OPINION OF ADVOCATE GENERAL TIZZANO

delivered on 23 January 2003 [1]

I — Introduction

1. By application of 20 September 2000 the United Kingdom of Great Britain and Northern Ireland brought an action under Article 230 EC for annulment in part of Commission Decision 2000/449/EC [2] of 5 July 2000 ('the contested decision') in so far as it excludes from Community financing under the Guarantee Section of the European Agricultural Guidance and Guarantee Fund ('EAGGF') the sum of EUR 5 039 175.46 (equivalent to GBP 2 919 698.26), equal to 2% of the expenditure declared by the United Kingdom in the arable crops sector for the harvesting years 1995 and 1996 (financial years 1996 and 1997) in respect of the Wessex region, on account of the inadequate system of supervision of the checks carried out in that region.

1 — Original language: Italian.

2 — 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 Guidance and Guarantee Fund (EAGGF) (notified under No C(2000) 1847) (OJ 2000 L 180, p. 49).

II — The relevant provisions

2. Article 1(2)(b) of Regulation (EEC) No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy ('Regulation No 729/70'), [3] as amended by Council Regulation (EC) No 1287/95 of 22 May 1995 [4] provides that the Guarantee Section of the European Agricultural Guidance and Guarantee Fund is to finance, in particular, intervention intended to stabilise the agricultural markets.

3. Article 3(1) of that regulation provides:

'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).'

3 — OJ, English Special Edition 1970 (II), p. 218.

4 — OJ 1995 L 125, p. 1.

4. Article 5(2) provides:

'The Commission, after consulting the Fund Committee:

...

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

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

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

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

...'

5. Article 8 of the regulation provides:

'(1) 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.

The Member States shall inform the Commission of the measures taken for those purposes and in particular of the state of the administrative and judicial procedures.

(2) 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 paying authorities or bodies and deducted by them from the expenditure financed by the Fund'.

6. As regards Article 5(2)(c) of Regulation No 729/70, as amended, attention must be drawn to Article 8(1) and (2) of Commission Regulation (EC) No 1663/95 of 7 July 1995 laying down detailed rules for the application of Council Regulation (EEC) No 729/70 regarding the procedure for the clearance of the accounts of the EAGGF Guarantee Section ('Regulation No 1663/95'), [5] in accordance with which:

'(1) 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 (6).

(2) The decisions referred to in Article 5(2)(c) of Regulation (EEC)

5 — OJ 1995 L 158, p. 6.

No 729/70 shall be taken after an examination of any report drawn up by the Conciliation body according to the provisions laid down in [Decision] 94/442/EC.'

7. Article 1(1) of Commission Decision 94/442/EC of 1 July 1994 setting up a conciliation procedure in the context of the clearance of the accounts of the European Agricultural Guidance and Guarantee Fund (EAGGF), Guarantee Section,[6] provides that:

'For the purposes of the clearance of EAGGF Guarantee Section accounts, a Conciliation Body, hereinafter referred to as the "Body", is hereby set up in the Commission. Its tasks shall be:

(a) to examine any matter referred to it by a Member State which, following inspections pursuant to Article 9 of Regulation (EEC) No 729/70 and bilateral discussion of the findings of such inspections, receives formal notification from the competent Commission departments, with reference to this Decision, of the conclusion that certain items of expenditure incurred by that Member State are not chargeable to the EAGGF Guarantee Section,

(b) to try to reconcile the divergent positions of the Commission and the Member State concerned, and

(c) at the end of its investigations, to draw up a report on the outcome of its efforts at reconciliation, making any remarks it deems useful should all or some of the points of dispute remain unresolved.'

8. By virtue of Article 1(2)(a) of Decision 94/442,

'the position of the Body shall be without prejudice to the Commission's final decision on the clearance of the accounts...'.

9. With regard to the financial consequences of inquiries which establish that there are deficiencies in a Member State's control procedures, the Commission drew up a document laying down guidelines to be followed in those cases (document No VI/216/93 of 1 June 1993), subsequently revised and replaced by document No VI/5330/97 of 23 December 1997 ('the guidelines'). According to the approach set

6 — OJ 1994 L 182, p. 45.

out in those documents and followed as from the clearance of the accounts for the financial year 1990, wherever it is not possible to determine the actual amount of irregular payments and it is therefore impossible to quantify the financial loss suffered by the Community, the Commission is to apply flat-rate financial corrections or adjustments of 2%, 5% or 10% of the expenditure declared, depending on the amplitude of the risk of loss.

10. With particular regard to financial corrections connected to deficiencies in the controls carried out by the Member States' authorities, the guidelines distinguish two categories of control, key controls and ancillary 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'.

11. On the basis of those guidelines, the Commission applies the various levels of flat-rate corrections as follows:

'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.'

12. In exceptional cases greater corrections may be decided on, up to 100%.

III — The facts

13. Between 30 June and 4 July 1997 the Commission carried out an audit relating to aid for arable areas in England and Wales. That audit concerned, *inter alia*, the Bristol Regional Service Centre ('the Bristol Centre') of the Ministry of Agriculture, Fisheries and Food ('MAFF'), which has responsibility for the Wessex region. On that occasion, the Commission officials selected for more detailed auditing three applications for aid processed at the Bristol Centre and which had been the subject of on-the-spot checks all carried out by the same inspector.

14. The parties disagree as to the reasons for the selection of those three applications. According to the Commission, no other inspection report was available at the Bristol Centre, and therefore only in the three cases in question was it possible to carry out an in-depth audit. The United Kingdom maintains, however, that at that time 17 other on-the-spot inspections had been carried out by seven other inspectors from the same Centre and that the Commission could therefore have subjected other applications for aid to in-depth examination. The parties do, however, agree on the fact that as a result of the audit significant discrepancies were discovered in each of the three selected cases.

15. Consequently, the MAFF ordered the transfer to other duties of the inspector who had carried out the on-the-spot checks in those three cases. Furthermore, it undertook to repeat the other on-the-spot checks performed by that inspector in 1997 and some of the checks carried out by other inspectors in the same year, in order to establish the actual extent of the problem. As a result of all that, anomalies were revealed in four of the five other inspections carried out by that inspector in 1997; since those anomalies were corrected in time the EAGGF suffered no financial loss for the year 1997. By contrast, re-performance of the sample of checks made by the other inspectors did not reveal any anomalies.

16. By letter of 12 December 1997 the Commission's services communicated to the United Kingdom, in accordance with Article 8 of Regulation No 1663/95, the anomalies discovered during the audit at the Bristol Centre and also indicated that, in view of the seriousness of the irregularities found, part of the expenditure declared in 1995 and 1996 might have to be excluded from Community funding in accordance with Article 5(2)(c) of Regulation No 729/70. To that end, the Commission requested information concerning the procedures for supervising the activities carried out by the inspector responsible for the irregularities discovered and information concerning the measures adopted by the Bristol Centre in 1995 and 1996 to identify and correct irregularities committed by other inspectors.

17. The United Kingdom authorities replied by letter of 17 March 1998, stating that, following re-performance of all inspections carried out by the inspector concerned, the value of the irregularities detected for 1997 amounted to 9.45% of the total of claims for aid checked by that inspector and that the potential amount of sums paid but not due could be calculated by applying that percentage to the total value of the claims for aid checked by that inspector in 1995 and 1996. In that letter the United Kingdom authorities informed the Commission of their intention to re-examine all the claims inspected by that inspector in the two previous years, 1995 and 1996, in order to discover any further anomalies.

18. By letter of 16 June 1998 the Commission's services gave the United Kingdom confirmation of its opinion in relation to the irregularities detected at the Bristol Centre and convened a bilateral meeting in accordance with Article 8 of Regulation No 1663/95 at the Commission's offices on 16 September 1998.

19. At the request of the Commission's services and with a view to the meeting of 16 September, by letter of 21 August 1998 the United Kingdom supplied the Commission with additional information relating to the system applied in the Bristol Centre region for checking and supervising the Community aid scheme.

20. Following the meeting of 16 September 1998, by fax of 4 November 1998 the Commission's Agriculture Directorate-General informed the United Kingdom that it intended to propose a deduction of 9.45% of the total amount of the applications for aid for 1995 and 1996 checked by the inspector in question, thus applying to those two years, as suggested in the United Kingdom's letter of 17 March 1998,

the same percentage of irregularities as detected in the applications for aid for 1997 inspected by that inspector. That fax requested the United Kingdom to submit its comments on the proposed measure within six weeks.

21. It does not in fact appear that the United Kingdom made any written reply to the fax of 4 November 1998. Nevertheless, by letter of 2 August 1999 the Agriculture Directorate-General formally communicated to the United Kingdom, in accordance with the second paragraph of Article 8(1) of Regulation No 1663/95, its conclusion that, after examination and consultation of the other competent services of the Commission, and contrary to what had been proposed in the fax of 4 November 1998, a deduction of 2% of the total amount of expenditure checked by the Centre in 1995 and 1996 would be proposed.

22. On 6 October 1999 the United Kingdom sought the initiation of the conciliation procedure under Decision 94/442. Before the Conciliation Body the United Kingdom maintained that, with regard to the work of a single inspector in 1997, the irregularities found by the Commission were of an isolated nature and did not therefore constitute sufficient evidence to conclude that the control system applied in the Bristol Centre region was inadequate. In point of fact, certain checks carried out by the United Kingdom authorities after the Commission's audit revealed that the inspector had not committed irregularities in the two previous years, except for three unimportant errors in 1996, and that no inspector had committed any irregularity in 1997. In addition, the United Kingdom claimed that an effective system for supervising the activities of inspectors in the Bristol Centre region was already in existence in 1995 and 1996 and that, although that system had not made it possible to detect the irregularities committed by the inspector at the time the Commission conducted its audit, it had certainly made it possible to identify them later and to correct them in time. Finally, the United Kingdom stated that it had adopted, as from 1997, an improved system for supervising on-the-spot checks.

23. By contrast, the Commission, for its part, objected that the irregularities which it had found, even if they did relate to the activity of just one inspector, constituted solid evidence of the general inadequacy of the supervision system in the region in question such as to support the conclusion that the risk of excessive expenditure's being charged to the EAGGF for the years 1995 and 1996 was not limited to the activities of that inspector. According to the Commission, that was also borne out by the fact that, after the improved supervision system was introduced in 1997, the rate of irregularities revealed during on-the-spot checks rose from 5.86% in 1996 to more than 15% in 1997. On that point, however, the United Kingdom replied that that increase could be explained by the fact that in 1997 farmers had become much more dependent financially on arable area

payments and therefore sought to make declarations of areas reflecting as closely as possible the actual areas, running the risk of incurring the consequences of any inaccuracies.

24. In its final report of 8 March 2000, the Conciliation Body invited the services of the Commission to re-examine their assessment of the system of supervision of on-the-spot checks applied in the region covered by the Bristol Centre. In its opinion, the three on-the-spot checks audited by the Commission were not representative of the quality of checks in the region concerned. Moreover, the fact that, as the United Kingdom maintains, there had been no time to carry out supervision, since the Commission's actions took place at the beginning of the period in which the on-the-spot checks were made, makes it impossible to draw any general conclusion as to the inadequacy of actual supervision in the region.

25. The Conciliation Body's report did not, however, prompt a change of mind on the part of the Commission's services. They therefore proposed a flat-rate correction of 2% of the expenditure declared by the United Kingdom under the arable areas payments scheme for the harvesting years 1995 and 1996 (financial years 1996 and 1997) in respect of the Wessex Region, as previously announced in the letter of 2 August 1999 and as finally decided by the Commission in the decision at issue in these proceedings.

IV — Legal analysis

26. In support of its action challenging the contested decision, the United Kingdom puts forward four pleas in law:

— first, that Government maintains that the contested decision is unlawful because the Commission erred in finding that the supervision of checks carried out in the Wessex Region was inadequate, concluding that expenditure was not effected in compliance with Community rules within the meaning of the first paragraph of Article 5(2)(c) of Regulation No 729/70;

— alternatively, by its second and third plea, the United Kingdom claims that in determining the amount to be excluded from Community financing the Commission acted in breach of the fourth paragraph of Article 5(2)(c) of Regulation No 729/70 and/or committed a manifest error of assessment, in addition to violating the principle of proportionality;

— last, by its fourth plea, the United Kingdom Government alleges breach

of essential procedural requirements in the procedure leading up to the adoption of the contested decision.

A — *Alleged error committed by the Commission in finding the system of supervision applied in the region concerned to be inadequate*

Arguments of the parties

27. The United Kingdom maintains that the Commission erred in finding that the supervision of on-the-spot checks carried out in the Wessex Region covered by the Bristol Centre was inadequate. In the applicant's submission, neither of the two aspects examined by the Commission for that purpose, that is to say, the irregularities in the on-the-spot checks made by an inspector discovered during the 1997 audit and the increase in the rate of anomalies in the applications for aid revealed in 1997 in relation to the rate in 1996 for the region concerned, justifies that conclusion.

28. With particular regard to the deficiencies of the on-the-spot checks uncovered by the Commission's officials, the United Kingdom, repeating the arguments it put forward before the Conciliation Body, claims that the present system of supervision would certainly have uncovered those inadequacies. That had not yet happened when the Commission's audit took place, simply because the audit was carried out between the end of June and the beginning of July 1997, that is to say, at the end of the first month of the four-month period in which on-the-spot checks are carried out. At that point, therefore, there had been no time in which to effect any supervision. In any event, since the aid would be paid only as from 16 October the national authorities still had long enough in which to perform effective supervision.

29. In support of the foregoing, the United Kingdom describes the two elements of the system of supervision current at the time of the Commission's audit, namely, paper checks and joint inspections. The first consists of examination by the Field Team Manager, who is responsible for the quality of the on-the-spot checks carried out by the inspectors from the Bristol Centre, of a sample of inspection reports drawn up by the inspectors themselves. Joint inspections, by contrast, consist of the unannounced arrival of the Field Team Manager on the site of the on-the-spot check being conducted by an inspector, or of the arrival (whether or not known in advance) of a senior inspector at the inspection being conducted by another inspector. The United Kingdom maintains that this system of supervision, applied for the purposes of the Commission's audit, and therefore also in the two preceding years, was comprehensive and effective and thus satisfied the requirements laid down by the Community legislation. As an illustration of the operation of that system, the United Kingdom claims that out of 239 inspection reports in

1996 100 were re-examined by the Field Team Manager and that, in the same year, approximately 46 on-the-spot checks were carried out in the presence of the Field Team Manager, while 88 more were carried out in the presence of a more senior inspector.

30. According to the applicant Government, the excessively short duration of the on-the-spot inspections carried out by the inspector with responsibility for the three cases subject to the Commission's audit would definitely have been revealed when a paper check was done, since the latter concerns the reports prepared by the inspectors in which the duration of the inspections carried out is specifically mentioned. Furthermore, since the inspector in question was one of the most junior, those inspections would have been subject to increased supervision, including a number of joint inspections in which the inspector would have been accompanied by a senior official.

31. Second, according to the United Kingdom, Community law requires the introduction, not of detailed and rigid rules, but of a coherent and effective system of supervising the staff entrusted with on-the-spot checks, such as that in operation at the Bristol Centre at the time of the Commission's audit.

32. Nor, in the United Kingdom's submission, can the Commission argue the contrary on the basis of the increase in the rate of anomalies detected after an improved system of supervision was introduced in 1997. It maintains, repeating its arguments before the Conciliation Body, that the increase may be explained by the fact that farmers have become much more dependent financially on arable area payments and have therefore tried to obtain the highest possible sum by way of aid. Therefore, by contrast to what happens in favourable periods, in which farmers tend to err on the side of caution in declaring the areas eligible for aid in order to avoid penalties, in 1997 they declared areas as close as possible to the actual areas, running the risk of incurring the consequences of any inaccuracies.

33. In response to all that, the Commission objects that, although serious irregularities were disclosed in 1997 in the checks carried out by just one inspector, there could be no certainty that such irregularities had not been committed in the previous years also, either by that inspector or by others employed by the Bristol Centre. It in fact emerged from the checks made by the United Kingdom authorities after the Commission's audit that that inspector had made errors during the 1996 checks, although they were not as serious as those discovered in 1997. However, the fact that checks made in 1997 concerning the two

preceding years did not reveal any serious anomalies is not conclusive, since the United Kingdom itself acknowledges that any errors committed in the past might not be readily detectable *a posteriori*.

34. Second, the Commission contends that the work of the inspector in question was so unsatisfactory in 1997 that it is difficult to imagine that it could have been much better in earlier years. Therefore the fact that no serious irregularities on the inspector's part were detected in respect of the years 1995 and 1996 prompts the conclusion that supervision must also have been inadequate.

35. Finally, the very fact that the number of irregularities detected in 1997 in the region covered by the Bristol Centre increased markedly after the introduction of an improved supervision system under which senior officials re-performed on-the-spot checks carried out by inspectors suggests that errors had slipped by unnoticed in earlier years. Nor can the increase in the number of irregularities detected be attributed, as the United Kingdom argues, to 'maximisation' of the areas declared. The very fact that 1997 was a difficult year for farmers ought to have made them even more scrupulous in declaring the areas eligible for aid, in order to avoid the penalty of reduction in or loss of the aid. In this situation, the United Kingdom cannot be considered to have established that the system of supervision applied before the Commission's audit mission was complete and effective.

Assessment

36. By way of introduction I think it helpful to observe that, on the basis of the Court's case-law, it is for the Commission to prove an infringement of the rules on the common organisation of the agricultural markets [7] and to give reasons for its decision finding an absence of, or defects in, inspection procedures operated by the Member State in question; [8] the Commission is, however, required 'not to demonstrate exhaustively that the checks carried out by the Member States are inadequate, but to adduce evidence of serious and reasonable doubt on its part regarding the checks carried out by the national authorities'. [9] According to the same case-law, it is on the other hand for the Member State to adduce the most detailed and comprehensive evidence that its figures are accurate and, if appropriate, that the Commission's calculations are incorrect; [10] if a Member State wishes to disprove the Com-

7 — Case C-281/89 *Italy* v *Commission* [1991] ECR I-347, paragraph 19; Case C-253/97 *Italy* v *Commission* [1999] ECR I-7529, paragraph 6.

8 — Case C-8/88 *Germany* v *Commission* [1990] ECR I-2321, paragraph 23.

9 — Case C-54/95 *Germany* v *Commission* [1999] ECR I-35, paragraph 35; Case C-28/94 *Netherlands* v *Commission* [1999] ECR I-1973, paragraph 40.

10 — Case C-54/95 *Germany* v *Commission*, cited above, paragraph 35; *Netherlands* v *Commission*, cited above, paragraph 41, and Case C-278/98 *Netherlands* v *Commission* [2001] ECR I-1501, paragraph 93.

mission's findings, it must support its own allegations by evidence of a reliable and operational supervisory system. [11]

37. I shall now consider the present case in the light of the judicial guidance cited above. To that end I think it necessary to consider whether the Commission has gathered evidence such as to cast serious and reasonable doubt on the adequacy of the system of supervision and checking applied in the region covered by the Bristol Centre. Secondly, it will be necessary to consider whether the United Kingdom has been able to produce evidence capable of dispelling or at least weakening such doubt.

38. With regard to the first point, the Commission did not, to my mind, commit an error of assessment when it considered that, following the serious irregularities detected during the audit at the Bristol Centre, the system of supervision at that Centre was incapable of uncovering and correcting any deficiencies and irregularities in the on-the-spot checks carried out by its inspectors.

39. It is true that the irregularities detected relate to the activities of a single inspector in 1997. None the less, it is significant that nearly all the on-the-spot checks carried out by that inspector in 1997 until her transfer to another post contained anomalies, and that some of them were so glaring that, as the United Kingdom itself states, a quick glance at the documents prepared by that inspector would have uncovered them immediately. Given those circumstances, it seems to me reasonable to consider, subject to proof to the contrary, that the system of supervision current at the Bristol Centre was not capable of detecting such irregularities and was therefore ineffective.

40. Furthermore, the increase in the proportion of irregular applications for aid discovered during on-the-spot checks by inspectors from the Bristol Centre following the introduction of an improved system of supervision in 1997 would appear to confirm the effectiveness of the new system of supervision, compared to the deficiencies of that in place at the time of the Commission's audit.

41. That leads me to consider that the Commission has discharged the burden of proof laid on it by the case-law cited above, since the irregularities it uncovered, although concerning a single inspector, were in themselves such as to give rise to the serious and reasonable doubt that the system of checking and supervision in the region covered by the Bristol Centre was entirely inadequate.

11 — Case C-253/97 *Italy* v *Commission*, cited above, paragraph 7, including other references, and Case C-247/98 *Greece* v *Commission* [2001] ECR I-1, paragraph 70.

42. By contrast, the United Kingdom's claims concerning the effectiveness of the system of supervision as it existed in the Bristol Centre region before the Commission's audit seem to me not to be supported by actual specific evidence liable to challenge the validity of the 'reasonable doubts' expressed by the Commission.

43. The United Kingdom contents itself with stating that out of 239 inspection reports prepared in 1996 100 were re-examined by the Field Team Manager and that, in that same year, about 46 on-the-spot inspections were made in the presence of the Field Team Manager, while 88 others were carried out in the presence of a more senior inspector. It is not, however, clear which or how many inspection reports drawn up by the inspector found to have committed irregularities were re-examined by the Field Team Manager in 1995 and 1996, or which or how many of the inspections she carried out in those years took place in the presence of the Field Team Manager or a more senior inspector. The applicant Government does not, moreover, explain how the system of supervision could possibly have failed to uncover any anomaly in the checks made by that inspector before 1997, when merely re-performing those checks, even with the limitations imposed by *a posteriori* verification, was sufficient to reveal several errors she had made in 1996.

44. For those reasons I consider, therefore, that the first ground of application is unfounded and must accordingly be rejected.

B — *The amount of the financial correction applied*

45. The second and third grounds of the application are designed to challenge the amount of the financial correction applied by the Commission in the contested decision. In particular, by those pleas the United Kingdom accuses the Commission of applying a flat-rate deduction instead of a deduction calculable on the basis of criteria which are more specific and more consistent with the anomalies detected, and in any event of acting in breach of the principle of proportionality. Since those two grounds of application are closely linked, they may properly be dealt with together.

Arguments of the parties

46. First of all, the United Kingdom claims that, as is acknowledged by the Commission itself, the allegedly inadequate supervision caused no financial losses for the EAGGF in 1997, thanks to the corrective measures taken by the national authorities. With regard to the two previous years, however, the United Kingdom maintains that the possible financial consequences which the Commission inferred from the irregularities found in 1997 and relating to one inspector may quite possibly concern only the work of that one inspector, since there is no evidence that the 12 other inspectors employed in the Bristol Centre region committed any irregularities. How-

ever, the applicant government continues, following the re-performance of all the checks made by that inspector in 1995 and 1996 in order to find any other anomalies, the United Kingdom authorities found only three errors, which were moreover minor, committed by that inspector in 1996 (which subsequently led to the recovery of the sum of GBP 919.66, credited to the EAGGF), while no anomaly was found for 1995. A financial correction for those two years is not therefore justified.

47. Nevertheless, the United Kingdom acknowledges that the results obtained on re-performing the checks are of limited value, since the harvests in respect of which the aid was requested in 1995 and 1996 could no longer be seen. If, therefore, for that reason a deduction should be considered justified for those two years, it ought to be calculated solely on the sum equivalent to the overall amount of the aid applications checked by the inspector in question. It was only for that inspector, in point of fact, that the subsequent checks performed by the national authorities revealed any danger of anomalies. To the sum so calculated must be applied a correction of 9.45%, equal to the proportion of anomalies detected in the on-the-spot checks carried out by that inspector in 1997. Furthermore, adds the applicant Government, such a deduction corresponds to that originally proposed by the Commission's Agriculture Directorate-General in November 1998.

48. Given the foregoing, concludes the United Kingdom, the application of a flat-rate deduction equal to 2% of the total amount of the applications for aid dealt with by the Bristol Centre is not justified. In any case, it is contrary to the principle of proportionality, for it increases by 23 times (from GBP 125 866 to £2 921 518) the amount of the correction applied in relation to that originally proposed by the Agriculture Directorate-General.

49. The Commission, on the other hand, defends its decision, referring to the arguments it put forward concerning the inadequacy of the system of supervision. Precisely because it is impossible *a posteriori* to assess accurately the effect on expenditure of the deficiencies revealed in the quality of the on-the-spot checks it is necessary to apply a flat-rate deduction.

50. As regards the level of that correction, the Commission begins by stating that the serious deficiencies identified in the carrying out of the key controls would even have justified a rate of 5%. Nevertheless, it considered it appropriate to apply a rate of 2%, taking into account the fact that the chief failure laid to the United Kingdom's charge, namely, the inadequacy of the system of supervision, related to an ancillary control and the national authorities took swift and effective remedial measures as soon as the shortcomings in question were discovered.

51. With regard, next, to the alleged breach of the principle of proportionality, the Commission maintains that the financial correction which it applied reflects the effect on EAGGF expenditure of the deficiencies detected. Observance of the principle of proportionality is, moreover, ensured by the application of a rate of 2% in the contested flat-rate correction, which is the lowest of the rates provided for by the guidelines drawn up in that connection by the Commission (see paragraphs 10 to 11 above).

Assessment

52. In order to assess the two grounds of application, it must be established: (a) whether the Commission committed an error in finding that the financial consequences of the deficiencies discovered could not be determined exactly, and therefore in applying a flat-rate instead of a specific deduction; (b) whether, by fixing that deduction at the rate of 2%, it overstepped the bounds of its discretion and violated the principle of proportionality.

53. With regard to the first point, I consider that the answer can only be 'No', once the conclusion is accepted that as a matter of fact the system of supervision at Bristol was, overall, inadequate. In other words, while it is true, as I have sought to show (paragraphs 39 to 44 above), that the deficiencies disclosed represent evidence of the general inadequacy of the system of supervision and control, it cannot but be concluded that the Commission was correct in deciding on a flat-rate deduction.

54. The answer to the question in point (b) must also be negative. As the Commission has observed, the flat-rate deduction of 2% is the minimum provided for by the guidelines it drafted; a lesser deduction is therefore possible only where the Member State concerned succeeds in establishing that the maximum probable loss to the Fund is less than that minimum rate. It seems to me that the United Kingdom has not adduced persuasive evidence in that regard. Indeed, not only has it recognised that re-performance of the on-the-spot checks carried out in 1995 and 1996 by the inspector responsible for the irregularities uncovered did not make it possible to find all the irregularities that she might have committed, it even failed to take steps to re-perform the on-the-spot checks carried out by the other inspectors in 1995 and 1996, satisfying itself with doing so for only a dozen or so of those carried out in 1997 and claiming, without however adducing any evidence, that those were checks performed before the Commission's audit.

55. For those reasons, therefore, I consider that the second and third grounds of the application are not well founded either.

C — *The alleged breach of essential procedural requirements*

Arguments of the parties

56. By its fourth ground of application the United Kingdom complains that the Commission failed to observe the procedural conditions laid down in the second paragraph of Article 8(1) of Regulation No 1663/95, in so far as it refers to a 'bilateral meeting' between the institution and the Member State concerned (see paragraph 6 above). According to the applicant Government, in this case the Commission held that discussion without 'endeavouring' to come to an agreement on the proposed financial deduction which it subsequently communicated formally to the Member State.

57. In the first place, the United Kingdom claims that the Commission did not involve in the bilateral discussion representatives of all the services concerned but only those of the Agriculture Directorate-General. Furthermore, the defendant first proposed a more modest financial deduction and later, apparently after consultation of those services which had not participated in the discussion, decided upon a much greater deduction. In the applicant Government's view, proceeding in such a manner makes nonsense of the attempt to reach an agreement in the bilateral discussion, and is all the more serious because the procedure laid down by Article 8(1) is intended to protect the interests of Member States in a matter where the financial consequences may be significant.

58. The Commission, for its part, contends that it observed to the full the formalities laid down by Article 8(1) of Regulation No 1663/95. In particular, it duly communicated to the United Kingdom the irregularities identified during its audit by letter of 12 December 1997, in which it also mentioned the possibility of a financial deduction for the purposes of Article 5(2)(c) of Regulation No 729/70. The United Kingdom therefore was well aware that a deduction of 2%, or of a still greater amount, could be applied.

59. The bilateral discussion was also correctly conducted, in full accordance with Article 8(1) of Regulation No 1663/95. The Commission acknowledges that, as a result of that meeting, the Agriculture Directorate-General expressed the opinion that the financial deduction to be applied ought to be limited to the expenditure checked by the inspector whose work had been found to be inadequate. It stresses, however, the fact that that was simply the opinion which

that Directorate-General intended to propose to the Commission, an opinion that was not and could not be regarded as the institution's final decision.

60. Next, the fact that the Commission came to a different decision, finding that the irregularities uncovered justified a more stringent financial deduction does not mean that the procedure was not properly conducted or make nonsense of the prior bilateral discussion. On the contrary, that discussion allowed an in-depth exchange of ideas between the parties, which served to clarify the issues and facts. Moreover, adds the Commission, it is obvious that bilateral discussions under Article 8 do not constitute a formal mechanism for the resolution of disputes, which remains the prerogative of the Court of Justice.

Assessment

61. As a preliminary point, it is appropriate to observe that while, 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', [12] on the one hand, 'the Member States cannot, in their relations with the Commission, adopt purely formalist positions, when it is clear from the circumstances that their rights were fully protected', [13] on the other. In any case, still in accordance with the settled case-law of the Court, 'a procedural irregularity will entail the annulment of a decision in whole or in part only if it is shown that in the absence of such irregularity the contested decision might have been substantively different'. [14]

62. It follows from those principles that, in order to assess the substance of the fourth ground, it is necessary to examine not only whether the Commission acted in breach of the procedural formalities laid down by Article 8(1) of Regulation No 1663/95 but also whether, if such a breach should be established, it had a significant effect on the content of the contested decision.

12 — Case C-170/00 *Finland* v *Commission* [2002] ECR I-1007, paragraph 34, and Case C-158/00 *Luxembourg* v *Commission* [2002] ECR I-5373, paragraph 24.

13 — *Finland* v *Commission*, cited above, paragraph 34.

14 — To this effect, see, for example: Case 150/84 *Bernardi* v *Parliament* [1986] ECR 1375, paragraph 28, and the Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-263/95 *Germany* v *Commission* [1998] ECR I-441, paragraph 12; still to the same effect, Case 41/69 *Chemiefarma* v *Commission* [1970] ECR 661, paragraph 52; Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraph 31; Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraph 48, and Case C-288/96 *Germany* v *Commission* [2000] ECR I-8237, paragraph 101, including other references.

63. As regards the first point, I consider that the United Kingdom is correct in its assertion that the Commission did not, in the circumstances of the case, observe the formalities laid down by Article 8(1) of Regulation No 1663/95. The second paragraph of that article provides that at the end of the period allowed for the reply to the communication referred to in the first paragraph, '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'. [15]

64. It seems plain to me that the expression 'measures to be taken' refers not only to the measures to be adopted in order to ensure future observance of the rules infringed, but also to the financial corrections to be imposed, given that the latter would normally be one of the most important topics of discussion in the procedure contemplated by the article in question.

15 — Italics added.

65. Secondly, unless that provision is to be rendered pointless, I consider that, in order to comply with the duty to endeavour to come to an agreement as to 'the measures to be taken', the Commission's services cannot merely convene the bilateral discussion and listen to the arguments of the Member State, without allowing the latter to put forward its comments on the specific measures which those services intend to propose.

66. In my opinion, in order to observe the procedure under Article 8(1), the Commission's services must, if only informally, provide the Member State with the information necessary for it to take a position on the amount of the financial corrections which they mean to propose, in order to come — where possible — to an agreement concerning those corrections before formally communicating the conclusions. It would seem to me to be logical that, until the Commission's services communicate *informally* the measures they intend to propose, there is no possibility of coming to an agreement on those measures and that once they have been *formally* communicated within the meaning of the second paragraph of Article 8(1) of Regulation No 1663/95 there is nothing left for the Member State but to activate the conciliation procedure.

67. In the present case, it is apparent from the documents before the Court that the Commission's services, by the fax of 4 November 1998, communicated to the United Kingdom the amount of the financial correction that they intended to propose. At the same time, they invited that Government to submit its comments within six weeks, thus giving it the opportunity of expressing its point of view. In that respect, the absence of any reply from the United Kingdom must be regarded as tacit acceptance of the proposal made by the Commission's services, given that the amount of the financial correction proposed in the fax was exactly the same as that proposed by the United Kingdom in a letter sent to the Commission on 17 March 1998. That does not mean, of course, that the Commission's services were bound by that proposal and could not subsequently change their point of view, but they would at the very least have had to do so in accordance with the same procedure as that followed until that moment, that is to say, by means of a fresh informal communication to the United Kingdom giving the latter the chance to reply and possibly to come to a new agreement, before the formal communication of the conclusions.

68. I therefore consider that, by failing to communicate to the United Kingdom the exact amount of the financial correction they intended to propose, before communicating it formally by letter of 2 August 1999, the Commission's services acted in breach of the procedure laid down in the second paragraph of Article 8(1) of Regulation No 1663/95.

69. Such breach seems to me all the more significant because not even by the letter of 12 December 1997, sent pursuant to the first paragraph of Article 8(1) of Regulation No 1663/95, were the United Kingdom authorities given the opportunity of expressing their views on the amount of the financial correction which the Commission's services intended to apply.

70. As I said above, however, it still remains to consider whether all that amounts to a breach of essential procedural requirements such as to warrant annulment of that part of the contested decision which is challenged by the applicant Government.

71. In that regard, the United Kingdom maintained at the hearing that as a result of that breach of procedure it was deprived of the opportunity of expressing its own point of view and of supplying the evidence in its possession to all the services of the Commission which were jointly involved in the adoption of the decision. If it had been given that opportunity, adds the United Kingdom, it could have tried to persuade not just the staff of the Agriculture Directorate-General but the entire Commission to come to an agreement.

72. I must however remark that the applicant Government did in actual fact have the chance to express its own point of view to the whole Commission by means of the conciliation procedure. As everybody knows, that procedure, which may be initiated by the Member State only after the Commission's services have formally communicated their conclusions in accordance with the second paragraph of Article 8(1) of Regulation No 1663/95, serves a twofold purpose. The first is, through the mediation of the Conciliation Body, to make the parties arrive at the agreement that they ought already to have tried to reach by means of the procedure described above (see paragraphs 64 to 67). The second purpose of the procedure is, where agreement is not reached, to make known to the Commission, as a collegiate body, by means of the report prepared by the Conciliation Body, the latter's observations (if any), and the observations submitted by the Member State during the attempt at conciliation. Pursuant to Article 8(2) of Regulation No 1663/95 the Commission adopts its decision after examining the report drawn up by the Conciliation Body.

73. In the circumstances of the case the United Kingdom had the chance during the conciliation procedure to present its observations concerning the amount of the financial correction applied in the contested decision. It was in fact definitively informed of that amount before the procedure was initiated, in the formal communication of 2 August 1999 of the conclusions of the Commission's services. As the documents in the case make clear, the Conciliation Body's report summarised the positions taken by the parties, including the United Kingdom's observations relating to the amount of the proposed financial correction. In short, that report, as is shown by the third recital in the preamble to the contested decision, was the subject of examination by the whole Commission and not, as the United Kingdom maintains, by the services of the Agriculture Directorate-General alone.

74. If, therefore, despite everything, the arguments of the applicant Government were not sufficient to dissuade the Commission from accepting in the contested decision the financial correction proposed by its own services, that cannot be attributed to the breach of procedure committed by those services in connection with the bilateral discussion since, as we have seen, that breach did not after all have any significant influence on the United Kingdom's rights of defence. In any case, the applicant has not established, as required by the case-law referred to above, that in the absence of that procedural irregularity the contested decision might have been substantively different.

75. For those reasons, I consider that the fourth ground of application also is unfounded and must therefore be rejected, together with the entire application.

V — Costs

76. 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 having regard to what I have just said concerning the outcome of the action, I consider that its application ought to be granted.

VI — Conclusion

77. In light of the considerations set out above, I suggest that the Court should:

(1) dismiss the application;

(2) order the United Kingdom of Great Britain and Northern Ireland to pay the costs.