JUDGMENT OF THE COURT (Sixth Chamber)

6 July 2000 *

In Case C-45/97,

Kingdom of Spain, represented by R. Silva de Lapuerta, Abogado del Estado, acting as Agent, with an address for service in Luxembourg at the Spanish Embassy, 4-6 Boulevard E. Servais,

applicant,

v

Commission of the European Communities, represented by A.M. Alves Vieira, of its Legal Service, and B. Vilá Costa, a national civil servant on secondment to its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, also of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: Spanish.

APPLICATION for the annulment in part of Commission Decision 96/701/EC of 20 November 1996 amending Decision 96/311/EC on the clearance of the accounts presented by the Member States in respect of the expenditure for 1992 of the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) and in respect of certain expenditure for 1993 (OJ 1996 L 323, p. 26), in so far as it relates to the Kingdom of Spain,

THE COURT (Sixth Chamber),

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

Advocate General: P. Léger,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 20 May 1999,

gives the following

Judgment

1 By application lodged at the Court Registry on 4 February 1997, the Kingdom of Spain 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 annulment in part of Commission Decision 96/701/EC of 20 November 1996 amending Decision 96/311/EC on the clearance of the accounts presented by the Member States in respect of the expenditure for 1992 of the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) and in respect of certain expenditure for 1993 (OJ 1996 L 323, p. 26, hereinafter 'the contested decision'), in so far as it relates to the Kingdom of Spain.

2 The action seeks the annulment of the contested decision in so far as it declares that the sum of ESP 721 255 271 in respect of consumption aid for olive oil is not chargeable to the EAGGF.

3 It is clear from the documents before the Court that the Kingdom of Spain set up a system for the administration and supervision of consumption aid for olive oil involving two authorities. The Servicio Nacional de Productos Agrarios (hereinafter 'Senpa') is the authority responsible for granting approval to the recipient plants, for making direct payments of aid, and of advances on condition that the required security is lodged, and for imposing penalties. The Agencia para el Aceite de Oliva (the Olive Oil Agency, hereinafter 'the AAO') is the supervisory

authority responsible for carrying out the inspections provided for under the Community rules.

4 In connection with the clearance of the accounts for 1992, Commission officials carried out two inspections of the AAO in Spain, on 30 September 1993 and 1 October 1993 and between 14 and 18 March 1994, in order to determine that the consumption aid for olive oil was being properly administered and to verify the efficiency and accuracy of the supervision of such aid by that Member State.

5 According to the inspection report of 31 May 1994 (hereinafter 'the inspection report'), those inspections revealed serious flaws. By letter of 22 September 1994, the Commission informed the Spanish authorities that, in view of all the deficiencies found in the management of the system, the EAGGF proposed a financial correction equal to 50% of the total amount of the consumption aid for olive oil due to the Kingdom of Spain, that is to say, ESP 15 447 431 500.

6 Following numerous contacts and two bilateral meetings, the Commission proposed to the Spanish authorities, by letter of 13 June 1995, that it would abandon the flat-rate financial correction that it had originally adopted and calculate the amount of the reduction in the aid that was in fact due to the Kingdom of Spain on the basis of the 27 files actually checked by the EAGGF inspectors; that method, it stated, would reduce the amount of expenditure not chargeable to the EAGGF to ESP 721 255 271.

7 That amount was calculated on the basis of the irregularities confirmed in 13 plants, with corrections ranging from 10% to 100% of declared expenditure. In the case of the undertakings Lorenzo Sandúa, Hurtado Tenorio, Olivar de Segura and Agroalimentaria Minerva the proposed correction represented 100% of the aid, whilst in the case of the undertakings Sagarra Bascompte SA, Amador Rodríguez SL, Fernández y Ruiz de Aguilar SA, Uteco Jaén, Aragonesa de Aceite

de Oliva, Martínez Henarejos, Hispanoliva, Hijos de Joaquín Seguí and Emiliano Vivas, the correction was 10%.

8 The Kingdom of Spain, which did not accept the abovementioned Commission proposal, referred the matter to the Conciliation Body established under Commission Decision 94/442/EC of 1 July 1994 setting up a conciliation procedure in the context of the clearance of the accounts of the European Agricultural Guidance and Guarantee Fund (EAGGF) Guarantee Section (OJ 1994 L 182, p. 45). In its report of 5 December 1995 the Conciliation Body invited the Commission to reconsider with the Spanish authorities whether it might be possible to vary further the correction rates according to the different plants concerned or to replace the Commission's proposed financial correction by a flat-rate correction of 2% of the total expenditure declared by that Member State for 1992.

9 However, the Commission did not accept that invitation and adopted the contested decision, which embodies the proposal contained in the letter of 13 June 1995.

10 The Kingdom of Spain puts forward two submissions in support of its action: first, infringement of the provisions relating to the funding of the common agricultural policy and those concerning the common organisation of the market in oils and fats, and second, infringement of the principle of proportionality. It states in this connection that, since the Commission proposes, on the basis of the facts established in the inspection report, a financial correction applying to 13 undertakings, four of which have been denied all of the aid initially obtained and the remaining nine receive only 10% of that aid, it will set out in respect of each plant the reasons why it considers that the aid was not granted in breach of Community law. It is necessary therefore to consider both submissions with regard to the situation of each of those undertakings.

The undertakings in respect of which the financial correction was 100%

Lorenzo Sandúa

11 The inspection report records the following breaches: incoming consignments of olive oil were not itemised at the time of the annual inspection; as regards outgoing consignments of olive oil during any one period, there was only a reference to the month concerned, without any additional information; the inspectors suspected falsification of invoices, but those suspicions were taken no further; the stock records did not include the 25-litre containers shown on the last five invoices for bulk olive oil; the company did not submit those five invoices, or the value added tax ('VAT') books and assessments, or the accounts; all the documents were located outside the plant; at the request of the AAO, the undertaking sent the documents, but with three months' delay, the AAO did not mention any alteration of the documents sent and in particular, in light of the delay, did not refer to the possibility that they were 'doctored'. The Commission therefore applied a financial correction of 100% of the aid declared.

12 The Kingdom of Spain maintains that the aid was paid in accordance with the Community rules.

13 As regards in particular the suspicions of falsification of the invoices, the Kingdom of Spain points out that, when the AAO discovered grounds for doubting the accuracy of those invoices, it proposed that Senpa should extend the period for lodging its report under Article 9(3) of Commission Regulation (EEC) No 2677/85 of 24 September 1985 laying down implementing rules in respect of the system of consumption aid for olive oil (OJ 1985 L 254, p. 5), as amended by Commission Regulations (EEC) No 571/91 of 8 March 1991 (OJ 1991 L 63, p. 19), No 1008/92 of 23 April 1992 (OJ 1992 L 106, p. 12), and No 643/93 of 19 March 1993 (OJ 1993 L 69, p. 19) (hereinafter 'Regulation No 2677/85'). Allegedly, during that period the AAO investigated, supplemented its information and analysed the results before concluding that even though consideration of the facts had not revealed the existence of any application for aid which did not

comply with the necessary requirements, it would be appropriate in future for the auditing of the books and the relevant accounts and papers to be supplemented, as it had been, by horizontal checks on the premises of the businesses and recipients concerned.

14 The Kingdom of Spain claims that there was not only a complete check but also additional inspections in respect of the facts observed, that questions which may have raised doubts were resolved, that stock records were available at the undertaking, and that the accounts alone were kept by experts who did not belong to it, and that it was in the light of all the inspection procedures which had been implemented and the results of those procedures that the department for the assessment of AAO inspection procedures filed its report in the form of a proposal concerning the applications for aid, this report then being forwarded to Senpa.

15 Under the first paragraph of Article 7 of Council Regulation (EEC) No 3089/78 of 19 December 1978 laying down general rules in respect of aid for the consumption of olive oil (OJ 1978 L 369, p. 12), Member States must institute a system of supervision to ensure that the product for which aid has been applied qualifies for such aid.

16 The first subparagraph of Article 12(1) of Regulation No 2677/85 provides that for the purposes of the checks referred to in Article 7 of Regulation No 3089/78, Member States are to inspect the stock records of all approved undertakings. They must also carry out random checks on the financial supporting documents relating to the transactions carried out by those undertakings.

17 The third, fourth and fifth subparagraphs of Article 12(1) provide that in the course of the inspections referred to in the first subparagraph Member States must check that the total quantities of oil stored in bulk and packaged and the empty packaging physically present at the undertaking and the storage place

referred to in Article 7 correspond with the data contained in the stock records. If any doubt arises as to the accuracy of the information given in the application for aid, Member States must also check the accounts of approved undertakings. The Member State may also subject approved undertakings to unannounced checks of the same type as those referred to above.

18 Those rules make it clear that the documents relating to stock records and accounts must be available on the premises of undertakings when the inspection is carried out by the competent authority, even when it is a random inspection.

19 In the case in question, the Kingdom of Spain does not deny that the accounts were not available when the AAO inspectors made their checks. It was therefore impossible to carry out the inspection provided for in the first and fourth subparagraphs of Article 12(1) of Regulation No 2677/85.

20 It should be noted also that under the seventh subparagraph of Article 12(1) of Regulation No 2677/85, as a horizontal check and particularly where there is doubt about the accuracy of the figures in the aid applications, the Member State must undertake additional checks among persons supplying raw materials and packaging and operators to whom the packaged oil has been supplied.

21 In this connection the Kingdom of Spain acknowledges that, in spite of doubts about the accuracy of the invoices, the Spanish authorities did not carry out any horizontal checks.

22 It follows that the checks provided for in Article 7 of Regulation No 3089/78 and Article 12(1) of Regulation No 2677/85 were not in fact made.

23 As regards the amount of the financial correction, the Kingdom of Spain criticises the Commission for having failed in this case to follow the criteria which it had itself laid down in its communication of 3 June 1993 to the EAGGF Committee regarding assessment of the financial consequences when preparing the decision to clear the accounts of the EAGGF Guarantee Section (Doc. VI/216/93). In that communication the Commission proposed three categories of flat-rate correction, amounting to 2, 5 or 10% depending on the seriousness of the infringement concerned. In that context, a correction of 100% would in any event be disproportionate.

24 It is settled case-law that the Commission may refuse to charge to the EAGGF all expenditure incurred if it finds that there are no adequate control procedures (see C-242/97 *Belgium* v *Commission* [2000] ECR I-3421, paragraph 122).

25 In its communication of 3 June 1993 the Commission thus reserves the possibility, in exceptional circumstances, of applying a correction rate greater than 10%.

26 In this case the deficiencies in the inspections at Lorenzo Sandúa are so serious that they justify the refusal to charge to the EAGGF any of the expenditure declared.

Hurtado Tenorio

27 The inspection report records the following irregularities: the quantity of olive oil stored in bulk was not that shown in the business books; there were variations in quality; the category and quality of products sold were not indicated and do not appear on the sales invoices; the mere transfer of stock to a sales outlet was entered as being an outgoing consignment of oil for sale; air depots are used although they were not shown as being on the packaging plant's premises but at the oil mill; the results of the analyses carried out revealed that the product contained 0.5 p.p.m. of trichloroethylene although the maximum permitted level is 0.1 p.p.m.; 5 936 kg were deducted from the aid application in respect of qualities sold which did not meet the standards, although the AAO pointed out in its report that in the case of anomalies concerning the purity of oil aid may be totally disallowed and a penalty may be imposed. The Commission therefore imposed a financial correction of 100% of the aid declared.

28 The Kingdom of Spain disputes the EAGGF's findings.

29 So far as the first complaint is concerned, namely that there were discrepancies in the oil stored in bulk, the Kingdom of Spain states that the quality of oil evolves naturally with time and that oil initially described as 'extra virgin' may become 'virgin' oil. It states that this change may be indicated in the stock records under 'Corrections to qualities', but has no effect on the amount of aid. The discrepancy in the oil stored in bulk which is mentioned is due to the fact that 872 litres of extra virgin oil were missing from stock according to the stock records, whilst at the same time there were an extra 934 litres of virgin olive oil. The discrepancy between the physical stocks and the recorded stocks was therefore only 62 litres, a figure which seems negligible in comparison with the total volume of stocks.

30 In this connection, it should be noted that under subparagraphs (a), (b) and (f) of the first paragraph of Article 3 of Regulation No 2677/85, each packaging plant

must keep daily records of stocks of olive oil, by origin and packaging, existing at the date on which it was approved; the quantity and quality of each consignment of olive oil entering the plant, by origin and packaging; and the quantity and quality of olive oil packaged. In the case in question, the Kingdom of Spain does not challenge the findings of the inspection report that the undertaking's stock records did not correctly record the different qualities of olive oil stocks.

31 So far as the second complaint is concerned, to the effect that the stocks did not correspond to the business books, the Kingdom of Spain notes that the discrepancy between the figures contained in the subsidiary register and those given in the business books is 5 litres, or 4.58 kg. The AAO report takes the smaller quantity, without imposing any penalty, in view of the insignificance of the discrepancy.

32 In this connection, it should be noted that the Kingdom of Spain acknowledges the discrepancy, though describing it as 'insignificant', between the figures contained in the stock records and those contained in the business books. The file confirms, moreover, that there were unsubstantiated discrepancies between the stock records and the physical quantities of oil stored in bulk, and between the same categories of oil stocks which were packaged. On this point the stock records do not therefore comply with the Community rules.

33 So far as the third complaint is concerned, to the effect that there were no indications in the sales invoices of the category of products sold, their quality or their packaging, the Kingdom of Spain claims that one need only look at those invoices to see that they contain all the information required under the relevant rules. It maintains that the invoices accurately reflect the commercial and tax aspects of the operation they are required to show, although it would have been better if they had given more details. At all events, those details were known to the AAO from the accounts relating to the products, which refer to the business books.

34 It should be noted in this connection that subparagraphs (g) and (h) of the first paragraph of Article 3 of Regulation No 2677/85 state that the daily stock records must also indicate the quantity and quality of olive oil leaving the plant, by lot, and for each consignment leaving the plant, the number of the sales invoice. The Kingdom of Spain does not deny the findings of the inspection report that the invoices do not indicate the quality of olive oil sold. Since such information is, however, essential in order to identify the category of products sold, the Community rules have not been complied with.

35 So far as the fourth complaint is concerned, namely that a transfer of stock to a sales outlet was shown as a consignment leaving the plant as a result of sales of olive oil, the Kingdom of Spain maintains that the undertaking considered that a consignment leaving for a sales outlet did not in fact give entitlement to receive aid; it was in those circumstances that for a few months aid was applied for in respect of a quantity greater than that to which the undertaking was entitled, but on the other hand during other months aid was requested for a smaller quantity, so that when the AAO investigated that period of several months, it was apparent that the quantities actually sold which left the plant and were entitled to aid were greater than those for which aid had been applied. Ultimately, the practice followed by the undertaking did not entail the payment of aid for oil which was not sold and which did not actually leave the plant.

36 Article 9(1) of Regulation No 2677/85 states that every application for aid must relate to the total quantity of olive oil leaving the packaging plant during a given month. If the minimum quality of 15 tonnes is not achieved during the course of a given month, the aid application must be lodged no later than the end of the second month following that in which the minimum quantity is achieved. Paragraph 3 of that article states that the Member State must pay the aid within 150 days of submission of the aid application.

37 In the case in question, it is not disputed that for several months Hurtado Tenorio was seeking larger amounts of aid for quantities of olive oil than those to which it was entitled. Such conduct is contrary to the Community rules and a breach of

this kind cannot be offset by a proportionate reduction in the applications for aid during other months. Furthermore, the Kingdom of Spain has not provided any evidence to support its assertions that the aid obtained during the period in question did not exceed the amount which the undertaking concerned was entitled to claim.

38 So far as the fifth complaint is concerned, to the effect that air depots were used which do not feature among the packaging plant's installations but are included among those of the oil mill, the Kingdom of Spain states that both the packaging facility and the oil mill are installations involved in the plant's activities. If the depots are declared in the section relating to the oil mill there is no reason to declare them in the section reserved for packaging, in order to avoid the risk of duplication. Moreover, all the depots were declared, whether they relate to the packaging activity or the milling activity, the contents of each of them were determined and then a check made on the basis of the ledger containing the stock records for each activity and the 'reckonings'.

39 In this connection, it should be noted that the second subparagraph of Article 7(2) of Regulation No 2677/85 states that the storage place outside the area must permit a proper check to be kept upon the products stored and must have been approved in advance by the relevant supervisory body. In the case in question the Kingdom of Spain has not shown that those requirements were met.

40 So far as the sixth complaint is concerned, namely that trichloroethylene was present in the oil, the Kingdom of Spain claims that the EAGGF is wrong to consider that this indicated that the oil was impure, since the presence of that substance is more an indication of pollution of the oil, estimated to be 0.5 p.p.m. The situation did not come under Article 5 of Regulation No 2677/85 concerning quality checks, but should be regarded as an infringement of the provisions of Article 4 of Regulation No 3089/78 on the definition of olive oil.

41 In this connection, Article 5(1) of Regulation No 2677/85 states that Member States must check by sampling that the oil put up in an immediate container accords with one of the definitions referred to in Article 4(1)(a) of Regulation No 3089/78. The first subparagraph of Article 5(2) of Regulation No 2677/85 provides that where the competent authority in each Member State finds that the oil in question does not meet one of the definitions referred to in paragraph 1 as a result of blending or other chemical processes intended to render oil not eligible for consumption aid so eligible, the competent authority must forthwith withdraw the plant's approval for a period of one to five years depending on the gravity of the infringement, without prejudice to any other penalties.

42 The Kingdom of Spain acknowledges that the presence of a chemical in a consignment of 5 936 kg of olive oil is not compatible with the definition of olive oil provided for under the Community rules. In this connection, it does not contradict the Commission's statement that the olive oil contained the said chemical in a proportion 5 times greater than the prescribed limits. The infringement of the Community rules is therefore proved.

43 It follows that the Kingdom of Spain has failed to disprove any of the irregularities which Hurtado Tenorio is alleged to have committed. In view of the seriousness of some of the irregularities committed, the correction of 100% of the expenditure declared is not disproportionate and therefore appears justified.

Olivar de Segura Cooperative

44 The inspection report records the following irregularities: there were no details of the inspection of the accounts and incoming consignments of olive oil, only references to the relevant books; the inspector's final report was inadequate since it merely stated that everything was in order, even though there was a note to Senpa noting that 4 580 kg had been deducted due to errors which occurred when the figures were copied from the account books on to the aid application.

The Commission therefore imposed a financial correction of 100% of the aid declared.

45 The Kingdom of Spain claims, firstly, that the EAGGF's findings do not correspond with the facts since the AAO inspectors checked the records and their checks contain precise details. Furthermore, the inspector proposed a reduction corresponding to 4 580 kg in the aid applied for, equivalent to 5 000 litres of olive oil, for a consignment which the plant stated it had sold but which did not appear in the stock records; so, according to its criteria, the inspector did not accept that part of the application which was not substantiated by supporting documents.

46 Moreover, the AAO report was not in favour of paying aid in respect of those 4 580 kg of olive oil; in fact, examination of the stock records revealed that that quantity was not included in the ledger of outgoing consignments for the period concerned. According to the records, that quantity went out in June 1992 and the plant entered it again, by mistake, in the May application.

47 The Kingdom of Spain claims, secondly, that by requiring withdrawal of approval and imposing a correction of 100% the Commission infringed the principle of proportionality. In its view, the requirement to withdraw approval temporarily, as laid down in Article 3(1) of Regulation No 3089/78, is not an automatic consequence of the mere fact that an application has been made for aid in respect of a greater quantity than that to which the undertaking is entitled or of oil that does not meet the specifications. It is necessary, on the one hand, for the quantity of oil in respect of which aid has been improperly applied for to be significant, that is to say, according to the second subparagraph of Article 12(6) of Regulation No 2677/85, for it to exceed 'the checked quantity [...] by at least 20%', and, on the other hand, that there should be fraudulent intent and not just a simple error.

48 In the case of the Olivar de Segura Cooperative, the penalty of withdrawal of approval is not justified either by the quantity of the excess in question, which represents 4% of the total amount of oil checked, or by fraudulent intent, since the error was detectable in the account books of the aid applicant.

49 According to the Commission, withdrawal of approval is automatic where one of the conditions provided for in Article 2(1) of Regulation No 3089/78 is no longer met. In this connection, on the one hand, Article 12(6) of Regulation No 2677/85, as amended by Regulation No 643/93, cannot be applied to the financial year being inspected, which was prior to the date of entry into force of that provision, as amended. On the other hand, the withdrawal measure is not conditional on evidence of the intentional nature of the infringement committed by the recipient of the aid.

50 In the case in question, it is not disputed that the application for consumption aid for olive oil submitted by the cooperative concerned related to a quantity which exceeded by 4 580 kg that for which entitlement to aid had been recognised.

51 In this connection the abovementioned Article 12(6), in the version applying in the case in question, provides that where it is found by the competent authority that an application for aid relates to a quantity greater than that for which the entitlement to aid was recognised, the Member State must immediately withdraw approval for a period of from one to five years, depending on the seriousness of the infringement, without prejudice to any other penalties.

52 It is clear from that provision that the competent authority, which is required to take into consideration the seriousness of the infringement concerned, is thus obliged to comply with the principle of proportionality.

53 In this connection it should be pointed out that the Commission amended Article 12(6) of Regulation No 2677/85 by Regulation No 643/93 in that where the competent authority finds that an application for consumption aid relates to a quantity greater than that for which entitlement to aid has been recognised the Member State must impose a penalty on the packaging undertaking equal to between three and eight times the aid improperly applied for, depending on the seriousness of the infringement. However, where the quantity for which aid has been improperly applied for exceeds the checked quantity for which entitlement to aid has been recognised by at least 20%, the Member State, in addition to imposing a financial penalty, must withdraw approval for a period of from one to three years depending on the seriousness of the infringement.

54 This new version of Article 12(6) merely lays down the criteria which, in the Commission's view, should guide application of the principle of proportionality in the event of the prescribed penalties being imposed, as is clear moreover from the fourth recital in the preamble to Regulation No 643/93.

55 The Commission does not dispute the statement by the Kingdom of Spain that the quantity for which aid was improperly applied for amounted to 4% of the total applications submitted by the cooperative in question. Even considering that in the new version of that provision the penalty of withdrawal of approval, which is imposed only where the quantity for which aid has been improperly applied for exceeds the checked quantity for which entitlement to aid has been recognised by at least 20%, is accompanied by a set of financial penalties applicable to any improper aid application, which was not provided for before, it must be accepted that exceeding the quantity for which entitlement has been recognised by 4% cannot by any means justify withdrawal of approval.

56 Inasmuch as the financial correction of 100% of the aid declared is essentially based on the incorrect statement by the Commission that the irregularity of the aid application in respect of 4 580 kg of oil ought to have led to withdrawal of approval from the Olivar de Segura Cooperative, the contested decision must be annulled in that respect.

Agroalimentaria Minerva

57 The inspection report records the following irregularities: there were unexplained differences between the physical stocks and the recorded stocks; the aid application related to a quantity greater than that to which entitlement to aid was recognised for a reason which cannot merely be ascribed to an arithmetical accounting error, thus constituting an infringement incurring withdrawal of approval. The Commission therefore imposed a financial correction of 100% of the aid declared.

58 As regards, in particular, withdrawal of approval as proposed by the EAGGF, the Kingdom of Spain states that aid was improperly applied for in respect of 3 069 kg of oil as the result of an error in adding up the quantities of oil entered in the stock records as having left the sales outlets in December 1991 for consumption. When compared with the quantity of oil to which entitlement to aid had been recognised for that plant, namely 480 011 kg, the error related to only 0.64% of that quantity; an error of that magnitude, when no false declaration has been made intentionally or as a result of serious negligence, should not lead to the imposition of the penalty provided for in Article 12(6) of Regulation No 2677/85.

59 As has been held in paragraphs 55 and 56 of this judgment with regard to the Olivar de Segura Cooperative, it is sufficient to state that in the case in question exceeding the quantity of oil giving entitlement to aid by 0.64%, a figure which is not disputed by the Commission, cannot justify withdrawal of approval from the plant concerned.

60 Since the Commission essentially based the financial correction of 100% on the alleged infringement of the provisions of Article 12(6) of Regulation No 2677/85, the contested decision must be annulled in that respect.

The undertakings for which the financial correction was 10%

Sagarra Bascompte SA

61 The inspection report records discrepancies between the results confirmed when the inspectors visited the plant and the final conclusions which the inspectors drew up in the AAO offices. According to the report of the inspection visit, the stock records were not up to date, it was impossible to check the stocks shown on paper, there were discrepancies between the physical stocks of containers and the recorded stocks of containers, and no business papers were submitted to the inspectors inasmuch as the accounts ledgers were not available at the time of inspection. However, the final conclusions drawn up in the central office of the AAO state that the stocks did tally with the records, and that the papers and ledgers were in order. Consequently, the Commission imposed a financial correction of 10% of the aid declared.

62 The Kingdom of Spain maintains that the EAGGF's allegations are incorrect and that the inspection was carried out in the proper manner.

63 As regards the allegation that the stock records were not up to date, it states that the inspection was initially carried out on the basis of the records, during which the inspector examined the stock records given to him by the undertaking. Then the inspection visit was made, during which checks were made *in situ*; finally, the conclusions from the entire procedure were drawn up; they could have been drawn up either during the visit or subsequently at the offices of the AAO.

64 According to the Kingdom of Spain, it sometimes happens that the plant has up-to-date information at the time of the visit but the most recent information had not been entered in the relevant records for perfectly valid reasons which are

mentioned in the inspectors' report, for example the illness of the person responsible for that job. This circumstance would not in any way prevent the stock records from being checked during the inspection procedure, as demonstrated by the fact that those checks were carried out at the plant in question.

65 In this connection, it should be observed that the first paragraph of Article 3 of Regulation No 2677/85 stipulates that each packaging plant must, from the date on which it is approved, keep daily stock records. The Kingdom of Spain acknowledges that at the time of the inspection the stock records of the plant concerned were not up to date. It is therefore established that the plant in question infringed that provision.

66 As regards the disparities between the physical stocks and the recorded stocks that were recorded during the inspection of the containers, the Kingdom of Spain states that no significant disparity was discovered. It states that the national inspector carried out the check on the basis of the books and business papers made available to him at the time of his visit. The non-availability of the tax records relating to quarterly VAT payments at the time of the visit was attributable to the fact that this was a random inspection under Article 12(1) of Regulation No 2677/85; it is very common practice in the case of individual plants and small companies for these records to be kept by external accountants. In the case in question, when a copy of the tax records was requested during the inspection, proof that the plant had paid the VAT was immediately sent by fax.

67 Suffice it to note in this connection, as stated in paragraph 18 of the present judgment, that the documents relating to the stock records and the accounts must be available on the premises of undertakings when the inspection is carried out by the competent authority, even when it is a random inspection. This was not so, however, in the case in question.

68 The failings detected during the checks on Sagarra Bascompte SA therefore fully justify the financial correction of 10%, which cannot by any means be regarded as disproportionate in view of the seriousness of the irregularities committed.

Amador Rodríguez SL

69 The inspection report records the following infringements: the inspectors certified, merely on the word of the plant itself, that there had been no changes in the packaging facilities; a member of the plant's staff was appointed as its legal representative without any documentary evidence being required; 14 000 containers were missing; 25-litre containers were also missing; 1- and 5-litre containers were not checked; the inspection of the business books was expressed in percentages and not in quantities; only 5% of the records of movements within the plant were checked; there was no information on outgoing consignments of olive oil and stores for packaged virgin olive oil. The Commission therefore imposed a financial correction of 10% of the aid declared.

70 The Kingdom of Spain states that those charges do not represent an accurate assessment of the inspection operations, which were carried out in accordance with the requirements of Article 12 of Regulation No 2677/85.

71 As regards the inspectors' certification — made solely on the word of the plant's representative — that no changes had taken place in the packaging facilities, the Kingdom of Spain maintains that on the first visit to a packaging plant the features of the facilities are always noted in the report, which contains information gathered simply from observation, such as the type of machinery, the model or the manufacturer, as well as other duly verified information, such as output. The Kingdom of Spain states that on subsequent visits the inspector always examines the existing facilities and checks whether there have been any

changes from the information obtained on the previous visit. If so, he notes this in the report. If not, he enquires of a representative of the plant to make sure that no modification likely to pass unnoticed on a visual inspection has in fact been made. If the answer is negative, the statement by the representative is mentioned in the report in order to have it noted in case any modification is revealed subsequently.

72 The Kingdom of Spain claims that the simplified form of this procedure, which is set out in the report, did not mislead any of the persons involved in preparing the file. None the less, instructions had been given so that in future the wording would be clearer and would show how the inspection procedure had been carried out.

73 In this connection it should be noted first of all that, in accordance with the fifth paragraph of Article 2 of Regulation No 2677/85, for the purpose of granting approval, the competent authorities of the Member State must carry out an on-the-spot inspection of the plant and packaging capacity of the undertaking seeking approval. Secondly, in the course of the inspections provided for in the third subparagraph of Article 12(1) of that regulation, Member States must check that the total quantities of oil stored in bulk and packaged and the empty packagings physically present at the undertaking correspond with the data contained in the stock records. That check means that the competent authority must ascertain the state of the packaging facilities on each of its inspection visits.

74 In the case in question, it is not disputed that the Kingdom of Spain has not established that such a check actually took place.

75 As regards the appointment of a member of the plant's staff as its legal representative without any documentary evidence to substantiate that capacity, the Kingdom of Spain claims that the representative capacity of the person acing on behalf of a plant is particularly important where statements have to be made on its behalf. Its importance is reduced where the person concerned merely accompanies the inspector on an inspection visit.

76 This line of argument cannot be upheld. The check provided for in Article 12(1) of Regulation No 2677/85 cannot serve any use unless someone duly authorised by the plant's management accompanies the inspector empowered to carry out the check and answers any questions raised in that context.

77 As regards the finding in the inspection report that 14 000 containers were missing, the Kingdom of Spain claims that so far as the 384 25-litre containers are concerned, 21 of them were indeed missing, but since they were not used for the marketing of olive oil they were not taken into account. So far as the absence of any check on the 6 518 1-litre containers and the 6 970 5-litre containers is concerned, the Kingdom of Spain observes that they were in fact checked by means of a reckoning process and that the figure thus obtained coincided more or less with that shown in the records.

78 In this connection, it is clear from the file that, according to the inspectors' comments, they were unable to count the 1-litre and 5-litre containers. It appears they were therefore content to record that it was impossible to check the number of containers, without giving reasons for this or any alternative methods of calculation.

79 In those circumstances, it must be concluded that, without there being any need to consider the other complaints raised in the inspection report, the irregularities established are sufficient in themselves to justify the financial correction of 10%.

Fernández y Ruiz de Aguilar SA

80 The inspection report records the following irregularities: there were no records of stocks of olive oil put up in containers or of stocks of containers; it was not possible to check whether they corresponded, since the inspectors summed up their report with the words 'nothing to report', although it is accepted that it was not possible to check for correspondence. The Commission therefore imposed a financial correction of 10% of the aid declared.

81 As regards the absence of stock records, the Kingdom of Spain refers to the points made in the inspection report.

82 According to that report, the records for stocks of packaged olive oil and stocks of containers do exist and were checked. The Commission's allegations on this point are therefore unfounded.

83 As regards the impossibility of checking for correspondence, the Kingdom of Spain maintains that at the time checks were carried out the inspector did not indicate in his report whether the physical stocks corresponded with the recorded stocks, although he did mention this subsequently in the report drawn up at the offices of the AAO.

84 In this connection it need only be observed that the failure to indicate the abovementioned correspondence cannot justify the assumption that the necessary checks were indeed carried out; moreover, although the Kingdom of Spain claims that those checks were made subsequently, it does not provide evidence to prove that claim.

85 In view of the significance of this aspect of the inspection, it must be concluded that the financial correction of 10% appears justified.

Uteco Jaén Cooperative

86 The inspection report records the following irregularities: the inspectors approved the equipment, the filling facility, the store and the staff without carrying out any checks; there were no stock records; it was not possible to check that the stocks of olive oil put up in containers and the stocks of containers corresponded; outgoing consignments of oil were shown as sales although they were simply stock transfers; oil returned by customers was not recorded. The Commission therefore imposed a financial correction of 10% of the aid declared.

87 As regards the first complaint, the Kingdom of Spain refers to its observations on the same complaint against Amador Rodríguez SL, which it refuted in paragraphs 70 and 71 of the present judgment.

88 It is clear from the minutes of the inspection that, in the section concerning the description of the features of the packaging facility and of the store, the AAO inspectors stated, merely on the basis of a statement by the representative of the plant, that the equipment and premises had not undergone any change since the

previous inspection. As is stated in paragraph 73 of this judgment, the check provided for in the third subparagraph of Article 12(1) of Regulation No 2677/85 requires the competent authority to ascertain the state of the packaging facilities on each of its inspection visits.

89 In this case, the Kingdom of Spain does not deny that no such check took place.

90 As regards the stock records, the Kingdom of Spain maintains that they exist, even though the movements for the days preceding the inspection were not entered in them owning to the absence of the relevant official; however, the documents recording those movements were on the premises of the plant; it was therefore possible to carry out an accurate examination of the recorded stocks at the offices of the AAO and compare them with the physical stocks on the basis of the notes taken on the spot.

91 That argument is insufficient to disprove the existence of an infringement of the first paragraph of Article 3 of Regulation No 2677/85, which stipulates that each packaging plant must keep daily records of stocks of olive oil from the date on which it is approved.

92 Those irregularities are in themselves sufficiently serious to justify the financial correction of 10% imposed in this case.

Aragonesa de Aceite de Oliva

93 The inspection report records the following irregularities: the accounts and stock records were incomplete; the number of documents inspected was not stated; there were no details concerning incoming and outgoing consignments of olive oil; the company declared that 20 560 kg of olive oil and 385 kg and 175 litres of packaged olive oil which did not belong to it were stored in its storage depots; none of the documents required of an approved plant was available; it was not possible to check whether the physical stocks corresponded to the recorded stocks; the majority of incoming consignments of olive oil was from members of the company; there was a note from the AAO to Senpa concerning the deduction of 46 kg of unrecorded products. The Commission for those reasons imposed a financial correction of 10% on the aid declared.

94 The Kingdom of Spain claims that the inaccuracies detected in the records were due to the fact that the plant had only recently been approved and that this was its first inspection.

95 Suffice it to hold this connection that such an explanation does not provide adequate justification under the relevant Community rules and therefore cannot be accepted.

96 As regards the absence of any indication of the number of business papers inspected, the Kingdom of Spain observes that, even if that number does not appear in the inspection report, it was stated in that report that 100% of the documents, of which AAO has a list, were checked. The number could therefore be established by a check at the offices of the AAO. As regards the lack of details concerning incoming and outgoing consignments of oil, it claims that the report mentions the incoming and outgoing consignments of bulk olive oil that were inspected, which are those shown in the accounting records inspected by the

AAO. Moreover, the report states that 100% of the supporting documents for incoming and outgoing consignments were checked.

97 It is clear from the minutes drawn up by the AAO inspectors that the records were not available during the inspection operations, which prevented the inspectors from checking whether the recorded stocks corresponded to the physical stocks. Moreover, unlike the reports on other plants, the report on Aragonesa de Aceite de Oliva does not contain information on incoming and outgoing consignments of olive oil. The statement that 100% of the supporting documents were checked is therefore not adequently substantiated.

98 Those irregularities are in themselves sufficient to justify the financial correction of 10%.

Martínez Henarejos

99 The inspection report records the following irregularities: there were no records of stocks of olive oil, seeds, oil put up in containers or containers; there was no check on whether physical stocks corresponded to recorded stocks, this check being carried out subsequently at the offices of the AAO; the written justification supplied by the plant to explain the delay in drawing up the records did not correspond to its statements on the subject contained in the inspection report; notes were sent to Senpa requesting deduction both of 435 kg of oil which after analysis proved to be of poor quality, and of 398 kg of oil which did not comply with Community quality requirements. The Commission on those grounds imposed a financial correction of 10% of the aid declared.

100 The Kingdom of Spain claims that the lack of correspondence with the stocks physically present at the time of the on-the-spot inspection found to exist following the inspection carried out at the offices of the AAO cannot be regarded as significant since it affected only around 1.17% of the volume of oil put up in containers. Those disparities are due to the fact that the plant packages its oil in containers of 16 different sizes, physical stocks of which existed at the time of the inspection. There were seven in which disparities were found; the absolute quantities were 2, 20, 4, 15, 6, 15 and 10 litres.

101 Suffice it to note in this connection that, as has already been pointed out in paragraph 18 of this judgment, the documents relating to stock records and accounts must be available on the premises of undertakings when the inspection is carried out by the competent authority, even when it is a random inspection. This, however, was not so in the case in question since it is clear from the AAO's report of 6 October 1992 that it was not possible to obtain the records or accounts for each category of container on the day of the inspection.

102 As for the fact that discrepancies existed between the recorded stocks and the physical stocks, which were evident in all cases, as regards olive oil stored in bulk and in containers, and in almost half the cases as regards packaged oil, the Spanish Government does not explain how such discrepancies could have been a result of the large number of containers used.

103 In those circumstances, the financial correction of 10% appears to be justified.

Hispanoliva

104 The inspection report records the following irregularities: the packaging facilities, the store and the structure of the plant were not inspected and the declarations made by the plant were accepted without checking; the containers were not inspected either, the inspector merely stated 'they are numerous and badly presented'; there was no check on whether the containers were in conformity; there were no details about the checks on incoming and outgoing consignments of oil or on imports from non-member countries; the plant provided sketches of the storage depots which were not checked; however, in the list of conclusions drawn up by the inspector, apart from the reference to the check on whether the physical stocks corresponded to the recorded stocks, the rest was regarded as being 'in order'. The Commission consequently imposed a financial correction of 10% of the aid declared.

105 The Kingdom of Spain observes that, in order that the on-the-spot checks can concentrate on the accuracy of the more important aspects of the data contained in the aid applications, the checks on packaging plants' facilities and machinery are carried out randomly where alterations are found in relation to previous inspections. If no alteration is found, the inspectors ask the undertakings if there have been any changes which might have passed unnoticed and, if the answer is no, this is noted in the inspection report in case some alteration has in fact taken place.

106 Since the data in the stock records corresponded to the quantities of packaged oil physically present within the plant at the time of the inspection, the inspectors decided not to make a precise count of the containers that were there; however, the inspector's attention was drawn to the need to establish their exact number on subsequent visits.

107 As is stated in paragraph 73 of this judgment, the inspection provided for in the third subparagraph of Article 12(1) of Regulation No 2677/85 means that the

competent authority must ascertain the state of the packaging facilities on each of its inspection visits. The Kingdom of Spain acknowledges that in the case in question that check did not take place.

108 The Kingdom of Spain also does not dispute the other findings made by the EAGGF inspectors.

109 In those circumstances, the financial correction of 10% cannot be challenged.

Hijos de Joaquín Seguí

110 The inspection report records the following irregularities: no invoice numbers were entered in the records; the movements of quantities and qualities were incorrect; errors were made in recording qualities of olive oil or virgin olive oil; the labels on the containers did not include identification numbers; on 12 April 1993, the AAO proposed to Senpa that it should withdraw approval from the plant because its packaging capacity was below the minimum quantity required under the relevant rules, a proposal which was revoked on 6 July 1993. The Commission consequently imposed a financial correction of 10% of the aid declared.

111 The Kingdom of Spain submits that the EAGGF's complaints are not sufficiently substantiated since the discrepancies between the physical stocks and the recorded stocks of packaged olive oil found during the on-the-spot inspection only concern a total of 142 litres. Moreover, the inspectors mentioned in the

statement attached to the report that they had carried out individual checks. Specifically, they examined the invoices and receipts relating to the commercial transactions and the entries in the tax records of the business papers submitted.

112 As the Advocate General states in point 153 of his Opinion, the figure of 142 litres given by the Kingdom of Spain does not take into account all the discrepancies discovered at the time of the inspection since discrepancies amounting to several hundred units were revealed between the recorded and physical calculations of the quantities of oil stored in bulk, on the one hand, and the stocks of containers on the other.

113 The Kingdom of Spain does not dispute the EAGGF's other findings.

114 In those circumstances, the financial correction of 10% appears justified.

Emiliano Vivas

115 The inspection report records the following irregularities: the on-the-spot inspection lasted only four hours, from 16.00 hrs to 20.00 hrs on 31 December 1993; there were no stocks; it was not possible to inspect the containers since, according to the inspector, they were not properly stored; there were significant omissions in the accounts, which did not contain actual invoices, merely photocopies; only the delivery notes were inspected; the inspector's final

conclusion was that, irrespective of the irregularities noted, the AAO inspector had concluded none the less that they were irrelevant as regards the consumption aid which the plant had received.

116 As regards the length of the inspection, the Kingdom of Spain submits that this is a small packaging plant which only operates for part of the year; the inspection visit coincided with a period when the staff had been temporarily laid off and its purpose was to check compliance with specific points. Other valuable checks were carried out at the plant, but the absence of oil stored in bulk and oil in containers saved a significant amount of time.

117 The absence of stocks was due to the low level of activity at the plant and cannot be regarded in any way as an anomaly, an infringement or defective operating.

118 As regards the inspection of empty containers, the inspector preferred to estimate their number by a process of reckoning, which confirmed that they corresponded with the recorded stocks; he was not able to make a definitive count of those containers because they were badly stacked. He therefore asked the undertaking to stack the containers properly in future so that they could be counted more easily, a request which was met, as the next visit showed.

119 The Kingdom of Spain acknowledges that the inspection provided for in the third subparagraph of Article 12(1) of Regulation No 2677/85 was not carried out. That infringement is sufficiently serious in itself to justify the 10% financial correction imposed in this case.

120 It follows therefore that the contested decision must be annulled with regard to the Kingdom of Spain in so far as it orders that none of the aid granted to the Olivar de Segura Cooperative and the undertaking Agroalimentaria Minerva should be charged to the EAGGF.

Costs

121 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 Kingdom of Spain has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. **Orders that Commission Decision 96/701/EC of 20 November 1996 amending Decision 96/311/EC on the clearance of the accounts presented by the Member States in respect of the expenditure for 1992 of the Guarantee**

Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) and in respect of certain expenditure for 1993 should be annulled, as regards the part relating to the Kingdom of Spain, in so far as it orders that none of the aid granted to the Olivar de Segura Cooperative and the undertaking Agroalimentaria Minerva should be charged to the EAGGF;

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

3. **Orders the Kingdom of Spain to pay the costs.**

Kapteyn Hirsch Ragnemalm

Delivered in open court in Luxembourg on 6 July 2000.

R. Grass

Registrar

J.C. Moitinho de Almeida

President of the Sixth Chamber