JUDGMENT OF THE COURT (Sixth Chamber)

21 October 1999 *

In Case C-44/97,

Federal Republic of Germany, represented by E. Röder, Ministerialrat in the Federal Ministry of Economic Affairs, and B. Kloke, Oberregierungsrat in the same ministry, acting as Agents, Postfach 13 08, D-53003 Bonn,

applicant,

v

Commission of the European Communities, represented by Klaus-Dieter Borchardt, of its Legal Service, acting as Agent, with an address for service at the office of Carlos Gómez de la Cruz, also of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the partial annulment of Commission Decision 96/701/EC of 20 November 1996 amending Commission Decision 96/311/EC on the clearance of the accounts presented by the Member States in respect of the expenditure for 1992 of the European Agricultural Guidance and Guarantee Fund (EAGGF) Guarantee Section and in respect of certain expenditure for 1993

* Language of the case: German.

(OJ 1996 L 323, p. 26) in so far as it refused to charge to the EAGGF the sum of DEM 19 591 000,

THE COURT (Sixth Chamber),

composed of: P.J.G. Kapteyn (Rapporteur), acting as President of the Sixth Chamber, G. Hirsch and H. Ragnemalm, Judges,

Advocate General: J. Mischo,
Registrar: D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 16 December 1998, at which the Federal Republic of Germany was represented by C.-D. Quassowski, Regierungsdirektor in the Federal Ministry of Economic Affairs, acting as Agent, assisted by G. Konopka, Head of the Meat Department at the Bundesanstalt für Landwirtschaft und Ernährung, and the Commission by K.-D. Borchardt,

after hearing the Opinion of the Advocate General at the sitting on 9 March 1999,

gives the following

Judgment

1 By application lodged at the Court Registry on 4 February 1997, the Federal Republic of Germany brought an action under the first paragraph of Article 173 of the EC Treaty (now, after amendment, the first paragraph of Article 230 EC) for the partial annulment of Commission Decision 96/701/EC of 20 November 1996 amending Commission Decision 96/311/EC on the clearance of the accounts presented by the Member States in respect of the expenditure for 1992 of the European Agricultural Guidance and Guarantee Fund (EAGGF) Guarantee Section and in respect of certain expenditure for 1993 (OJ 1996 L 323, p. 26) (hereinafter the 'contested decision') in so far as it refused to charge to the EAGGF the sum of DEM 19 591 000.

2 The documents before the Court show that this sum represents a flat-rate correction of 2% of the total declared expenditure for the delivery of beef and veal into intervention during the 1992 financial year. The Commission applied that flat-rate correction in accordance with its 'Guidelines on the flat-rate corrections in the event of deficiencies in controls carried out by the Member States' contained in its Decision of 31 July 1992 (Doc. Com. (92) PV 1116) communicated to the EAGGF Committee on 3 June 1993.

3 The guidelines provide for flat-rate corrections of 2, 5 or 10%, depending on the seriousness of the deficiencies. The 2% correction, applied in this case, operates where the deficiency is limited to certain elements of the control system of lesser importance, or to the operation of controls which are not essential to the assurance of the regularity of the expenditure, such that it can be reasonably concluded that the risk of loss to the EAGGF was minor.

4 The Commission justified applying that flat-rate correction on the ground that it had identified a number of deficiencies in the German control system during the audits conducted on measures for the purchase and sale as well as the storage of intervention beef and veal, in 1993 and 1994, both at the Bundesanstalt für landwirtschaftliche Marktordnung (the Federal Office for the Organisation of the Agricultural Markets; hereinafter 'BALM'), the German intervention agency at the material time, and at four coldstores, as well as on the basis of the annual inventories of Germany's 107 coldstores.

5 The Commission's complaints concerning the German control system were discussed with the competent German authorities in 1994 and 1995, when views were exchanged and talks held on a number of occasions, including one on 20 January 1995 at BALM's Frankfurt office. The talks, however, did not prove to be fruitful.

6 At the request of the German Government, the matter was referred to the Conciliation Body set up in accordance with Commission Decision 94/442/EC of 1 July 1994 setting up a conciliation procedure in the context of the clearance of accounts of the European Agricultural Guidance and Guarantee Fund (EAGGF) Guarantee Section (OJ 1994 L 182, p. 45). However, since the parties continued to hold different views, the Conciliation Body refrained from deciding by vote between the parties to the conciliation and, in its final report of 29 March 1996, merely stated that it was unable to identify any factors capable of providing a sound basis for reaching agreement between the parties.

7 In its summary report on the results of inspections concerning the clearance of the EAGGF Guarantee Section accounts for 1992 as well as certain expenditure for 1993 (Doc. VI/6355/95 of 27 March 1996) as well as the supplementary audit report (Doc. VI/5112/96 of 23 September 1996), the Commission noted that it had identified deficiencies at all stages of control, namely on entry into storage of the meat accepted for intervention, during storage and on removal from storage.

8 According to the Commission, those deficiencies in the control system constitute infringements of Article 8(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 well as Articles 3 and 4 of Commission Regulation (EEC) No 618/90 of 14 March 1990 laying down rules for drawing up the annual inventory of agricultural products in public storage (OJ 1990 L 67, p. 21).

9 The Commission adopted the contested decision on the basis of those provisions.

10 In support of its application, the German Government first of all challenges all of the Commission's complaints concerning the German control system, and also the accuracy of the Commission's findings. The German Government then analyses the Commission's criticisms with respect to the controls carried out when the meat is taken over, stored and removed from storage.

Preliminary observations

11 The German Government puts forward four pleas in law challenging the validity of the 2% flat-rate correction applied by the Commission.

12 First, it claims that, during previous financial years, the German controls were carried out using the same system, but the Commission did not charge the expenditure incurred to the German Government. Therefore, the fact that that expenditure was not charged to the German Government means that the Commission cannot raise the same deficiencies in relation to a subsequent financial year, and confirms that there are no deficiencies in the German control system.

13 The Commission acknowledges that, although it had found deficiencies in the controls on the public storage of beef and veal in intervention in Germany for the 1987 and 1988 financial years and had made appropriate recommendations to the German authorities, it had in effect decided not to charge sums to the German Government for those financial years. The Commission none the less contends that, during subsequent reviews of the control system, that circumstance prevented it neither from noting deficiencies already ascertained but not rectified and deficiencies that had newly emerged, nor from taking them into account for the purposes of charging expenditure.

14 In that connection, and as the Advocate General notes in point 21 of his Opinion, the fact that the Commission did not take the appropriate action, on the financial level, on a finding of deficiencies pertaining to one financial year cannot deprive it of the right to do so in relation to subsequent financial years, particularly where those deficiencies have persisted. Moreover, deficiencies ascertained subsequently may also be taken into account in determining the level of the flat-rate correction.

15 Secondly, the German Government cites in support of its argument a number of considerations set out in the provisional conclusions of the Conciliation Body of 1 March 1996, annexed to its final report.

16 In that regard, in the light of those considerations, which are referred to in points 24, 26 and 28 of the Advocate General's Opinion, it is first necessary to point out that the Conciliation Body did not reach any final conclusions but, taking the view that it could not, with any degree of certainty, be established, on the basis of the measures adopted by Germany, whether or not the German control system was sufficiently effective to avoid risks for the EAGGF, the Conciliation Body itself recommended a detailed analysis of the actual functioning of that system.

17 Next, even if, in certain specific cases, the considerations set out by the Conciliation Body reflect its opinion that the German authorities had demonstrated the accuracy of their statements, those considerations, as the Advocate

General notes in point 27 of his Opinion, leave open the question whether a general conclusion can be drawn from those cases.

18 Finally, pursuant to Article 1(2)(a) of Decision 94/442/EC, the Commission, as it has rightly maintained, and without being contradicted on this point by the German Government, is not bound by the conclusions of the Conciliation Body when adopting its decision.

19 Consequently, the considerations set out by the Conciliation Body cannot be regarded as conclusive in this case for the purposes of assessing the German control system.

20 Thirdly, the German Government charges the Commission with having failed to provide an adequate statement of the reasons for the contested decision.

21 In that connection, it should be pointed out that, according to settled case-law, in the specific context of the preparation of decisions on the clearance of accounts, the reasons for a decision must be considered to be adequate if the Member State to which the decision is addressed was closely involved in the process by which the decision came about and is therefore aware of the reasons for which the Commission considered that it was not required to charge the sum in dispute to the EAGGF (see Case C-22/89 *Netherlands* v *Commission* [1990] ECR I-4799, paragraph 18 and Case C-27/94 *Netherlands* v *Commission* [1998] ECR I-5581, paragraph 36).

22 In this case, the documents before the Court show that the German Government was involved in the process by which the contested decision came about. The doubts entertained by the Commission regarding the reliability of the German control system were brought to the attention of the German authorities on several occasions, both orally and in writing, discussions were held and the matter was referred to the Conciliation Body.

23 Furthermore, the Commission set out in its summary report the reasons which led it to refuse to clear the sum in dispute.

24 In those circumstances, the grounds for the contested decision must be held to be adequate.

25 Fourthly, the German Government maintains that the Commission failed to take account of the evidence put forward during the period before the action was brought.

26 The Commission, on the other hand, contends that it did examine that evidence but did not find it convincing. It points out that its findings and the 2% flat-rate correction relate to the inadequacies of the control system as a whole, that is to say the deficiencies affecting the three stages of control (entry into storage of the meat, storage itself and removal from storage) and not the inadequacies at each stage viewed in isolation.

27 In this regard, reference should be made to the settled case-law of the Court concerning the sharing of the burden of proof in the context of actions for annulment brought by a Member State against a Commission decision on the clearance of EAGGF accounts.

28 When the Commission refuses to charge certain expenditure to the EAGGF on the ground that it was incurred as a result of breaches of Community rules for which a Member State can be held responsible, it is for that State to demonstrate that the conditions for obtaining the funding refused by the Commission are met (see Case 347/85 *United Kingdom* v *Commission* [1988] ECR 1749, paragraph 14 and Case C-48/91 *Netherlands* v *Commission* [1993] ECR I-5611, paragraph 16). The Commission is required not to demonstrate exhaustively that there are irregularities in the data submitted by the Member States but to adduce evidence

of serious and reasonable doubt on its part regarding the figures submitted by the national authorities. The reason for this mitigation of the burden of proof on the Commission is that it is the State which is best placed to collect and verify the data required for the clearance of EAGGF accounts; consequently, it is for the State to adduce the most detailed and comprehensive evidence that its figures are accurate and, if appropriate, that the Commission's calculations are incorrect (see Case C-48/91, cited above, paragraph 17). In the event of a dispute it is for the Commission to prove that the rules of the common organisation of the agricultural markets have been infringed and, once it establishes such infringement, it falls to the Member State to show, as the case may be, that the Commission committed an error as to the financial consequences to be drawn from it (see Case C-281/89 *Italy* v *Commission* [1991] ECR I-347, paragraph 19; Case C-48/91, cited above, paragraph 18 and Case C-59/97 *Italy* v *Commission* [1999] ECR I-1683, paragraphs 54 and 55).

29 It is therefore necessary to examine the evidence the German Government has put forward to challenge the findings on which the Commission based the contested decision.

The controls at the time of takeover

30 The German Government puts forward five arguments to rebut the Commission's complaints concerning the controls carried out when the intervention beef and veal is taken over.

31 First, in its summary report, the Commission criticised the German Government for frequently using employees of the coldstores, acting as authorised representatives of BALM, instead of officers of BALM, to weigh the meat and certify it had been taken over. According to the Commission, that use of authorised representatives could jeopardise the correct execution of the controls at the

takeover stage and casts doubt on the reliability of the reports drawn up by those representatives. That, according to the Commission, was a deficiency in the German system because, once the meat had been frozen, packaged and stored in the coldstore, it was impossible subsequently to rectify any omissions or irregularities that may be uncovered in relation to the controls.

32 The German Government submits that there is no deficiency in the German control system at the takeover stage in this regard and claims that the Commission failed to take account, in its criticisms, of the fact that the system comprises two stages. In the first stage, controls are carried out in the slaughterhouse by officers of BALM exclusively; in the second, controls are carried out in the coldstore either by officers of BALM or, because of staff shortages, by employees of the coldstore. However, the German Government states that, in the latter case, the controls carried out by authorised representatives of BALM were subsequently verified by means of documentary checks and physical checks on the meat taken over, carried out by officers of BALM. Consequently, the control system constitutes a whole and should therefore be viewed as a whole and should not be judged on the basis of an assessment of the second stage, taken in isolation.

33 In that connection, it should be pointed out that, pursuant to Article 14 of Commission Regulation (EEC) No 859/89 of 29 March 1989 laying down detailed rules for the application of intervention measures in the beef and veal sector (OJ 1989 L 91, p. 5), which was applicable at the material time, 'the products shall be taken over by the intervention agency on the date of entry into the intervention centre.' It is therefore that day, and more specifically the point at which the meat is delivered to the coldstore, that is decisive for the purpose of determining whether the controls applicable at the time of takeover are correct.

34 Consequently, and as the Commission rightly points out, if controls are omitted or not properly carried out at the stage of takeover, they cannot be rectified subsequently by means of documentary or physical checks, even if those checks are carried out by officers of BALM.

35 Even if the subsequent documentary and physical checks, cited by the German Government, made by officers of BALM are of a certain value, they could not in any event rectify deficiencies in the checks made at the time of takeover. As the Advocate General states in points 77 to 79 of his Opinion, if the BALM inspector is not present at the time of takeover, he will inspect the meat either when it is in the freezer tunnel (Schockraum) or when it has already entered storage. In either case, thorough checks on the state of the meat cannot properly be made at a time when it is either in the process of being frozen or has already been frozen, packaged and placed on a pallet in the coldstore.

36 Secondly, the Commission stressed in its summary report that the use of authorised representatives is bound to create a risk of a conflict of interests between the vendor slaughterhouse and the coldstore responsible for storing the goods, if the two establishments belong to the same group of undertakings (linked undertakings). That risk becomes specific, in the case of linked undertakings, in particular through the possibility of introducing false reports into the payments system; it is therefore essential that the German Government should take effective steps to ensure that this conflict of interests does not undermine the quality of the controls. According to the Commission, however, the BALM instructions fail even to mention the particular problem of linked undertakings.

37 As regards the measures to combat the risk of a conflict of interests, the German Government maintains that, in the context of intervention transactions, if the vendor slaughterhouse was linked to a coldstore, BALM prevented, as far as possible, the meat purchased from being stored in that undertaking. In those rare instances where it was not possible to adhere to that principle for organisational reasons, the controls on takeover at the coldstore linked to the slaughterhouse were carried out exclusively by officers of BALM. The German Government points out that BALM had enforced compliance with those principles by transmitting oral instructions to its regional offices.

38 As regards the introduction of false reports into the payments system, the German Government maintains that this is possible only if there is collusion between all the individuals and departments responsible for the takeover of the beef and veal for intervention and for the administrative controls (slaughterhouse, BALM inspector or authorised BALM representative, certificated weigher, coldstore and BALM's central and regional offices). However, the German Government contends that no system could provide adequate protection against such a widespread and large-scale fraud, involving collusion between all those individuals and departments.

39 The Commission points out that, in reply to its letter of 13 April 1994 formally noting the risk that false reports might be introduced, the German Government stated, by letter of 6 July 1994, that 'in order to guarantee that the takeover reports of the BALM central office, its regional offices and the coldstore tally... an internal control and adjustment procedure will be introduced parallel to the current control procedure — as suggested by the EAGGF.' According to the Commission, in making that statement, the German Government acknowledged that the procedure employed up to then did not fully protect the payments system against the introduction of false reports.

40 As regards the measures designed to avert, at that stage, the risk of a conflict of interests arising as a result of action by authorised representatives of BALM, it should be noted that the correctness of the controls at the time of takeover is all the more important in those cases where the coldstore is linked to the slaughterhouse, and special measures are needed to ensure that the controls are actually carried out and are executed effectively.

41 As the Advocate General notes in point 85 of his Opinion, by issuing its oral instructions, BALM recognised the importance of this, but failed to give them the force that written instructions would have had. It must therefore be held that the oral nature of BALM's instructions means that those instructions cannot be completely effective and thus constitutes a deficiency in the German control system.

42 As to the risk of false reports being introduced where there are linked undertakings, it must be observed that such a risk cannot be excluded. It is clear from the statements by the German authorities, contained in their letter of 6 July 1994, that they recognised the reality of this risk by announcing that they were going to introduce a procedure designed to guarantee that the copies of the takeover reports in possession of the BALM central office, its regional offices and the coldstore tallied in every detail.

43 Thirdly, in its summary report, the Commission stated that an examination of the control reports made available to it revealed that where the controls are carried out by officers of BALM, their reports contain a number of negative comments that result in refusal of takeover, but that if the controls are carried out by coldstore employees, acting as BALM's authorised representatives, their reports contain no such comments. According to the Commission, that finding is confirmed by the checks carried out subsequently by officers of BALM and recorded in the 'reports on control in the receiving undertaking'.

44 As regards the last-mentioned reports, the German Government maintains that, under the German system, only the 'report on the qualitative assessment and takeover of the beef and veal' is authentic; the 'report on control in the receiving undertaking' is merely a BALM internal document. Furthermore, according to the German Government, the form entitled 'Report on qualitative assessment and on takeover of the beef and veal' did not originally include an appropriate section in which either BALM officers or its authorised representatives could record unusual features or deficiencies noted when the beef was taken over. Subsequently, however, and at the suggestion of the EAGGF, BALM recast the report to include a section in which unusual features or deficiencies noted could be recorded.

45 As regards the 'Reports on control in the receiving undertaking', the Commission makes the point that it was the German authorities themselves which produced that category of report in order to demonstrate that the German control system was working correctly, after the Commission had identified irregularities in the

takeover reports. The Commission contends the failure to include at that time an appropriate section in the 'Report on qualitative assessment and on takeover of the beef and veal' to be a further deficiency in the German system.

46 In that connection, as is confirmed by the 'Reports on control in the receiving undertaking' drawn up subsequently by the BALM officers, it is not in dispute that there were deficiencies in the controls carried out by BALM's authorised representatives at the time of takeover.

47 The German Government's argument that the reports are simply a BALM internal document and that only the report drawn up at the time of takeover is authentic must be rejected. As the Commission rightly maintains, it was the German authorities themselves which put forward those reports in order to demonstrate that their control system was working correctly. It follows that, if those documents lend support to the Commission's findings, there is nothing to prevent the Commission from citing them.

48 As regards the absence of a specific section in the 'Report on qualitative assessment and on takeover of the beef and veal' in which unusual features or deficiencies could be recorded, it must be observed, as the Advocate General remarks in point 81 of his Opinion, that if it is established that the main controls are those carried out when the meat is taken over, the fact that the report used for takeover controls in 1992 did not contain an appropriate section in which to record any unusual features that emerged on verification of takeover or minor deficiencies noted in the meat to be taken over, constitutes a further weakness in the German system at the time. That would be so *a fortiori* if, as the German Government claims, this was in fact the only authentic document. Moreover, the German Government has acknowledged that weakness and claims to have cured it by including an appropriate section in the report for subsequent financial years.

49 Fourthly, in its summary report, the Commission identified other factors that cast doubt on the reliability of the German system. It highlights three instances of irregularities resulting from fraudulent manipulation that expose deficiencies in the German system and adds that its doubts were confirmed by the available statistics on controls which show significant differences in the number of controls carried out by BALM's regional offices. The Commission explains that in some regions, where the volume of national deliveries was at a lower level, there was a high control rate, whereas in regions like Mülheim, Mannheim and Munich, where the volume of national deliveries was very high, the control rate was relatively low.

50 The German Government maintains that the three instances of irregularity recorded cannot call into question the security and correctness of the control system taken as a whole, particularly since they were discovered as a result of the checks carried out by the German authorities. As regards the regional discrepancies that emerge from the statistics on controls, the German Government maintains that, for the 1992 financial year, some 52% of the controls carried out in the coldstores — more than half therefore — were carried out by a BALM inspector and that all the remaining controls were carried out by authorised representatives of BALM, with the result that there was 100% control of takeover.

51 In that connection, it should be noted that while the three cases of irregularities resulting from fraud that were recorded do not of themselves justify calling into question the security and correctness of the German control system taken as a whole, as the German Government rightly maintains, they do, however, indicate that the system continues to be vulnerable because of the use of authorised representatives. The mere presence of BALM officers when the meat is delivered to coldstore would make fraud more difficult.

52 That finding is borne out by the observation that certain BALM regional offices that accept very large quantities of beef and veal into intervention are also those which carried out fewer controls. As the Advocate General notes in point 83 of

his Opinion, even though BALM officers directly carried out a total of 52% of the controls, the low level of official and independent controls carried out by the Mülheim, Mannheim and, above all, Munich offices was liable to make it easier for unscrupulous individuals to commit fraud.

53 Fifthly, according to the German Government, the Commission is basing its objection to the system of entry into storage that operates in Germany — not explicitly, it has to be said, but in substance — on Article 17(4) of Commission Regulation (EEC) No 2456/93 of 1 September 1993 laying down detailed rules for the application of Council Regulation (EEC) No 805/68 as regards the general and special intervention measures for beef (OJ 1993 L 225, p. 4), which allows an authorised representative of the intervention agency to engage in takeover transactions provided he is totally independent of the successful tenderer. The German Government criticises the Commission for applying that requirement, introduced by Article 17(4) of Regulation (EEC) No 2456/93, retroactively to the 1992 financial year, although the regulation was not in force at the material time and Article 8 of Regulation No 729/70 itself did not call for this.

54 According to the Commission, that complaint is unfounded because the criticisms directed at the German control system in relation to the 1992 financial year are based neither in fact nor in law on the regime established by Regulation (EEC) No 2456/93, but on the fact that the German Government failed to take the measures necessary to ensure that the transactions financed by the EAGGF were actually carried out and were executed correctly, in accordance with Article 8(1) of Regulation No 729/70, and to prevent and deal with irregularities.

55 In that regard it should be pointed out that even though Article 8(1) of Regulation No 729/70 did not include provisions as specific as those of Article 17(4) of Regulation (EEC) No 2456/93, the fact remains that, according to settled case-law of the Court, that provision, which constitutes an expression, in the sphere of agriculture, of the obligations imposed on Member States by Article 5 of the EC Treaty (now Article 10 EC), defines the principles according to which the Community and the Member States must ensure the implementation

of Community decisions on agricultural intervention financed by the EAGGF and combat fraud and irregularities in relation to those operations (see Joined Cases 146/81, 192/81 and 193/81 *BayWa and Others* v *Bundesanstalt für Landwirtschaftliche Marktordnung* [1982] ECR 1503, paragraph 13). It imposes on the Member States the general obligation to take the measures necessary to satisfy themselves that the transactions financed by the EAGGF are actually carried out and are executed correctly, even if the specific Community act does not expressly provide for the adoption of particular supervisory measures (see Case C-8/88 *Germany* v *Commission* [1990] ECR I-2321, paragraphs 16 and 17 and Case C-209/96 *United Kingdom* v *Commission* [1998] ECR I-5655, paragraph 43).

56 Since such an obligation was already incumbent on the German Government as a result of the rules in force at the material time, the Commission cannot be criticised for having applied Regulation (EEC) No 2456/93 retroactively.

The controls during storage

57 As regards the controls during storage, the German Government challenges the accuracy of the Commission's findings in relation to entry in the inventory report, verification of the inventory report and the absence of explicit national instructions on implementing these controls.

58 First, the Commission noted, in its summary report, that in the inventories there were never any differences between the book weight and the checked weight. This pointed to the conclusion that the inspectors were not undertaking stock controls in conformity with Article 3 of Regulation (EEC) No 618/90, which requires verification of the physical presence of the goods, but were directly transcribing the data on quantity and weight recorded in the coldstore's stock accounts. That finding was, moreover, confirmed by the statements made by coldstore employees interviewed by the Commission during checks carried out on the spot.

59 The German Government contends that Article 3 of Regulation (EEC) No 618/90 does not require that the weight of the meat be verified as part of the inventory control and maintains that it is for the Commission to prove the statements of the coldstore employees. For its part, the German Government offers, by way of evidence in rebuttal, the oral testimony of a number of BALM's officers.

60 The Commission produced a letter from the German Government dated 6 July 1994 which shows, it claims, that that government had acknowledged that the BALM inspectors were not always present when the inventory was drawn up and had affirmed its intention of monitoring more closely in future storekeepers' compliance with the provisions of Regulation (EEC) No 618/90.

61 In this respect, it should be noted that, while Article 3 of Regulation (EEC) No 618/90 does not, as the German Government rightly maintains, require that the meat be weighed, it does require actual verification of the physical presence of the goods.

62 The Commission relies on the statements of the coldstore employees as proof that that requirement was not satisfied, while the German Government, which maintains that it was, proposes that officers of BALM be heard in evidence.

63 In considering that offer of evidence, it should be noted, as the Advocate General remarks in point 122 of his Opinion, that the officers of BALM could substantiate their statements only in those cases in which they were actually present when the inventory was drawn up.

64 However, it is plain from the statements of the German Government that the officers of BALM were not always present when that inventory was drawn up. It

follows that the Commission's findings, based on witness statements, according to which, in some cases, the storekeepers merely transcribed the data from the stock accounts into the inventories, cannot be rebutted by the evidence from the BALM officers.

65 It should be added that those findings are confirmed by the statement contained in the letter of 6 July 1994 in which, aware that irregularities existed, the German Government undertook to monitor the drawing up of the inventories more closely in the future in order to secure compliance with Regulation (EEC) No 618/90.

66 Secondly, as regards inventory control, in its summary report the Commission criticised the German Government on the ground that the annual inventory reports do not mention compliance with Article 4 of Regulation (EEC) No 618/90 which requires physical inspection of 5% of the quantity stored, in accordance with the methods laid down in Annex III to the regulation. According to the Commission, those reports should show that the procedure and operations, including indication of weight, laid down in Annex III to Regulation (EEC) No 618/90, have been scrupulously complied with. That information is not, however, provided by either the annual inventory reports or the stock reports that accompany them.

67 The German Government disputes the Commission's findings and maintains that batches corresponding to at least 5% of the total quantity stored were selected and verified on the spot. It adds that, in the course of the additional verification covering 20% of the 5% already checked, required under Annex III to Regulation (EEC) No 618/90, the weight was checked by officers of BALM.

68 According to the Commission, the weights recorded in the appropriate section of the inventory reports simply make it possible to determine from which batch or category of goods the 20% of the 5% quantity already checked, that is to say 1%

of total stock, was selected for weight control, but does not make it possible, in particular, to determine the exact quantity that has been subject to physical inspection.

69 In that connection, as the Advocate General notes in point 125 of his Opinion, where, in relation to the use of Community resources, Community law requires specific controls, such as, in this case, physical inspection of 5% of the beef in storage, the competent national authorities must ensure that it is possible to verify compliance with that requirement in the course of the procedure for the clearance of accounts, on the basis of appropriate documentation or references. Consequently, if a control system does not include such documentation or references, their absence constitutes a deficiency in that system.

70 Furthermore, as the Advocate General notes in that same point of his Opinion, that deficiency was acknowledged by the German Government in the letter from the Federal Ministry of Food, Agriculture and Forests, produced by the German Government itself, in which it stated that, in future, 'the controls to be carried out during storage will, as you [the Commission] suggest, be fully documented'.

71 Thirdly, the Commission criticised the German Government for failing to issue explicit national instructions to be followed by the inspectors when carrying out physical checks on 5% of the meat stored and instead merely referring to Annex III to Regulation (EEC) No 618/90. According to the Commission, that reference is not sufficient to guarantee or, as the case may be, prove that the physical inspection has been correctly carried out.

72 The German Government, on the other hand, contends that the reference in the internal instructions to Annex III to Regulation (EEC) No 618/90 is sufficient because it is exhaustive and comprehensible.

73 In that regard, it should be noted that, while it is true that the procedure to be followed is clear from Annex III to Regulation (EEC) No 618/90, which was attached to the internal instructions and comprehensible to the inspectors, the German authorities are unable to prove that the operations required by that annex were carried out correctly because, as the Advocate General observes in point 126 of his Opinion, those authorities ought, for that purpose, to have imposed in their instructions an obligation on the inspectors to draw up detailed reports to make it possible to verify that the physical checks of 5% of the meat stored had been carried out correctly.

74 In the absence of any instruction of that nature, the German control system is therefore deficient in this respect.

The controls on removal from storage

75 As in the case of the controls at the time of takeover, in its summary report the Commission criticised the German Government for having entrusted the controls on removal from storage not to officers of BALM but to authorised representatives of BALM who were coldstore employees. According to the Commission, this use of representatives provides a pretext for manipulations and abuse during the process of removal from storage, which become still easier in the case of coldstores belonging to the same group of undertakings as the purchaser (linked undertakings). According to the Commission, the German Government ought at least to have issued written instructions to ensure that the controls were carried out in the presence of officers of BALM.

76 The German Government contends that the controls on removal from storage were carried out correctly. It maintains that where meat was removed from storage and the undertakings involved were linked, the checks were carried out exclusively by officers of BALM.

77 In that regard, it should be noted that, while the rules applicable in 1992 do not require that officers of the intervention agency be present when meat is being removed from storage, the fact remains that, in the case of linked undertakings, checks carried out by officers of BALM, or at least in their presence, would constitute a guarantee against risks of manipulation or abuse.

78 In any event, having regard, on the one hand, to the categorical assertions of the German Government and, on the other hand, to the failure of the Commission to undertake a comprehensive check on all the linked undertakings, it must be concluded that the Commission has not proved that officers of BALM were not present when meat was delivered to undertakings linked to the company that owned the coldstore.

79 It should be pointed out, however, that just as the Court has found on examining the German control system in relation to takeover, the German authorities again failed, in the case of linked undertakings, to include written instructions requiring that officers of BALM be present when the meat was removed from storage. It follows that this lack of written instructions constitutes a deficiency in the German control system.

80 In its summary report, the Commission also criticised the German Government for failing to ensure that the beef was weighed and properly accounted for when it was moved from storage. It cites, in particular, a number of cases in which the meat was moved from storage under the supervision of authorised BALM representatives and in which its weight on removal from storage was exactly the same as its weight when it was taken over. According to the Commission, since the meat must first be weighed and only then packaged during the process of takeover but must be weighed with its packaging when it is removed from storage (gross weight), it is highly unlikely that the weight of the packaging will correspond exactly to the weight loss generally undergone by meat in storage. That is why the Commission doubts whether the meat removed from storage has always been weighed.

81 On the one hand, the Commission points out in this connection that Article 2 of Commission Regulation (EEC) No 147/91 of 22 January 1991 defining and fixing the tolerances for quantity losses of agricultural products in public intervention storage (OJ 1991 L 17, p. 9) has set, for beef and veal, the tolerance limit for normal weight loss during storage at 0.6%.

82 Furthermore, according to the Commission, in the case of non-identified losses of beef, in excess of the tolerance limit of 0.6% fixed by Regulation (EEC) No 147/91, the Member States are required credit to the EAGGF a sum substantially higher than the sales value of the quantities lost, in accordance with Council Regulation (EEC) No 3492/90 of 27 November 1990 laying down the factors to be taken into consideration in the annual accounts for the financing of intervention measures in the form of public storage by the European Agricultural Guidance and Guarantee Fund, Guarantee Section (OJ 1990 L 337, p. 3) and Commission Regulation (EEC) No 3597/90 of 12 December 1990 on the accounting rules for intervention measures involving the buying-in, storage and sale of agricultural products by intervention agencies (OJ 1990 L 350, p. 43).

83 The Commission contends that a very substantial quantity of meat has been removed from storage in circumstances in which the German Government has failed to fulfil its obligations under Article 8 of Regulation 729/70, which requires it to ensure that the operations financed by the EAGGF are actually carried out and are executed correctly, and that, consequently, there were shortcomings in the controls carried out on removal from storage, the financial consequences of which are attributable to the German Government.

84 The German Government puts forward three sets of arguments in defence of its control system.

85 First, the purchasers themselves ensure that the meat awarded on tender and paid for is correctly delivered in terms both of quantity and quality because BALM's terms of sale do not allow claims to be made later. Attention would therefore be drawn to manipulations during the operations for removal from storage.

86 Secondly, the checks carried out subsequently by the BALM officers confirm that the operations for removal from storage were carried out correctly.

87 Thirdly, the specific cases in which the Commission identified anomalies — where the weight on removal from storage was the same as the weight on takeover — were not the result of manipulation or weighing errors but of a mistake which resulted in two different categories of meat being accounted for together, when they ought to have been accounted for separately.

88 That line of argument put forward by the German Government must be rejected. In the first place, merely to assert that the purchasers made no claim cannot be considered as proof of the correctness of the checks made on removal from storage because, as the German Government itself explains, BALM's terms of sale preclude claims after delivery. Next, the documentary controls carried out subsequently by BALM officers cannot remedy any irregularities committed in the process of removal from storage. Finally, the mistake cited by the German Government confirms the lack of reliability of the German control system.

89 Consequently, the Commission's doubts as to whether the meat was always weighed on removal from storage are both serious and reasonable.

90 It follows from examination of all the evidence adduced by the German Government that it has failed to prove that its control system is free of deficiencies liable to result in the risk of minor losses to the EAGGF and that it has failed to prove that the Commission's findings are inaccurate.

91 Having regard to all of the foregoing considerations, the application by the German Government must be dismissed.

Costs

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

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the Federal Republic of Germany to pay the costs.**

Kapteyn Hirsch Ragnemalm

Delivered in open court in Luxembourg on 21 October 1999.

R. Grass

Registrar

J.C. Moitinho de Almeida

President of the Sixth Chamber