OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 11 May 2000 *

1. The United Kingdom is challenging, pursuant to Article 173 of the EC Treaty (now, after amendment, Article 230 EC), Commission Decision 1999/187/EC of 3 February 1999 ('the Decision') [1] on the clearance of the accounts presented by the Member States in respect of the expenditure for 1995 of the Guarantee Section of the European Agricultural Guidance and Guarantee Fund ('EAGGF'). More specifically, the action seeks annulment of the provision disallowing the disbursement from that fund of the sum of GBP 869 283 included in the financial assistance paid in advance by the United Kingdom to British farmers pursuant to Commission Regulation (EEC) No 1164/89 of 28 April 1989 laying down detailed rules concerning the aid for fibre flax and hemp. [2]

2. The United Kingdom and the Commission disagree as to the number of hectares planted with an experimental variety of fibre flax which qualify for Community aid in the context of a study into its viability for industrial use. The applicant points out that the relevant legislation is silent on this point, and maintains that it acted in good faith in its interpretation and application of the rules in force at the material time, which prompted it to seek reimbursement in respect of the total surface area planted, namely 1 903 hectares. The defendant, for its part, contends that the variety in issue was grown solely with a view to obtaining Community subsidies, and insists that the aid should be limited to an area corresponding to 100 hectares.

3. The present dispute, as framed in those terms, might appear to call for a judgment of Solomon. Nevertheless, the nature of the action for annulment and the restricted parameters of the review which it seeks, combined with the absence of any evidence of bad faith in the grant of the aid, the deficiencies in the rules adopted by the Commission and the absence of any objective criterion justifying its decision, suggest that it would not be appropriate to follow the example of the king amongst judges by dividing up the subject-matter of the dispute with a view to satisfying both parties.

That subject-matter should not therefore be divided in two, in accordance with the first decision made by the exuberant Solomon; [3] nor can the dispute be resolved, as in the

* Original language: Spanish.

1 — OJ 1999 L 61, p. 37.

2 — OJ 1989 L 121, p. 4.

3 — Of whom it is said that his riches were as plentiful as stones, that he possessed forty thousand horses, seven hundred wives and three hundred concubines, and that he caused thirty oxen to be sacrificed each day.

case of his second judgment, by means of an insight into the psychology of the parties. [4] It is necessary to make do with a prosaic review of the legal issues.

The legal framework

4. Council Regulation (EEC) No 1308/70 [5] established the common organisation of the market in flax and hemp. Article 4 of that regulation, in the version applying for the purposes of these proceedings, [6] provides:

'1. A system of aid shall be introduced for flax grown mainly for fibre and for hemp grown in the Community.

...

Such aid, the amount of which shall be uniform throughout the Community for each of these products, shall be fixed each year.

2. The amount of aid shall be so fixed per hectare of area sown and harvested as to ensure an even balance between the volume of production required in the Community and the amount that can be marketed....

...'

5. Under Article 4(4) and (5), the Council and the Commission are required to adopt rules for the grant of aid, whilst Article 12 establishes the procedure to be followed by the Commission for the purposes, *inter alia*, of adopting measures for granting aid. That procedure includes the consultation of a management committee.

6. In the exercise of their respective powers, the Council has laid down general rules, including, in particular, rules applying to checks on entitlement to aid, [7] and the Commission has adopted Regulation (EEC) No 1164/89 laying down detailed implementing rules.

4 — Holy Bible, 1 Kings, chapter 3, verses 16 to 28 (see the Spanish version taken direct from the original languages, ed. E. Nácar and A. Colunga, Madrid, 1968). See also Carbonnier, J.: *Flexible droit*, Paris, 1992, p. 361 et seq.

5 — Council Regulation (EEC) No 1308/70 of 29 June 1970 on the common organisation of the market in flax and hemp (OJ, English Special Edition 1970 (II), p. 411).

6 — And resulting from the successive amendments made, in so far as concerns the present case, by Council Regulations (EEC) Nos 814/76 of 6 April 1976 (OJ 1976 L 94, p. 4), 2057/92 of 30 June 1992 (OJ 1992 L 215, p. 16) and 1557/93 of 14 June 1993 (OJ 1993 L 154, p. 26).

7 — Council Regulation (EEC) No 619/71 of 22 March 1971 laying down general rules for granting aid for flax and hemp (OJ, English Special Edition 1971 (I), p. 169).

7. At the material time, Article 2 of Regulation No 1164/89 provided as follows:

'Aid shall be granted for flax grown from the seed varieties:

— specified in Annex A, or

— currently under review by Member States' authorities for inclusion in the catalogue of flax varieties intended mainly for the production of fibre.'

The contents of the second indent had been introduced by Regulation (EEC) No 174/81. [8] According to the second recital in the preamble to that regulation, the insertion of that provision was justified inasmuch as the relevant legislation would otherwise have the effect of disqualifying for aid new varieties of flax which were being studied by the authorities of the Member States with a view to entering them in the catalogue of varieties, resulting in a situation which could discourage the development of new varieties.

8. It should be noted that that second indent, on which the parties place divergent constructions, was repealed by Regulation (EC) No 624/97, [9] on the ground that practical experience had 'shown a need to adjust certain provisions in order to prevent the scheme from being abused' (fifth recital in the preamble).

9. The catalogue of varieties referred to in the second indent of Article 2 of Regulation No 1164/89 is provided for by Directive 70/457/EEC. [10] According to Article 1(2) of that directive, 'the common catalogue of varieties shall be compiled on the basis of the national catalogues of Member States.'

Thus, accepted varieties must be included in one of the national catalogues of varieties officially accepted for certification and marketing (Article 3(1)). Following the expiry of a period of between two and three years, the seeds and plants of a variety accepted in one or more Member States may freely circulate within the Community and the variety in question is to be listed in the common catalogue published in the *Official Journal* (Articles 15, 16 and 18). Where no opposition is raised by any Member State, the variety may be listed prior to the expiry of that period (under the 'accelerated procedure' provided for in Article 15(5)).

8 — Commission Regulation (EEC) No 174/81 of 22 January 1981 amending Regulation (EEC) No 771/74 laying down detailed rules for granting aid for flax and hemp (OJ 1981 L 20, p. 13).

9 — Commission Regulation (EC) No 624/97 of 8 April 1997 amending Regulation (EEC) No 1164/89 laying down detailed rules concerning the aid for fibre flax and hemp (OJ 1997 L 95, p. 8).

10 — Council Directive 70/457/EEC of 29 September 1970 on the common catalogue of varieties of agricultural plant species (OJ, English Special Edition 1966-1972, p. 36).

10. According to Article 4 of Directive 70/457, a variety may be accepted for inclusion in the common catalogue only if it is 'distinct, stable and sufficiently uniform' and is of 'satisfactory value for cultivation and use'. To that end, Article 7(1) of the directive provides that the Member States are to adopt measures to ensure that the acceptance of varieties is based on the results of official examinations, particularly growing trials, covering a sufficient number of characteristics for the variety to be described. The methods used for determining those characteristics must be exact and reliable.

11. Article 7(2) requires the Commission to fix:

(a) the characteristics to be covered as a minimum by the examinations of the various species;

(b) the minimum requirements for carrying out the examinations.

12. The latter provision was extended by Directive 72/180/EEC. [11] Point 5.6 in Part A of Annex II to that directive lays down the minimum general conditions for examinations relating to flax, as regards the criteria of its distinctive nature, stability and uniformity, and provides that such examinations must be carried out on at least two plots each containing two thousand plants. According to statements made by the Commission, which have not been challenged by the applicant, those requirements can be fulfilled by using a planted area of approximately two hectares.

11 — Commission Directive 72/180/EEC of 14 April 1972 determining the characteristics and minimum conditions for examining agricultural varieties (OJ, English Special Edition 1972 (II), p. 404).

The facts

13. In 1994 a number of farmers in the United Kingdom began to cultivate a new variety of fibre flax called 'Klasse' on a trial basis, with a view to its use in the production of fibres for the automobile industry. The 'Klasse' variety formed the subject-matter of a number of trials and was entered in the United Kingdom national catalogue of flax fibres in December 1996, although it has never appeared in Annex A to Regulation No 1164/89.

14. During the 1995 financial year, on the basis of Article 2 of Regulation No 1164/89, the United Kingdom Government granted aid to growers of the 'Klasse' variety for a total cultivation area of 1 903 hectares.

15. The Commission carried out two inspection visits to the United Kingdom, in September 1995 and January 1996. The

inspection report was sent to the United Kingdom Government on 26 July 1996 under cover of a letter signed by the Director-General for Agriculture.

That letter informed the United Kingdom authorities that certain financial corrections were envisaged as a result of the inspections which had been carried out. Despite the fact that the justification given for the extensive planting of 'Klasse' flax had been the need to study its industrial viability, the Commission considered that the aid should be limited to areas which could be identified beyond doubt as devoted to experimental cultivation.

16. On 18 July 1997 the Commission sent to the United Kingdom a formal notice setting out the results of the checks carried out. That communication accepted the possibility of granting aid for research into industrial viability but made it clear that, unless the United Kingdom was able to show that the crop of 'Klasse' flax had been processed, the area allowed by the clearance of accounts services for the purposes of granting aid for industrial trials could not exceed 100 hectares.

17. The United Kingdom Government considered that there was no basis in law for thus limiting the aid and therefore referred the matter, by letter of 4 December 1997, to the Conciliation Body.

That body was set up by Commission Decision 94/442/EC [12] in order 'to permit a reconciliation of the positions of the Commission and a Member State when these differ' (second recital in the preamble). In its final report of 15 May 1998, [13] it expressed its understanding of the United Kingdom authorities' perplexity in the face of the proposal retroactively to limit to 100 hectares 'the area to be regarded as eligible for aid for a variety under test'. The Conciliation Body likewise found that, although the proposed correction was probably excessive, a relatively substantial reduction in the amount of the aid could be justified.

18. Notwithstanding the contents of that report, the Commission maintained its argument that an area of 100 hectares was ample for experimental testing of a new variety. The United Kingdom authorities, for their part, continued to assert that there was no legal basis whatever for the limit proposed by the Commission.

In those circumstances, the Commission on 3 February 1999 adopted the contested Decision refusing to allow the sum of GBP 869 283 on the ground that it appeared to have been improperly paid by the United Kingdom authorities.

12 — 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).

13 — Which does not have binding force (Article 1(2)(a) of Decision 94/442).

19. The United Kingdom regarded the Decision as unlawful and therefore brought an action before the Court on 22 April 1999, seeking partial annulment of the Decision in issue.

20. The 'Klasse' variety was entered in the common catalogue in May 1997. Its entry in the catalogue was accompanied by a note stating that it was not clearly classifiable as a variety of either nutritive or textile flax. In July 1998 the 'Klasse' variety was deleted from the United Kingdom national catalogue and hence from the common catalogue.

The arguments of the parties

21. The United Kingdom relies, in support of its application for annulment, on four pleas, as follows:

— the contested Decision is contrary to Regulation No 1164/89 as the latter contains no provision permitting the aid payable in respect of the experimental cultivation of fibre flax to be limited to an area of 100 hectares;

— the contested Decision is unlawful as the Commission is not competent to limit the scope of Regulation No 1164/89 without following the procedures provided for in Article 12 of Regulation No 1308/70;

— the Decision is arbitrary and inadequately reasoned;

— in that it imposes a limit of 100 hectares, the Decision is in fact a legislative act having retroactive effects, thereby infringing the principles of legal certainty and the protection of legitimate expectations.

The United Kingdom additionally claims that the Commission should be ordered to pay the costs.

22. The Commission contends that the application should be dismissed and that the United Kingdom should be ordered to pay the costs.

Analysis of the grounds relied on in support of the application for annulment

23. It is appropriate, at the outset, partially to rearrange and reformulate the grounds

of nullity relied on. The allegations put forward by the applicant under four separate headings merely comprise, strictly speaking, two sufficiently differentiated grounds of annulment.

The United Kingdom, relying on the arguments contained in the first, second and fourth indents, maintains that the relevant provisions of the contested Decision are illegal, since the Commission was empowered to adopt them only on an adequate substantive legal basis or in accordance with the established formal procedure, and in any case without giving them retroactive effect. That is the first ground relied on.

The argument that the contested Decision is arbitrary and inadequately reasoned is capable of constituting an autonomous second ground.

(a) The first ground: the contested provisions are unlawful inasmuch as the Commission was not competent to adopt them

24. The United Kingdom Government maintains that the Decision in issue cannot be based on Regulation No 1164/89, since the second indent of Article 2 of that regulation (concerning the cultivation of flax varieties currently under review by Member States' authorities for inclusion in the catalogue of fibre flax varieties) makes no provision for limiting projected grants of aid.

25. According to the applicant, the United Kingdom authorities were required, in the absence of any rule limiting to 100 hectares the area in respect of which aid might be granted, to grant such aid to all growers of the 'Klasse' variety who lawfully applied for it. Moreover, the total area of 1 903 hectares in respect of which the aid was granted is modest if one takes into account the fact that the cultivation in question was intended to determine the viability of the new variety for industrial use.

26. The United Kingdom further considers that, in so far as the Commission has sought to adopt, in the guise of an administrative decision, a legislative measure designed to limit the scope of Regulation No 1164/89, such a measure must *ipso facto* be illegal. First, that being the case, the Commission modified a provision of the scheme of aid for flax without following the prescribed procedure, under which, *inter alia*, the corresponding management committee must be consulted (see point 5 above). Second, such a measure constitutes in any event a legislative act having retroactive effect and is contrary to the principles of legal certainty and the protection of legitimate expectations.

27. The Commission, for its part, maintains that, although the relevant Community rules did not expressly fix a maximum area to be planted with fibre flax for experimental purposes, that area had to be kept within reasonable limits and had to be proportionate to the objectives pursued. According to the Commission, the aid provided for in the second indent of Article 2 of Regulation No 1164/89 was

solely intended to finance scientific, not industrial, trials. In support of its arguments, the defendant relies on Directive 72/180, which lays down certain minimum sowing conditions with a view to obtaining reliable data and provides that two hectares of experimental planting are sufficient for that purpose (see point 12 above).

Consequently, although the Commission agreed in principle to extend aid to cultivation carried out for the purposes of industrial trials (see point 16 above), it did so as a concession to the United Kingdom. Even so, the Commission considers that it was not, strictly speaking, obliged to finance aid for the carrying out of viability studies in the absence of any evidence showing that the crops to which the aid related had been processed. The decision to grant aid in respect of a maximum of 100 hectares should therefore be regarded as a further generous concession.

28. Lastly, the defendant suggests that the Court of Justice should interpret Regulation No 1164/89 in the light of its case-law on the prohibition of the abuse of rights, [14] in which it has expressly held that Community legislation is not to be interpreted as allowing subsidies to be granted with respect to transactions not carried out in good faith. [15]

29. In my view, it is appropriate at the outset to set out the scope of the present action for annulment: its object — which could not be achieved by any other means — is the annulment of the contested Decision in so far as that decision refuses reimbursement of the aid granted for the cultivation of 1 903 hectares of experimental fibre flax and allows such reimbursement of aid only in relation to 100 hectares. Whilst it may appear otiose to reiterate the point, the task of the Court of Justice within the framework of Article 173 of the EC Treaty is limited to ruling on the legality of the contested measure, to which end it is required to examine the matters of fact and law which were taken — or should have been taken — into consideration by the authority adopting that measure. It is not for the Court, therefore, to set itself up as an appellate body in relation to that authority or to exercise unlimited jurisdiction in hearing and determining the case. This means that, in contrast to the position with regard to actions under Article 172 of the EC Treaty (now Article 229 EC), the Court is not empowered to modify the decision in issue or to substitute a different act in its place. For those reasons, I do not consider that an action under Article 173 constitutes an appropriate vehicle for giving rulings in the nature of a judgment of Solomon.

Having said that, I would go on to state that I am not convinced that the way in which the Commission has acted in the

14 — Case 33/74 *Van Binsbergen* v *Bedrijfsvereniging Metaalnijverheid* [1974] ECR 1299; Case C-23/93 *TV10* v *Comissariaat voor de Media* [1994] ECR I-4795; Case 229/83 *Leclerc and Others* v *'Au Blé Vert'* [1985] ECR 1; Case 39/86 *Lair* v *Universität Hannover* [1988] ECR 3161; and Case C-206/94 *Brennet* v *Paletta* [1996] ECR I-2357.

15 — Case 125/76 *Cremer* v *BALM* [1977] ECR 1593; Case 250/80 *Töpfer* [1981] ECR 2465; and Case C-8/92 *General Milk Products* v *Hauptzollamt Hamburg-Jonas* [1993] ECR I-779.

present case fulfils the requirements of formal and substantive legality. As I propose to explain below, even though the objective pursued by the Commission may appear to be lawful, the means employed by it are not in conformity with the legislation.

30. It is necessary precisely to define the framework of positive law applicable to the dispute. In my view, the only provision which is specifically applicable is the second indent of Article 2 of Regulation No 1164/89, which provides for grants of aid 'for flax grown from the seed varieties... currently under review by Member States' authorities for inclusion in the catalogue of flax varieties intended mainly for the production of fibre.'

That point is agreed between the parties. The Commission has argued, as a preliminary point, that the provision in question is intended to cover only scientific trials, and that it is therefore referable to Directive 70/457, which is in turn referable to Directive 72/180 (see points 10 to 12 above). However, by the date of its communication of 18 July 1997 at the latest, the Commission was prepared to accept that Regulation No 1164/89 could serve as the basis for grants of aid for industrial trials.

I would merely observe that it cannot be inferred from the wording of Article 2 of Regulation No 1164/89 that the aid for which it provides is intended solely for scientific trials, to the exclusion of all tests of an industrial nature.

31. In those circumstances, the United Kingdom was empowered, and indeed obliged, to grant aid for the cultivation, for the purposes of industrial experimentation, of a new variety of flax for the production of fibres. Conversely, this means that the Commission was not entitled to refuse reimbursement of the aid granted on account of the nature of the tests carried out.

32. As to the maximum area for which the aid in question could be granted, it must be reiterated that the Community legislation lays down no rules in that regard. Thus, in its communication of 18 July 1997 the Commission itself conceded that point, even though it considered that the area under cultivation should be limited to what is reasonable and proportionate to the objectives pursued. I agree. However, although the Commission accepts that Regulation No 1164/89 may serve as the basis for promoting industrial trials, it has produced no evidence whatever to show that the 1 903 hectares planted must be regarded as excessive for those purposes.

33. It follows that there existed no legislative provision entitling the Commission to refuse reimbursement of the aid granted in relation to 1 903 hectares sown for industrial trials, on the ground that that aid was excessive.

34. The Commission argues that, in the absence of any evidence that the crops were processed, it was not obliged to admit aid

granted for industrial purposes. Moreover, as it stated at the hearing, the wording of the second indent of Article 2 of Regulation No 1164/89, which refers to varieties 'currently under review by Member States' authorities', imposed on Member States a duty to exercise special vigilance.

35. I do not share the view that the wording of the second indent necessarily imposes on Member States any increased responsibility with regard to the carrying out of trials. It seems to me that the wording on which the Commission places such emphasis should instead be interpreted as meaning *varieties subjected to review by the Member States' authorities*. Any other construction would mean the exclusion from the benefit of aid of any trials not directly carried out by those authorities, which would produce a particularly strange result within the framework of the EAGGF.

I do accept that the Commission may, on the basis of the second indent, require a Member State to verify that crops benefiting from aid have been planted with a view to the carrying out of genuine tests as to viability. The Member State concerned may, for its part, refuse to grant the aid or, as the case may be, demand to be repaid if it finds that the flax was grown not for experimental purposes but solely in order wrongfully to benefit from the rules for the promotion of such cultivation. [16]

16 — See, *mutatis mutandis*, the judgment in *General Milk Products* v *Hauptzollamt Hamburg-Jonas*, cited above.

36. However, the question whether the Commission was entitled, in the absence of such verification, to reduce the area to 100 hectares, as contested by the applicant, is a different issue.

37. In that regard, I am bound to say that the Commission has not established any connection between the absence of proof that the crop was processed and the limiting of the maximum area eligible for aid to 100 hectares. The reduction imposed by that institution might have appeared justified if a calculation had been carried out in relation to the area actually planted for experimental purposes.

However, in its written communication of 18 July 1997 the Commission merely pointed out that the United Kingdom authorities had produced no evidence whatever to show that genuine tests had been carried out, refusing reimbursement of any expenditure on the variety in question relating to an area in excess of 100 hectares on the ground that that area was in its view the maximum needed to carry out the tests on the new variety.

At no juncture did the defendant explain the basis for that assessment.

38. Having previously argued the opposite, the Commission now maintains that its

willingness to allow aid in respect of 100 hectares constituted a gratuitous concession. That submission must be rejected, as it blatantly contradicts what was stated in its letters.

39. All the foregoing leads me to conclude that the Commission was not entitled to reduce to a sum corresponding to 100 hectares the amount payable by way of reimbursement of the aid granted for the purposes of carrying out industrial trials on a new variety of fibre flax.

40. In those circumstances, the first ground of annulment should be upheld.

(b) The second ground: the contested Decision is unlawful in that it is inadequately reasoned and arbitrary

41. The United Kingdom Government maintains that, in limiting to 100 hectares the area eligible for aid, the contested Decision lacks any scientific or technical justification.

42. According to the applicant, it is apparent from the case-law of the Court of Justice on clearance of accounts [17] that it is for the Commission to produce evidence proving an infringement of the Community rules. In the present case, the Commission should have provided appropriate justification for the imposition of a limit of 100 hectares. The sole defence relied on is a submission that the area of 1 903 hectares was far greater than that needed for the trials referred to in Directive 72/180. In the applicant's view, however, that directive is applicable only to trials of a scientific nature and is not concerned with industrial feasibility trials such as those in the present case, to which its provisions have no relevance.

43. The applicant considers that, when adopting the contested Decision, the Commission should have fulfilled its obligations of transparency, consistency and scientific justification, by providing reasons for that decision. As it is, the Commission failed to provide any such justification, either in its correspondence with the United Kingdom Government or in the proceedings before the Conciliation Body, and the Decision must therefore be regarded as arbitrary.

44. The Commission points out, first of all, that the extent of the duty to state reasons depends not only on the wording of the Decision but also on the context in which it was adopted and, in particular, the related

17 — Case C-281/89 *Italy* v *Commission* [1991] ECR I-347.

documents on the basis of which it was adopted. The Court of Justice has consistently held that the statement of reasons for a decision must be regarded as sufficient if the Member State to which it was addressed was closely involved in the process by which the decision came about and was aware of the reasons which led to its adoption. [18]

45. The Commission goes on to state that, in the present case, it informed the United Kingdom authorities fully of its view that the sowings could not be regarded as experimental and did not fulfil the requirements of Article 2 of Regulation No 1164/89; that view was set out, in particular, in the reports annexed to its letter of 26 July 1996 and in the Decision.

46. The reasons given by the Commission to justify the measure at issue appear to me to be particularly flimsy.

47. The approach adopted in its Formal Notice of 18 July 1997 is different from that manifested in the Summary Report accompanying the Decision. In the first of those documents, 100 hectares is said to constitute 'the maximum hectarage admitted by the clearance of accounts services for an industrial trial'; in the second, by contrast, that area is stated to be the maximum needed in order to carry out the tests referred to in Directive 72/180, that is to say, scientific tests.

In the rejoinder, on the other hand, the notion of industrial trials no longer features in the Commission's arguments, and 100 hectares, instead of being the maximum area allowed for those purposes, is stated to represent merely an unusually generous concession on the part of the defendant.

48. However, the volatility of the approach adopted by the Community institution does not stop there. As the United Kingdom Government points out, the Commission puts forward, in its correspondence and in its defence, as many as five different criteria to determine the area to be financed at the expense of the EAGGF.

49. Thus, in paragraph 16 of the defence, the defendant states that the maximum area eligible for aid is the two hectares referred to in Directive 72/180; on the other hand, it maintains in paragraph 14 of the same

18 — Case C-22/89 *Netherlands* v *Commission* [1990] ECR I-4799; Case C-27/94 *Netherlands* v *Commission* [1998] ECR I-5581; and Case C-28/94 *Netherlands* v *Commission* [1999] ECR I-1973.

pleading that that area of two hectares is merely a minimum requirement and that it is therefore permissible to grant aid for more extensive sowings. Nor should one overlook the abovementioned criteria set out in (a) the Summary Report accompanying the Decision and (b) the Formal Notice of 18 July 1997. Lastly, the 1996 inspection report stated that any aid that could legally be granted would have to be restricted to areas that could be identified beyond doubt as experimental.

50. It follows from the foregoing that the criterion referred to in the Formal Notice of 18 July 1997 merely constitutes one of several different criteria put forward by the Commission.

At the hearing, the Commission sought to attach particular significance to the fact that the United Kingdom had not produced any evidence showing that the crop had been processed. However, that justification contradicts the other arguments put forward by the Community institution and is inconsistent, in particular, with its willingness to allow aid for a limited area corresponding to 100 hectares of cultivated flax. If, as the Commission claims, that lack of evidence of processing constituted the decisive reason for the refusal, then it necessarily follows that, had the United Kingdom produced evidence showing that the crop had been processed and that the trials had been carried out, the aid would have been approved in its entirety. This would in turn have been inconsistent with the wording of the Decision, which limits to 100 hectares the area in respect of which any aid may be allowed. Lastly, as is pointed out above, the allegation that the Commission granted a concession by approving the aid for that area, quite apart from having been raised at a late stage, is not supported by any of the statements contained in the documents.

51. In those circumstances, the Commission cannot be said to have fulfilled its obligation to provide a proper statement of reasons for its decision to reduce the aid to be financed by the EAGGF to a sum corresponding to 100 hectares.

52. The second plea must therefore also be upheld.

Costs

53. On the basis that the grounds put forward by the United Kingdom should be upheld, it is appropriate to order the Commission, in accordance with the first subparagraph of Article 69(2) of the Rules of Procedure, to pay the costs of the proceedings.

Conclusion

54. In accordance with the foregoing, I propose that the Court should:

(1) annul Commission Decision 1999/187/EC of 3 February 1999 on the clearance of the accounts presented by the Member States in respect of the expenditure for 1995 of the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) inasmuch as it disallows the disbursement from that fund of the sum of GBP 869 283 relating to financial assistance paid in advance by the United Kingdom pursuant to Commission Regulation (EEC) No 1164/89 of 28 April 1989 laying down detailed rules concerning the aid for fibre flax and hemp;

(2) order the Commission of the European Communities to pay the costs.