mentioned either in the said letter or in the attached report.

78 Hence the letter of 23 June 1998 does not constitute a communication within the meaning of Article 8(1) of Regulation No 1663/95.

79 Nor does the letter of 13 June 2000 mention the type of correction envisaged.

80 In the present case, the first communication from the Commission that complies with the requirements of this provision is the letter of 20 August 2001.

81 The Commission cannot resist the effects of the time-limit laid down in the fifth subparagraph of Article 5(2)(c) of Regulation No 729/70 on the ground that the Greek authorities did not cooperate sufficiently in clarifying the discrepancies discovered. There is in fact, nothing to prevent the Commission from evaluating the losses by extrapolation from such discrepancies and stating the amount in the communication provided for in the said provision.

82 It is therefore necessary to annul the contested decision insofar as it excludes from Community financing expenditure effected by the Hellenic Republic in the arable crops sector before 20 August 1999 to the extent that the said expenditure is subject to the correction on account of discrepancies between the declared expenditure and the notified areas eligible for aid.

The flat-rate correction of 5% applied to the 1998 and 1999 marketing years on account of shortcomings in the establishment of the IACS

83 In point B.7.3.1.1 of the summary report the Commission relates in detail that the Hellenic Republic had not yet established the IACS.

Arguments of the parties

84 The Hellenic Republic maintains, first, that the percentage of on-the-spot checks carried out nationally was more than twice that of 5% provided for in Regulation No 3887/92. It claims that in 1998 it amounted to 13.55% of aid applications. This fact, in conjunction with the fragmentation of land holdings and the large number of

aid applications lodged, made the increase in the rate of on-the-spot checks requested by the Commission on the one hand superfluous and on the other hand improper, given the high administrative and financial cost entailed by such an increase. The delays in implementing such checks, especially after the harvest, did not prevent effective identification of the crops, albeit after the harvest, thanks to the crop residues that were still present and in good condition, owing to the high temperature and dryness. Consequently, according to the Greek authorities, both the rate and the standard of the checks were satisfactory.

85 The Greek authorities claim that the discrepancies detected between the checks communicated to the Commission and those carried out using remote sensing techniques are not real but due to errors committed when the data were input.

86 Moreover, according to the Greek authorities, as far as the quality of remote sensing checks is concerned, it should be noted that the tolerance of +/– 6.2 m was applied during 1998 and 1999 in accordance with the specifications from the Joint Research Centre (ISPRA) and that that approach did not work satisfactorily in Greece because of the fragmentation of land holdings. A pilot scheme to define the optimum tolerance subsequently showed that the optimum tolerance for Greece was +/– 3 m, and it is this tolerance that has been applied since 2000. In the opinion of the Greek authorities, it should be acknowledged that any shortcomings discovered were not sufficiently serious to expose the EAGGF to the risk of financial losses.

87 With regard to the failure to complete the cadastre and the associated difficulty in identifying agricultural parcels, it should be noted that, according to the Greek authorities, they began work on the creation of cartographic support for the IACS in cooperation with the competent departments of the European Union and the Joint

Research Centre (ISPRA) in 1994 with the objective of covering around 90% of IACS declarations. This entailed the production of orthophotos and slides of units; it was completed in 1997 and tested in certain regions of the country in 1998. According to the Greek authorities, it was applied fully in 1999 and covered around 75% of the agricultural parcels of the IACS.

88 In the light of the foregoing, and taking into account especially the stage reached in the creation of the wine and oil register — 75% — and the prospect of its imminent completion, the Greek authorities maintain that the fact that that project has not been fully completed does not constitute a serious shortcoming that would give rise to a real risk of a loss of Community resources.

89 Finally, with regard to the absence of penalties and the lack of an appropriate monitoring system, the Greek authorities maintain, first, that the penalties provided for in Article 9 of Regulation No 3887/92 were not applied to areas declared as irrigated, although the producers had adduced no evidence to that effect, because the crops existed and no intentional false declaration was involved and, in any case, such penalties only applied from 2000 onwards when a large separate area had been created to grow maize.

90 For these reasons, the Greek Government maintains that the national monitoring structures and system have improved and that the flat-rate financial correction of 5% is disproportionate. It points out that the same rate of correction had been applied to earlier harvests.

91 The Commission states that in 1998 a high percentage of significant irregularities was discovered in a large number of regions. Nevertheless, during that year the Greek authorities did not carry out additional checks and the percentage of applications checked in 1999 did not increase as laid down in Article 9 of Regulation

No 3887/92. According to the Commission, the Greek authorities were unable to provide statistical data on checks carried out for 1999 and 2000 as the computer software containing the centralised statistical data was not yet in use.

92 In addition, the Commission points to shortcomings in the rates and quality of checks by remote sensing, the quality of conventional on-the-spot checks, the system for identifying agricultural parcels, checks on irrigated crops and the overall supervision of procedures.

93 The Commission contends that the Greek Government recognises and accepts all the conclusions of the checks as well as the discrepancies discovered and the shortcomings of both the system and the checks. It states that that government recognises in particular that the number of checks did not increase in 1999, that the declared number of checks by remote sensing was inaccurate, that on-the-spot checks were carried out late, even after the harvest, that the tolerance of 6.2 m accepted for aerial photography was inappropriate to the small-scale farming encountered in Greece, that the establishment of the cadastre was far from completion during the period in question and that the penalties laid down in Article 9 of Regulation No 3887/92 were not imposed because of arbitrary interpretations of that provision.

94 In view of the seriousness of the gaps in the monitoring system during the period in dispute and the consequent high risk of loss for the EAGGF, the correction of 5% must, according to the Commission, be considered justified.

Assessment by the Court

95 In application of the case-law cited in paragraphs 33 to 35 of this judgment, it was for the Greek Government to show that, for the 1998 and 1999 marketing years, the

Hellenic Republic had applied a reliable and effective system of checks and that the objections raised by the Commission following physical verification carried out by its staff were not justified.

96 The Greek Government does not deny, as regards the establishment of the IACS, that the computerised data base provided for in Articles 2 and 3 of Regulation No 3508/92 was not created within the time allowed and was not in operation during the years in question. It asserts only that the national monitoring structures and system have been improved as compared with the situation in the past and that the facts adduced by the Commission do not constitute a serious shortcoming that would lead to a real risk of loss of Community resources.

97 In this regard, it is necessary to point out right away the importance of the establishment of the IACS, without there being any need to examine in detail the question of the quality of checks by remote sensing or the percentage of checks carried out on-the-spot. The identification of agricultural parcels alone, which has still not been wholly achieved in Greece, is a key element in the correct application of a system linked to land area. The lack of a reliable system for identifying agricultural parcels of itself entails a high risk of damage to the Community budget.

98 As regards the penalties laid down in Regulation No 3887/92, it is sufficient to note that producers declared their land as irrigated without being able to provide proof. The penalty provided for in Article 9(2) of that regulation consists in excluding the parcels concerned from Community financing. Contrary to the Greek Government's assertion, that penalty was already applicable to the years in question.

99 Although improvements are discernible, the said government cannot maintain that, by reason of that finding and taking account of the fact that a correction rate of 5% had already been applied previously, the rate of corrections to be applied must be

reduced. Despite those improvements, praiseworthy though they be, the risk of damage for the EAGGF was very high, and that was after the expiry of the period allowed for the establishment of the IACS on 1 January 1997, so that the correction of 5% imposed for earlier years could be judged to be indulgent.

100 Consequently, the flat-rate corrections of 5% applied for 1998 and 1999 appear consistent with the guidelines laid down by the Commission in Document No VI/5330/97.

The flat-rate correction of 2% applied for the 1998 and 1998 marketing years on account of the retentions made by agricultural cooperative associations

101 It is apparent from point B.7.3.1.5 of the summary report that in 1998 and 1999 the agricultural cooperative associations automatically withheld around 2% of the amount of aid paid to farmers to cover their operating expenses.

Arguments of the parties

102 The Greek Government maintains that national law has not permitted such retentions since the disputed crop years. According to that government, the judgment in Case C-247/98 *Greece* v *Commission* [2001] ECR I-1, from which it is apparent that such retentions are prohibited, refers expressly to retentions made before the entry into force of Law No 2537/97 on 1 December 1997. Article 37 of that law added a second subparagraph to Article 2 of Law No 1409/83, providing

that 'the retention of the amount provided for in the preceding subparagraph does not relate to amounts charged to the European Agricultural Guidance and Guarantee Fund (EAGGF) unless Community provisions stipulate otherwise'. Hence, according to the Greek Government, national legislation directly prohibits retentions, of any kind, on aid from the EAGGF.

103 The Greek Government admits that the obligation for the Member State to ensure the payment of aid in its entirety is not confined to establishing a national legislative framework in that regard but also extends to strict compliance therewith and to its application, so that any retentions on aid that are discovered can be recovered on the ground that they were made improperly or unlawfully. That latter point presupposes a complaint from the beneficiary of the aid and, more generally, the absence of any contrary agreement between the agricultural associations and beneficiaries. According to the Greek Government, in the present case no Community or national provision was infringed since the beneficiary of the aid expressly consented to the retention of part of that aid.

104 At the hearing in the present case the Greek Government added that after the vote on Law No 2538/97 the administration, by means of various circulars drew the attention of all the departments involved to the fact that this law was to be strictly observed and that offenders would be prosecuted.

105 In the opinion of the Greek Government, in view of the measures taken and the improvements noted in this area, it is unjustified, or at least extremely unjust and disproportionate, to exclude from Community financing an amount equal to 2% of the aid paid to beneficiaries.

106 The Commission submits that the Greek Government recognises that the retention of 2% applied by the agricultural cooperative associations is contrary to Community

law and that it does not dispute the outcome of the Commission's checks showing that those associations retained an amount equal to 2% of the sums paid to beneficiaries.

107 Although the Greek authorities repealed the law authorising the agricultural cooperative associations to offset the expenses associated with the payment of aid by retaining 2% of the latter, the Commission maintains that they did not take adequate measures to prevent continuation of the practice of retentions by the said associations. The Commission points out that the Member States should prevent any direct or indirect circumvention, by means of non-transparent practices, of the obligation to pay the aid to the producers in their entirety.

108 The Commission adds that it has received a series of complaints from producers concerning the retention.

Assessment by the Court

109 Article 15(3) of Regulation No 1765/92 provides that the payments referred to in that regulation are to be paid over to the beneficiaries in their entirety.

110 Despite the adoption of Law No 2538/97 barring retentions prohibited in this way, it is common ground that during 1998 and 1999 the agricultural cooperative associations automatically retained an amount representing about 2% of the aid paid to farmers in order to cover their operating costs.

111 The support arrangements for producers of certain arable crops do not provide for any exception authorising such a retention. The Court has ruled that Article 15(3) of Regulation No 1765/92 prohibits national authorities from making a deduction from the payments made or from demanding the payment of administrative fees charged for processing applications and having the effect of reducing the amount of the aid (Joined Cases C-36/97 and C-37/97 *Kellinghusen and Ketelsen* [1998] ECR I-6337, paragraph 21). The same applies to agricultural cooperative associations involved in the payment of the aid in question.

112 The obligation stemming from Article 15(3) of Regulation No 1765/92 is an obligation to achieve a particular result, so that it is of no importance whether complaints were received or agreements were concluded between the beneficiaries and the cooperatives regarding the retention of part of the aid.

113 The correction of 2% imposed by the Commission is equal to the percentage retained by the agricultural cooperative associations. The plea based on the disproportionate nature of that correction can therefore not be accepted.

114 Consequently, the Commission was entitled to apply the disputed correction.

115 In the light of the foregoing considerations, the remainder of the application must be dismissed.

Costs

116 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. However, under Article 69(3) of those rules, where each party succeeds on some and fails on other heads the Court may order that the costs be shared or that the parties bear their own costs. In the present case, since each party has been partially unsuccessful, the parties should bear their own costs.

On those grounds, the Court (First Chamber), hereby:

1. **Annuls Commission Decision 2002/524/EC of 26 June 2002 excluding from Community financing certain expenditure incurred by the Member States under the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF), insofar as it excludes from Community financing expenditure incurred by the Hellenic Republic in the arable crops sector prior to 20 August 1999 to the extent that the said expenditure is subject to the correction on account of discrepancies between the declared expenditure and the notified areas eligible for aid;**

2. **Dismisses the remainder of the application;**

3. **Orders each of the parties to bear its own costs.**

[Signatures]