OPINION OF ADVOCATE GENERAL MENGOZZI

delivered on 10 January 2008 [1]

1. By its appeal, the Kingdom of Belgium ('the appellant') seeks to have set aside the judgment of the Court of First Instance of 25 July 2006 ('the judgment under appeal'), [2] by which that court dismissed its application, principally, for the annulment of Commission Decision 2004/136/EC [3] of 4 February 2004, in so far as that decision imposed on the appellant a flat-rate reduction of 2% of the expenditure declared for the purposes of financing through the European Agricultural Guarantee and Guidance Fund (EAGGF), Guarantee Section, for the financial years 2000-2002, or, in the alternative, a reduction in the amount of the expenditure excluded from such financing.

I — Legislative background

2. According to the Community rules on the financing of the common agricultural policy, [4] intervention intended to stabilise the agricultural markets, undertaken in accordance with Community rules within the framework of the common organisation of agricultural markets, is to be financed, in particular, through the Guarantee Section of the EAGGF. [5] Where it finds that expenditure has not been effected in compliance with Community rules, the Commission is to decide on the expenditure to be excluded from Community financing. [6] In accordance with national provisions laid down by law, regulation or administrative action, the Member States are to take the measures necessary to satisfy themselves that transactions financed by the EAGGF are actually carried out and are executed correctly, in order to prevent and deal with irregularities and to recover sums lost as a result of irregularities or negligence. [7]

1 — Original language: Italian.

2 — Case T-221/04 *Belgium* v *Commission*.

3 — Decision excluding from Community financing certain expenditure incurred by the Member States under the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) (OJ 2004 L 40, p. 31).

4 — Pertinent in this case are Regulation (EEC) No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy (OJ, English Special Edition 1970 (I), p. 218) and, in relation to expenditure incurred after 1 January 2000, Council Regulation (EC) No 1258/1999 of 17 May 1999 on the financing of the common agricultural policy (OJ 1999 L 160, p. 103). Those regulations are no longer in force since, as of 1 January 2007, Council Regulation (EC) No 1290/2005 of 21 June 2005 on the financing of the common agricultural policy (OJ 2005 L 209, p. 1) has been applicable.

5 — See Article 1(2)(b) and Article 3(1) of Regulation No 729/70, as well as Article 1(2(b) and Article 2(2) of Regulation No 1258/99.

6 — See Article 5(2)(c) of Regulation No 729/70 and Article 7(4) of Regulation No 1258/99.

7 — See Article 8(1) of Regulation No 729/70 and Article 8(1) of Regulation No 1258/99.

3. Article 1 of Council Regulation (EEC) No 3508/92 of 27 November 1992 establishing an integrated administration and control system for certain Community aid schemes [8] requires each Member State to set up such an integrated system, which in the crop sector must apply, in particular, to the Community support system for producers of certain arable crops.

4. According to Article 2 of the regulation, '[t]he integrated system shall comprise the following elements:

(a) a computerised data base;

(b) an alphanumeric identification system for agricultural parcels;

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

(d) aid applications;

(e) an integrated control system'.

Council Regulation (EC) No 1593/2000 of 17 July 2000 amending Regulation (EEC) No 3508/92, [9] which entered into force on 28 July 2000, deleted the word 'alphanumeric' from Article 2(b) and (c) of the latter regulation.

5. Pursuant to Article 1(4) of Regulation No 3508/92, for the purposes of that regulation, an 'agricultural parcel' means 'a continuous area of land on which a single crop is raised by a single farmer'.

6. According to Article 4 of Regulation No 3508/92:

'The alphanumeric identification system for agricultural parcels shall be established on the basis of land registry maps and

8 — OJ 1992 L 355, p. 1. That regulation was amended on several occasions, and finally repealed by Council Regulation (EC) No 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers and amending Regulations (EEC) No 2019/93, (EC) No 1452/2001, (EC) No 1453/2001, (EC) No 1454/2001, (EC) No 1868/94, (EC) No 1251/1999, (EC) No 1254/1999, (EC) No 1673/2000, (EEC) No 2358/71 and (EC) No 2529/2001 (OJ 2003 L 270, p. 1).

9 — OJ 2000 L 182, p. 4.

documents, other cartographic references or of aerial photographs or satellite pictures or other equivalent supporting references or on the basis of more than one of these elements.'

Regulation No 1593/2000 replaced the text of that article as follows:

'An identification system for agricultural parcels shall be established on the basis of maps or land registry documents or other cartographic references. Use shall be made of computerised geographical information system techniques including preferably aerial or spatial orthoimagery, with an homogenous standard guaranteeing accuracy at least equivalent to cartography at a scale of 1:10 000.'

7. Article 7 of Regulation No 3508/92 provides that '[t]he integrated control system shall cover all aid applications submitted, in particular as regards administrative checks, on-the-spot checks and, if appropriate, verification by aerial or satellite remote sensing'.

8. Article 8 then provides that:

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

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

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

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

...'

9. On the basis of Article 13(1) of Council Regulation No 3508/92, as amended by Council Regulation (EC) No 2466/96 of 17 December 1996, [10] as of January 1997, all the various elements of the integrated administration and control system referred to in

10 — OJ 1996 L 335, p. 1.

Article 2 of that regulation should have been applied in Belgium. Subsequently, Regulation No 1593/2000 added to Article 13(1), in particular, a subparagraph (c), which sets at 1 January 2005 at the latest the date by which 'the geographical part of the parcel identification system, as provided for in Article 4' should apply in the different Member States.

10. Article 6 of Commission Regulation (EEC) No 3887/92 of 23 December 1992 laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes,[11] as amended by Commission Regulation (EC) No 1678/98 of 29 July 1998,[12] provides as follows:

'1. Administrative and on-the-spot checks shall be made in such a way as to ensure effective verification of compliance with the terms under which aids and premiums are granted.

2. The administrative checks referred to in Article 8(1) of Regulation (EEC) No 3508/92 shall include in particular:

(a) cross-checks on parcels and animals declared in order to ensure that aid is not granted twice in respect of the same calendar year without justification;

(b) … [13]

3. On-the-spot checks shall cover at least a significant percentage of applications. The significant percentage shall represent at least:

…;

— 5 % of "area" aid applications. However, this percentage shall be reduced to 3% for area aid applications numbering more than 700 000 per Member State in the calendar year.

Should on-the-spot checks reveal significant irregularities in a region or part of a region, the competent authority shall make additional checks during the current year in that area and shall increase the percentage of applications to be checked in the following year.

4. Applications subjected to on-the-spot checking shall be selected by the competent

11 — OJ 1992 L 391, p. 36.

12 — OJ 1998 L 212, p. 23.

13 — Concerns checks on bovine animals only.

authority on the basis of a risk analysis and an element of representativeness of the aid applications submitted. The risk analysis shall take account of:

— the amount of aid involved;

— the number of parcels and the area or number of animals for which aid is requested;

— changes from the previous year;

— the findings of checks made in past years;

— other factors to be defined by the Member State;

— infringements of Regulation (EC) No 820/97.[14]

…

7. Agricultural parcel areas shall be determined by any appropriate means defined by the competent authority which ensure measurement of a precision at least equivalent to that required for official measurements under the national rules. The competent authority shall set a tolerance margin taking account of the measuring method used, the accuracy of the official documents available, local factors (such as slope, shape of parcel) and the provisions of the following subparagraph.

…'

11. Commission Regulation (EC) No 2801/1999 of 21 December 1999 amending Regulation (EEC) No 3887/92[15] replaced the text of the abovementioned Article 6(2), as of 1 January 2000, by the following:

'2. The administrative checks referred to in Article 8(1) of Regulation (EEC) No 3508/92 shall include in particular:

14 — Council Regulation of 21 April 1997 establishing a system for the identification and registration of bovine animals and regarding the labelling of beef and beef products (OJ 1997 L 117, p. 1).

15 — OJ 1999 L 340, p. 29.

(a) cross-checks on declared parcels and animals in order to ensure that the same aid is not granted more than once in respect of the same calendar/marketing year and to prevent any undue cumulation of aid granted under Community aid schemes involving declarations of areas;

(b) …;[16]

(c) …'[17]

Furthermore, Regulation No 2801/1999 replaced the second indent of Article 6(3) of Regulation No 3887/92 as follows:

'— 5% of "area" aid applications.'

12. Article 7(1) of Regulation No 3887/92 provides as follows:

'Should a Member State decide to use remote sensing on all or part of the sample referred to in Article 6(3), it shall:

— perform photo interpretation of satellite images or aerial photographs of all parcels to be checked with a view to recognising the ground cover and measuring the area;

— check on the spot all applications for which photo interpretation does not verify the accuracy of the declaration to the satisfaction of the competent authority'.

13. Article 9(2) of Regulation No 3887/92, as amended by Commission Regulation (EC) No 1648/95 of 6 July 1995,[18] provides, in particular, as follows:

'If the area actually determined is found to be less than that declared in an "area" aid

16 — Concerns checks on bovine animals only.

17 — Concerns checks on bovine animals only.

18 — OJ 1995 L 156, p. 27.

application, the area actually determined on inspection shall be used for calculation of the aid. However, except in cases of force majeure, the area actually determined on inspection shall be reduced:

— by twice the difference found if this is more than 3% or two hectares but not more than 20% of the determined area.

If the difference is more than 20% of the determined area, no area-linked aid shall be granted.

…'

14. Regulation No 3887/92 was repealed by Commission Regulation (EC) No 2419/2001 of 11 December 2001,[19] which lays down new detailed rules for applying the integrated administration and control system established by Regulation No 3508/92; pursuant to Article 54 thereof, it applies to aid applications relating to marketing years or premium periods starting as of 1 January 2002.

15. Article 31(2) of Regulation No 2419/2001, a provision which corresponds to the first sentence of the first subparagraph of Article 9(2) of Regulation No 3887/92, provides as follows:

'Without prejudice to reductions and exclusions in accordance with Articles 32 to 35, if the area declared in an area aid application exceeds the area determined for that crop group as a result of administrative or on-the-spot checks, the aid shall be calculated on the basis of the area determined for that crop group.'

II — The facts which gave rise to these proceedings

16. As of 1996, the Belgian authorities adopted an identification system for agricultural parcels based on aerial photographic images produced using a computerised geographic information system (GIS).[20] The agricultural parcels were identified on aerial photographic images by being traced by hand by the farmers, and then graphically encoded in the GIS by the authorities.

19 — Commission Regulation laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes established by Council Regulation (EEC) No 3508/92 (OJ 2001 L 327, p. 11).

20 — An information system used to represent and analyse things which exist or happen on the earth's surface and have a spatial reference. The geographical or spatial data is based on a common system of spatial referencing.

17. Following checks carried out in Belgium in May 2001, the Commission services responsible for clearing the EAGGF accounts identified the existence of certain anomalies in the checks which the Belgian authorities had carried out in the arable crops sector.

18. On 30 September 2003, the Commission adopted a summary report in which it took the view, in particular, that, during the 1999-2001 crop years, the Kingdom of Belgium had complied with neither Article 8 of Regulation No 3508/92 nor Articles 6 and 9 of Regulation No 3887/92, since, on the one hand, it had failed to reduce the declared area of agricultural parcels in respect of which applications for aid had been made and/or carry out on-the-spot checks in cases in which the administrative checks indicated that the area declared was larger than the area encoded in the GIS ('the GIS area') and, on the other, because it had been late in graphically encoding the agricultural parcels in the GIS, and had, therefore, failed to take certain files into consideration in the risk analysis. The Commission concluded that the Kingdom of Belgium had failed to carry out secondary checks adequately and in accordance with the applicable rules.

19. On 4 February 2004, the Commission adopted Decision 2004/136/EC ('the contested decision'), by which it imposed, in particular, a flat-rate correction of 2% (equivalent to EUR 9 322 809) of the expenditure disbursed by the paying agencies recognised by the Kingdom of Belgium and declared under the EAGGF, Guarantee Section, for the arable crops sector and for the financial years 2000-2002, because of shortcomings relating to the secondary checks.

III — Procedure before the Court of First Instance and the judgment under appeal

20. By an application initiating proceedings lodged at the Registry of the Court of Justice on 13 April 2004, and entered in the register as Case C-176/04, the Kingdom of Belgium asked the Court to annul the contested decision in so far as it imposed the abovementioned flat-rate correction or, in the alternative, to reduce the amount of the expenditure excluded from financing to EUR 1 079 814.

21. By order of 8 June 2004, the Court referred the case to the Court of First Instance pursuant to Article 51 of the Statute of the Court of Justice, as amended by Council Decision 2004/407/EC, Euratom, amending Articles 51 and 54 of the Statute of the Court of Justice. [21]

22. The application, lodged at the Registry of the Court of First Instance as Case T-221/04, was founded on three pleas. By its first plea,

21 — OJ 2004 L 132, p. 5.

the applicant maintained that it had not been in breach of Article 8 of Regulation No 3508/92 and Articles 6 and 9 of Regulation No 3887/92. By its second plea, which it submitted in the alternative to the first, it alleged infringement on the part of the Commission of the conditions it had laid down in its document No VI/5330/97 of 23 December 1997 entitled 'Guidelines for the calculation of financial consequences when preparing the decision regarding the clearing of the accounts of the EAGGF Guarantee Section' [22] ('the Guidelines'), as well as, in the final analysis, infringement of Article 5(2)(c) of Regulation No 729/70, [23] as amended by Regulation No 1287/95, [24] and of Article 7(4) of Regulation No 1258/99. [25] By its third plea, submitted in the alternative to the first two, the Kingdom of Belgium argued that there had been a breach of the principle of proportionality in the determination of the amount of the correction which the Commission had applied.

23. In the judgement under appeal, by which it dismissed the application in its entirety and ordered the applicant to pay the costs, the Court of First Instance declared, of its own motion and by way of preliminary, that the plea in the alternative seeking to obtain a reduction in the amount of the correction was inadmissible, since it did not consider that, in an action for annulment, it was empowered to replace or amend the contested decision. [26]

24. As to the substance, the Court of First Instance began by jointly considering and rejecting the first plea and the first part of the second plea, whereby the applicant claimed that the condition that there must have been a significant failure to apply the Community rules, within the meaning of the Guidelines, was not fulfilled in this case.

25. With reference to the first of the complaints addressed to the Kingdom of Belgium in the Commission's summary report, concerning the Belgian authorities' inadequate response to the anomalies brought to light by the GIS when administrative checks were carried out, the Court of First Instance first noted from that report that aid had been disbursed by the Belgian authorities, without further investigation, in certain cases in which the area declared in the aid application exceeded the GIS area by more than 5% and in all instances in which the declared area exceeded the GIS area by less than 5%. [27]

26. It pointed out that 'if, during the course of the administrative checks, the GIS shows that the area declared in an aid application is greater than the GIS area, that discrepancy constitutes an anomaly indicating a potential irregularity in the application ('the anomalies')'. The Court of First Instance found that 'if the GIS more accurately reflects the actual area than the area declared in the aid appli-

22 — Unofficial translation of the French original attached to the case-file.

23 — See footnotes 4 and 6 above.

24 — Council Regulation of 22 May 1995 amending Regulation (EEC) No 729/70 on the financing of the common agricultural policy (OJ 1995 L 125, p. 1).

25 — See footnotes 4 and 6 above.

26 — Judgment under appeal, paragraphs 26 to 28.

27 — Ibidem, paragraph 45.

cation, then payment of the aid in respect of areas based on the declared area constitutes an undue payment to the applicant and, consequently, a loss for the EAGGF'. It therefore rejected the applicant's argument that the lack of precision of the data on the area of the agricultural parcels produced by the GIS, and obtained by manual tracing of the area on possibly somewhat old photographic images, rendered those anomalies insignificant. According to the Court of First Instance, that lack of precision involved 'a risk of loss for the EAGGF'. The Court of First Instance further held that 'if the GIS data were accurate, that loss would be certain', whereas 'the imprecise nature of the data makes it impossible to determine whether or not that loss is real', as a result of which, 'the anomalies imply a risk of loss to the EAGGF'. [28]

27. The Court of First Instance then found that even though the legislation in force at the material time did not require the Member States to use a GIS — but merely permitted them to do so — by adopting a GIS before it became compulsory, the Belgian authorities had acquired 'a monitoring instrument capable of supplying relevant information which went further than the express obligations laid down in Article 6(2) of Regulation No 3887/92'. According to the Court of First Instance, the Commission could not, therefore, 'ignore this element establishing the existence of serious and reasonable doubt, which clearly indicated a risk of loss for the EAGGF, simply because the system which detected the anomalies was not compulsory or was not intended for that purpose'. Consequently, the Court of First Instance found that, in accordance with case-law, [29] the Commission had adduced evidence of the serious and reasonable doubt it entertained concerning the accuracy of the areas declared by the farmers and, thus, concerning the effectiveness of the controls carried out by the Belgian authorities and the reliability of the data which those authorities had transmitted. [30]

28. The Court of First Instance also rejected the applicant's claim that, by requiring the Belgian authorities, in the light of those anomalies, to carry out on-the-spot checks or make a reduction in the area or implement other administrative checks, the Commission was seeking to impose obligations which had not been introduced by legislation until after the material facts. In that context, the Court of First Instance observed that such obligations 'stem, in some circumstances implicitly, from the fact that, in accordance with the legislation in question, it is for the Member States to organise an effective system of inspection and supervision'. More particularly, the Court of First Instance concluded from Article 8 of Regulation No 3508/92 and from Articles 6(1) and 9(2) of Regulation No 3887/92 that 'the Member States are required to organise a series of administrative and on-the-spot checks to ensure that the substantive and formal conditions for granting aid are correctly observed'. It

28 — Judgment under appeal, paragraphs 47 to 48. All extracts from the judgment under appeal which appear in quotation marks in this Opinion are unofficial translations of the original French text.

29 — Case C-54/95 *Germany* v *Commission* [1999] ECR I-35, paragraph 35.

30 — Judgment under appeal, paragraphs 30, 49 and 50.

further concluded from the case-law [31] that 'the administrative checks preceding on-the-spot checks must be carried out in such a way as to enable the national authorities to draw all possible conclusions, be they matters of certainty or of doubt, regarding compliance with the conditions for granting aid'. [32]

29. After concluding that the Belgian authorities had failed to respond to the anomalies uncovered by the GIS, [33] the Court of First Instance considered whether the checks which those authorities had carried out for that purpose were effective. Those checks are described as follows in the judgement under appeal:

'In this case, among the criteria used for the risk analysis provided for in Article 6(4) of Regulation No 3887/92 to determine which files must be subject to an on-the-spot check, the Belgian authorities included, at their own initiative, a criterion based on anomalies. Where the files fell within a category of crop which itself displayed anomalies — either positive or negative — in excess of a given tolerance margin, the Belgian authorities verified the graphic data from the GIS and were able to establish that, in some cases, rectifying that data eliminated the anomalies. In the remaining cases, they selected the files for an on-the-spot check. The Belgian Government claims, and this has not been challenged, that it carried out such checks on 10% of the applications, representing a substantial proportion of the applications which had been identified on the basis of the criterion relating to anomalies in the context of the risk analysis (52% in 1999, 24% in 2000 and 28% in 2001).' [34]

30. In that connection, having established that the abovementioned tolerance margin was 5%, [35] the Court of First Instance stated that it was not acceptable to apply a tolerance margin in the context of an administrative check, since the effect was to distort the check. The Court of First Instance made the following observations to that effect:

'The purpose of the check is in fact to verify the data in an aid application. Therefore, to remove indicators of irregularity at that stage, in this case by taking into account anomalies greater than 5% only, precludes a comprehensive and effective analysis of the files concerned. Moreover, removing them at the risk-analysis stage prevents the anomalies, possibly combined with other criteria, from leading to the implementation of checks. Furthermore, while a tolerance margin may be accepted during on-the-spot checks, particularly by satellite remote sensing, because of the technical limitations of the instrument of measurement, the use of such a margin at the stage of the administrative checks cannot be justified on such grounds. In that connection, it must be noted

31 — Case C-41/94 *Germany* v *Commission* [1996] ECR I-4733, paragraph 17, and judgment of 14 April 2005 in Case C-468/02 *Spain* v *Commission*, paragraph 40.

32 — Judgment under appeal, paragraphs 51 to 54.

33 — Judgment under appeal, paragraph 57.

34 — Ibidem, paragraph 58.

35 — Ibidem, paragraph 59.

that the anomalies do not reflect an error in measurement, consequent on the imprecise nature of the GIS, as the Belgian Government claims, but rather the contradictions between the declared data and the administrative data held by the Belgian authorities'. [36]

31. The Court of First Instance added, in any event, that 'the use of a 5% tolerance margin cannot in any way allay the doubts concerning the accuracy of the figures provided by the Belgian authorities, at least to the level of 5% of those figures, without prejudice to the doubts that arise as a result of the absence of penalties applicable to the irregular applications'. It thus pointed out that, as stated by the Commission, 'the checks carried out by the Belgian authorities could not preclude aid being paid without additional checks on some files when the anomaly was more than 5% and on all files where the anomaly was less than 5%'. [37]

32. With reference to the second complaint set out in the summary report, concerning the delays in graphic data input, the Court of First Instance first noted from the report that, in late August, only 60% of data had been entered in the GIS in 1999, 70% in 2000 and 87% in 2001, a fact which led the Commission to conclude that it had not been possible to take a significant number of files into consideration in the risk analyses, or select them for an on-the-spot check. [38]

33. The Court of First Instance pointed out, in that connection, that the Commission had rightly concluded that the late input of data made it impossible to undertake the administrative checks in due time, thereby preventing the on-the-spot checks. In particular, the Court of First Instance found that '[a]s the Belgian Government has failed to adduce relevant evidence to overturn the Commission's findings regarding the absence of on-the-spot checks because of late input of data', 'a number of files escaped such checking'. [39]

34. According to the Court of First Instance, the fact that no provision relating to the EAGGF required graphic data input before 31 August each year did not preclude that finding, because, on the one hand, 'the absence of express obligations is not capable of dispelling doubts arising from the absence of on-the-spot checks' and, on the other, 'since that delay leads to an absence of checks, it infringes the general obligation to be in a position to carry out such checks'. The Court of First Instance then considered it irrelevant that on-the-spot checks were conducted after 31 August and gave rise to

36 — Ibidem, paragraph 60.
37 — Ibidem, paragraph 61.
38 — Ibidem, paragraph 65.
39 — Ibidem, paragraphs 67 and 69.

corrections. According to the Court of First Instance, that does not in fact mean that 'all the necessary checks were carried out and does not show that such on-the-spot checks were the result of an effective risk analysis carried out after 31 August'. [40]

35. Finally, the Court of First Instance also rejected the second part of the second plea, based on the lack of any real risk of loss for the EAGGF — a further condition for the imposition of a financial correction under the Guidelines — and the third plea concerning a breach of the principle of proportionality.

IV — Procedure before the Court of Justice and forms of order sought

36. By application lodged at the Registry of the Court of Justice on 13 October 2006, the Kingdom of Belgium brought an appeal against the abovementioned judgment.

37. The representatives of the parties were heard at the hearing which took place on 21 June 2007.

38. The appellant claims that the Court of Justice should::

— set aside the judgment under appeal and, allowing the application made at first instance, annul the contested decision;

— in the alternative, set aside the judgment under appeal and, under its unlimited jurisdiction, reduce to EUR 1 491 085 the correction imposed on the appellant in the contested decision;

— in the further alternative, set aside the judgment under appeal, and refer the case back to the Court of First Instance.

— order the Commission to pay the costs of both the appeal proceedings and the proceedings at first instance.

39. The Commission contends that the Court should:

— dismiss the appeal;

— order the appellant to pay the costs.

40 — Ibidem, paragraph 70.

V — Legal analysis

A — *The appeal against the judgment of the Court of First Instance*

40. The appellant adduces four grounds in support of its appeal. The first alleges distortion of the facts. The second alleges infringements of Article 8 of Regulation No 3508/92 and of Articles 6 and 9 of Regulation No 3887/92, as well as of the obligation to provide a statement of reasons. The third alleges infringement of the principle of proportionality. The fourth ground of appeal alleges error of law as regards the unlimited jurisdiction of the Community Courts in the matter at issue.

1. The first ground of appeal alleging distortion of the facts

41. The appellant explains that, at the material time, the system of identifying agricultural parcels which it had adopted from 1996, the GIS, was not compulsory, and did not become compulsory until 2005, as a result of Regulation No 1593/2000; it was more accurate and effective than the system adopted by the other Member States, because it was based on individual agricultural parcels (and not groups of parcels) and relied on aerial photographic images (and not maps or land registers). By identifying agricultural parcels, the GIS was designed to make it possible to carry out cross-checks when carrying out administrative checks on the aid applications, for the purpose of identifying and eliminating overlap between parcels and preventing aid being granted more than once for the same parcel. However, in the crop years covered by the contested decision (1999-2001; 'the material period'), the Belgian authorities never envisaged the GIS as an instrument for measuring the exact area of the agricultural parcels. The GIS area was imprecise because, instead of being based on measurements made on the ground or using remote sensing, it is based on a plan of the parcels which the farmers trace by hand on aerial photographic images. Errors or inaccuracies could be made by farmers or technical staff of the Bureau provincial (provincial office) in the manual tracing or the encoding of that tracing into the GIS and, although limited, those errors could have a significant impact on the calculation of the areas, given that the photographic images were on the scale of 1:10 000. Furthermore, during the material period, the GIS area did not necessarily correspond with the situation on the ground because the manual demarcation was effected on photographic images which could be as much as five years old, whereas, every year, 25-30% of the agricultural parcels changed in area, depending on the crops grown on the land. In the appellant's view, the GIS therefore provided only an approximate estimate of the areas, while the exact area could be calculated, in Belgium, as in the other Member States, only by means of measurements taken on the spot by suitably qualified individuals or through the photo interpretation of satellite images (remote sensing).

42. The appellant alleges that, in the light of those features of the GIS adopted by

the Belgian authorities, the Court of First Instance distorted the facts when, in paragraph 47 of the judgment under appeal, it took the view that the GIS more closely reflected reality than the area declared by the farmers in the aid applications. The Court of First Instance had further distorted the way in which the GIS operated by considering, on the one hand, that the discrepancy between the GIS area and the declared area, ascertained in the course of the administrative checks, constituted an anomaly indicative of a potential irregularity in the aid application and, on the other, that the imprecise nature of the GIS area made it impossible to ascertain whether there had been an actual loss for the EAGGF and that the GIS made it possible clearly to identify risks of loss for the EAGGF in the context of the administrative checks. According to the appellant, the judgment under appeal is generally based on the incorrect premise that the GIS is capable of revealing anomalies in relation to the declared areas.

43. The Commission considers that the Court of First Instance did not distort the facts. It contends that the Court of First Instance did not in fact consider the GIS to be a measuring instrument, but merely considered that the fact that the GIS areas and the declared areas did not tally prompted serious doubt in regard to the latter. Furthermore, according to the Commission, the purpose of the GIS could not, as the appellant maintained, consist merely in identifying the agricultural parcels, establishing where they overlapped and uncovering duplicated declarations. It points out, in that context, that, according to Article 6(2)(a) of Regulation No 3887/92, the administrative checks are to include 'in particular', and thus not exclusively, cross-checks on the declared parcels to avoid undue payments, and notes that Article 6(1) lays down that the administrative and on-the-spot checks are to be made in such a way as to ensure effective verification of compliance with the terms under which aids and premiums are granted.

44. For my part, I fail to perceive any distortion of the facts by the Court of First Instance in the judgment under appeal.

45. At paragraph 47 of the judgment under appeal, the Court of First Instance does not assert either that the GIS area reflects the actual area of the agricultural parcels or that it corresponds more exactly to the real area than does the declared area. The second part of that paragraph, according to which 'if the GIS area corresponds more closely to the actual area than the area declared in the aid application, the payment of area aid on the basis of the area declared leads to undue payment to the applicant and hence, a loss for the EAGGF', is drafted in theoretical terms (introduced as it is by 'if'). It is, therefore, intended to imply that if the GIS area is smaller than the declared area, disbursement of the aid based on the latter results in a loss for the EAGGF *if* the actual area corresponds more accurately to the GIS area than to the declared area. [41]

41 — The wording of that sentence is certainly unfortunate because it expresses in unhelpfully complicated terms the clear idea that there is a loss for the EAGGF if the aid is disbursed on the basis of the declared area and that area is greater than the actual area.

46. On the other hand, the statement contained in the first sentence of paragraph 47 — according to which 'where the GIS shows, during the administrative checks, that the area declared in an aid application is greater than the GIS area, that discrepancy constitutes an anomaly indicating a potential irregularity in the application' — seems to me to represent an assessment by the Court of First Instance and not a finding of fact. The judgment under appeal shows clearly that the Court of First Instance took into account the 'lack of precision of the GIS data' [42] and did not consider that data to be absolutely accurate. The question whether the discrepancy at issue could validly be regarded as an 'anomaly indicating a potential irregularity in the application', does not, therefore, in my view, concern the finding of the facts.

47. Consequently, does that question concern an assessment of the facts, which may not be reviewed in the context of an appeal, or a legal characterisation of the facts which might be open to criticism by the Court?

48. It seems to me that this question essentially concerns the significance which must be attached to the discrepancy at issue in relation to the obligations of the Member States and their authorities. Ultimately, the question seems to me to concern the definition of scope of the obligation incumbent upon the Member States to organise an effective system of inspection and supervision [43] and, more particularly, pursuant to Article 8 of Regulation No 3508/92 and Articles 6(1) and 9(2) of Regulation No 3887/92, to arrange for administrative and on-the-spot checks to enable them to ensure that the substantive and procedural conditions governing the grant of the aid are being properly observed. This is, consequently, a point of law which falls within the Court's jurisdiction in the context of appeal proceedings, and which the appellant raises more specifically and in greater detail in its second ground of appeal, which I shall now consider.

2. The second ground of appeal, alleging infringement of Article 8 of Regulation No 3508/92 and of Articles 6 and 9 of Regulation No 3887/92, and infringement of the obligation to state reasons

49. The second ground, as set out in the appeal, is divided into five limbs. By the first three limbs, the appellant contests the assessments of the Court of First Instance in relation to the complaint that the Belgian authorities had failed adequately to respond to the anomalies revealed by the GIS when the administrative checks were carried out. The fourth limb concerns the assessment by the Court of First Instance of the complaint based on late entering of graphic data. By the fifth limb, the appellant is alleging a breach

42 — See, for example, paragraph 48 of the judgment under appeal, according to which 'the lack of precision of the GIS data does not mean that it is unimportant'.

43 — Case C-8/88 *Germany* v *Commission* [1990] ECR I-2321, paragraph 16, and *Spain* v *Commission*, paragraph 35.

of the obligation to state reasons in relation to specific issues addressed in the judgment under appeal.

50. Since, even accepting that they exist, the alleged flaws in the reasoning in the judgment under appeal — which are cited in the fifth limb of the second ground of appeal — do not prevent the Court from examining in detail the arguments set out in the first four limbs of that second ground of appeal, I shall begin by considering the first four limbs.

(a) The first three limbs of the second ground of appeal (the complaint that the Belgian authorities failed adequately to respond to the anomalies revealed by the GIS when the administrative checks were carried out)

(i) Arguments of the parties

— The first limb, concerning a breach of Article 6(7) of Regulation No 3887/92 in relation to the definition of the appropriate means for determining the area of agricultural parcels

51. The appellant contends that by taking the view, in paragraph 49 of the judgement under appeal, that the 'GIS is a monitoring instrument capable of supplying relevant information which goes further than the express obligations laid down in Article 6(2) of Regulation No 3887/92' [44] and of making it possible to identify a risk of loss for the EAGGF, the Court of First Instance infringed Article 6(7) of that regulation. The latter provision in fact leaves it to the national authorities to define the appropriate means of determining the area of agricultural parcels. Since the Belgian authorities had decided that the area of the agricultural parcels should be determined either by on-site measurement by a surveyor or other qualified person or through the photo interpretation of satellite images (remote sensing), the Court of First Instance could not attribute to the GIS a capacity, as an instrument for measuring the area of agricultural parcels that the Belgian authorities had not attributed to it.

52. The Commission does not consider Article 6(7) of Regulation No 3887/92 to be relevant in this case, since, in its view, as far as the measurement of agricultural parcels is concerned, Article 6(7) applies to on-the-spot checks but not to administrative checks. In any event, the Commission points out that since 1996 the Belgian authorities have freely opted for a system for identifying agricultural parcels — and, therefore, administrative checks — which is based on aerial photographic images, an option which is specifically permitted by Article 4 of Regulation No 3508/92; those authorities were, consequently, required to draw the necessary conclusions in the event of a discrepancy between the area declared and the GIS area, and to take the appropriate action.

44 — Unofficial translation.

— The second and third limbs, alleging infringement of Article 8 of Regulation No 3508/92 and of Articles 6(1) and 9(2) of Regulation No 3887/92

53. The appellant contends that the method of proceeding which the Belgian authorities ought to have adopted, according to the Commission's summary report, once a positive discrepancy had been identified between the declared area and the GIS area (implementation of an on-the-spot check or reduction of the area as compared with the declared area; 'the measures omitted'), cannot be regarded as being compulsory, since they derive implicitly from the general obligation, resulting from Article 8 of Regulation No 3508/92 and Articles 6(1) and 9(2) of Regulation No 3887/92, to organise an effective system of inspection and supervision. The Court of First Instance wrongly applied those provisions in the belief that they required the Belgian authorities adopt the measures omitted.

54. Firstly, the appellant points out that, pursuant to Article 8 of Regulation No 3508/92 and Articles 6 and 7 of Regulation No 3887/92, the Member States enjoy wide discretion over the organisation of their integrated administration and control system, and that the Commission must respect that discretion. However, in ascertaining whether, in the exercise of that discretion, the Belgian authorities secured an effective inspection system, the Court of First Instance erred in neglecting to consider that the inspection system which they had adopted went well beyond the requirements of the Community legislation, since they had prepared a risk analysis based on 13 criteria and not just the four criteria explicitly set out in Article 6(4) of Regulation No 3887/92, as well as a system for identifying agricultural parcels that was based on individual parcels and not groups of parcels.

55. Secondly, requiring the Belgian authorities to take the measures omitted would be incompatible with the explicit provisions of secondary Community law. On the one hand, that requirement is incompatible with Article 6(3) of Regulation No 3887/92, which requires on-the-spot checks only in respect of a significant sample equivalent to 5% of the aid applications. To impose the measures omitted would, in practice, mean making the remote sensing method compulsory in the context of the administrative checks, when remote sensing was in fact a form of on-the-spot check. On the other hand, that same requirement is also incompatible with Article 9(2) of Regulation No 3887/92, which provides that the declared area should be reduced if it is greater than the area 'actually determined', that is to say, within the meaning of the judgment in *Agrargenossenschaft Pretzsch*,[45] the area ascertained using on-the-spot checks. The requirement to reduce the area in the event of a positive discrepancy between the area declared and the area determined during an administrative check was not introduced until the beginning

45 — Case C-417/00 [2002] ECR I-11053, paragraph 48.

of the 2002 crop year, pursuant to Article 31 of Regulation No 2419/2001.

56. Thirdly, the requirement to take the measures omitted is also incompatible with general principles of Community law, such as the principles of legal certainty and non-discrimination. On the one hand, the end-result would be to penalise farmers, even where there had been no on-the-spot check, and when that possibility could not be inferred from clear and specific rules and could not, therefore, be anticipated by farmers. On the other, that requirement would have the effect of discriminating against the Kingdom of Belgium as compared with all of the other Member States, which do not use a GIS based on individual agricultural parcels, but systems that are far less precise and effective in terms of administrative checks.

57. Fourthly, the Court of First Instance wrongly regarded a tolerance margin to be unacceptable in the context of the administrative checks. The application of a tolerance margin is expressly provided for by Article 6(7) of Regulation No 3887/92 and is also envisaged for administrative checks, even in recommendations from the Commission itself[46] and is particularly justified in this case, in which the data on the area of the agricultural parcels, obtained using the GIS, was not particularly reliable.

58. The Commission maintains that the obligation to adopt the measures omitted is inherent in compliance with the existing legislation, which requires the Member States, in particular, to carry out administrative checks on all aid applications (Article 8(1) of Regulation No 3508/92) in order to guarantee 'effective verification' of compliance with the terms governing the grant of aid (Article 6(1) of Regulation No 3887/92). Presented with the finding that there was a positive discrepancy between the declared area and the GIS area, it was not, in the Commission's view, open to the Belgian authorities to take no action, thereby rendering ineffective the administrative checks for which Community law provides.

59. The Commission does not consider that to assert that that obligation exists entails the application of remote sensing methodology at the stage of the administrative checks. It points out that the use of aerial photographic images for the purposes of administrative checks is an option which the Belgian authorities have taken and is not the same as physical checks carried out using remote sensing.

46 — The appellant is referring to the document produced by the Directorate-General for Research and entitled 'Technical recommendations for the financial year 2000' No OL/I04/M2066/2000 and the annex to document No VI/8388/94 of the Directorate-General for Agriculture and Rural Development.

60. As regards the abovementioned judgment in *Agrargenossenschaft Pretzsch*, the

Commission contends that paragraph 48 of that judgment, which the appellant cites, must be read taking account of the fact that, in the circumstances of that case, only an on-the-spot check could have made it possible to discover the infringement found. It points out that, in paragraph 40 of that judgment, the Court makes no distinction between administrative checks and on-the-spot checks when it states that 'the finding of a difference between the area declared and the area actually determined in the course of checks carried out by the competent authorities entails, by itself, the application of a penalty.' In addition, Article 31(2) of Regulation No 2419/2001 merely clarifies what already follows from Article 9(2) of Regulation No 3887/92.

61. The way in which the Court of First Instance construed the legislation at issue is not contrary to the principles of legal certainty and non-discrimination. On the one hand, the Court of First Instance stated in its judgment that the Belgian authorities had the possibility of carrying out on-the-spot checks. On the other, once they had opted for a particular method of checking, the Belgian authorities had to abide by that method and ensure that the checks were effective, pursuant to Article 6(1) of Regulation No 3887/92.

62. Finally, in the Commission's view, the tolerance margin under Article 6(7) of Regulation No 3887/92 concerns on-the-spot checks exclusively. The Commission's own recommendations, which the appellant has cited, certainly provide for the application of a tolerance margin in the context of the administrative checks on the area data, but only for data obtained when the system for identifying the agricultural parcels on the basis of orthoimagery is initially set up, and not for data obtained at later stages.

(ii) Assessment

63. The complaints raised in connection with the first three limbs of the second ground of appeal may be considered together, since they are all essentially designed to demonstrate that, in the judgement under appeal, the Court of First Instance wrongly held that Article 8 of Regulation No 3508/92 and Article 6(1) and 9(2) of Regulation No 3887/92 should be construed as meaning that, in circumstances such as those of this case, they required the Belgian authorities to take the measures omitted. In support of its contention, the appellant advances arguments based on the text of those provisions, on other provisions of Article 6 of Regulation No 3887/92 and on general principles of Community law.

64. Before I embark on an analysis of those arguments, I would point out — as, moreover, did the Court of First Instance in the judgement under appeal — that it is established case-law that where the Commission

refuses to charge certain expenditure to the EAGGF on the ground that it was incurred as a result of a breach of Community rules for which a Member State can be held responsible, the Commission is not required to demonstrate exhaustively that the checks carried out by the Member States are inadequate or that the figures supplied by them are incorrect, but is required to provide evidence of the serious and reasonable doubt it entertains concerning the checks carried out by the national authorities or concerning the correct application of the Community law in force. The reason for this mitigation of the burden of proof on the Commission is that it is the State which is best placed to collect and check the data required for the clearance of EAGGF accounts, and which is consequently required to adduce the most detailed and comprehensive evidence that its checks are actually carried out and, if appropriate, that the Commission's assertions are incorrect. [47]

65. It follows that the Court of First Instance was right to focus, in its analysis, on ascertaining whether the results of the checks which the Commission carried out were such as to cause it to entertain serious and reasonable doubt it concerning the effectiveness of the checks which the Belgian authorities had conducted in this case. In that connection, in relation to the first complaint raised by the Commission in the summary report, the Court of First Instance upheld the complaint, after first finding that a positive discrepancy between the declared area and the GIS area constituted 'an anomaly indicating a potential irregularity in the aid application', and that the Belgian authorities were required to take the appropriate action in response to this and, secondly, that their conduct when faced with this anomaly did not constitute an appropriate response, since that response ought to have consisted in the adoption of the measures omitted.

66. At paragraph 52 of the judgment under appeal, the Court of First Instance acknowledged that the Community legislation in force at the relevant time did not expressly require the Belgian authorities to adopt the measures omitted in response to the anomalies that were uncovered. However, it deduced that obligation, by implication, from Article 8 of Regulation No 3508/92 and Articles 6(1) and 9(2) of Regulation No 3887/92.

67. The question essentially raised by the first three limbs of the second ground of appeal is, in substance, whether the Court of First Instance did not thus misconstrue the scope of the obligations which those provisions impose upon the Member States.

68. It is true that, according to the Court's case-law, as cited by the Court of First Instance, the obligation to adopt certain supervisory measures and inspection procedures not expressly imposed on the Member

47 — Case C-335/03 *Portugal* v *Commission* [2005] ECR I-2955, paragraph 68, and the case-law cited therein.

States by the Community rules on the matter in question may be implied from the fact that, under the rules in question, it is for the Member States to apply the arrangements for the premiums in issue and to organise an effective system of inspection and supervision. [48]

69. More particularly, in addition to Article 8(1) of Regulation No 729/70 and the corresponding Article 8(1) of Regulation No 1258/99, which place the Member States under a general obligation to take the measures necessary to satisfy themselves that transactions financed by the Fund are actually carried out and are executed correctly, to prevent and deal with irregularities and to recover sums lost as a result of irregularities or negligence, it is necessary to cite Article 8(1) and (2) of Regulation No 3508/92, which require the Member States to carry out administrative checks on aid applications, supplemented by on-the-spot checks covering a sample of agricultural holdings, as well as Article 6(1) of Regulation No 3887/92, according to which administrative and on-the-spot checks are to be made in such a way as to ensure effective verification of compliance with the terms under which aids and premiums are granted.

70. It is clear from those provisions, viewed in the light of the obligation of sincere cooperation with the Commission embodied in Article 10 EC, as regards, more particularly, the correct utilisation of Community resources, that the Member States are required to set up comprehensive administrative checks and on-the-spot inspections, thus guaranteeing the proper observance of the substantive and formal conditions for the grant of the premiums in question. [49]

71. It does not seem to me, in this case, that that obligation can give rise to the consequences which the Commission and Court of First Instance have drawn from it vis-à-vis the Belgian authorities.

72. The integrated administration and control system established by Regulation No 3508/92 and Regulation No 3887/92 ('the IACS') is designed, according to the Court, 'to make administrative and control mechanisms more effective'. It is based, for that purpose, first and foremost on the declarations farmers provide in the aid applications. The Court has pointed out that '[a]n effective procedure presupposes that the information to be provided by an applicant for aid [pursuant to Article 6 of Regulation No 3887/92] is complete and accurate from the outset in order that he may make a proper application for the grant of compensatory payments and avoid the imposition of penalties'. [50]

48 — *Germany* v *Commission*, paragraph 16, and *Spain* v *Commission*, paragraph 35.

49 — *Germany* v *Commission*, paragraph 20, and *Spain* v *Commission*, paragraph 36.

50 — Case C-63/00 *Schilling and Nehring* [2002] ECR I-4483, paragraph 34.

73. The Court has further held that '[t]he grant of aid under the IACS involves procedures relating to a large number of applications', consequently, '[t]he effective protection of the financial interests of the Community in such a context entails that the recipients of aid take an active part in the correct implementation of those procedures and take responsibility for the correctness of the amounts granted to them under the IACS'. [51]

74. According to the Court, it is apparent from the provisions of Regulations Nos 3508/92 and 3887/92 that 'the national authorities are not required, or above all able, to carry out checks to verify the accuracy of all the statements made in aid applications submitted to them'. [52] With regard, in particular, to on-the-spot checks within the meaning of Article 6(3) of Regulation No 3887/92, the Court has, therefore, underlined, with reference to livestock aid applications, that they 'are to relate to a significant percentage of applications', but that 'that percentage may be only 10% of … aid applications submitted by farmers' [53] — the percentage stipulated in the first indent of Article 6(3), which the second indent thereof set at 5% for area aid applications.

75. In the system set in place by Regulations Nos 3508/92 and 3887/92, the on-the-spot checks — including those carried out to verify the accuracy of the area declared in the aid applications — are, therefore, designed to provide a means of verification which is of limited scope (sampling) and is framed by a series of provisions which both regulate how the checks are to be carried out (see Articles 6(7) and 7(1) of Regulation No 3887/92) and also clearly specify the circumstances in which they are to be carried out. In that context, Article 6(4) of the regulation provides that the competent national authority is to select the premium or aid applications which are to be subject to on-the-spot checks 'on the basis of a risk analysis and an element of representativeness of the aid applications submitted.'

76. The implementation of on-the-spot checks for a particular application therefore presupposes that, within that system, the application has been selected following a prior risk analysis relating to all of the applications submitted and based on criteria specifically listed in Article 6(4) of Regulation No 3887/92, on additional criteria which that provision allows the individual Member States to define and, possibly, other criteria, the application of which must prove necessary to secure the effectiveness of the control system, such as, for example, according to

51 — *Agrargenossenschaft Pretzsch*, paragraph 45.

52 — *Schilling and Nehring*, paragraph 37, and *Agrargenossenschaft Pretzsch*, paragraph 52.

53 — *Schilling and Nehring*, paragraph 37.

the Court, 'the results of the administrative checks for the current year'. [54]

77. As regards the administrative checks under Article 8(1) of Regulation No 3887/92, it is true that, as the Commission points out, given the words 'in particular' which appear in Article 6(2) of Regulation No 3886/92, the object of those checks is not necessarily limited to what Article 6(2) expressly provides for, that is to say, as regards area aid, cross-checks of the parcels in order to prevent an unjustified cumulation of aid. As the Court of First Instance notes in the judgment under appeal, the Court of Justice has stated that 'administrative controls preceding on-farm inspections must be carried out in such a way as to enable the national authorities to draw all possible conclusions, be they matters of certainty or of doubt, regarding compliance with the conditions for granting premiums'. [55]

78. However, I am not entirely persuaded, in the first place, that the accuracy of the area declared in the aid application must be regarded as a condition for the grant of the aid. Article 9(2) of Regulation No 3887/92 in effect provides that a positive discrepancy between a declared area and a 'determined' area is to result in the refusal (or cancellation) of the aid only if the declared area is 20% greater than the determined area. Secondly, I would point out that the Court has also held that 'administrative controls and on-farm inspections were designed by the Community legislature as two means of verification which, although separate, complement each other', [56] clearly indicating that they must not duplicate each other.

79. It does not, in particular, seem to me to be possible to consider that, during the material period, the administrative checks had to be organised by the Member States in such a way as to enable them to ascertain, inter alia, the accuracy of the area declared in the aid application. In its response to the appeal, the Commission did not go so far as to claim that such a requirement existed, nor, moreover, was a requirement of that nature upheld in the judgment under appeal. The approach which the Court of First Instance adopted, and which the Commission defends, was rather that once the Belgian authorities adopted an instrument, the GIS, which was not compulsory and not designed to measure the area of agricultural parcels but was none the less capable of providing data on those areas, they should have drawn the appropriate conclusions from that data.

54 — *Spain* v *Commission*, paragraphs 34 to 41, in which the Court pointed out, in particular, that the list of factors to be taken into account in the risk analysis, pursuant to Article 6(4) of Regulation No 3887/92, is not definitive.

55 — *Germany* v *Commission*, paragraph 17, and *Spain* v *Commission*, paragraph 40, cited in paragraph 54 of the judgment under appeal.

56 — *Germany* v *Commission*, paragraph 43, and *Spain* v *Commission*, paragraph 38.

80. If, then, it was not possible to identify from the rules in force during the material period, an obligation incumbent upon the Belgian authorities to determine the exact area of the agricultural parcels already at the stage of the administrative checks, I consider that the Court of First Instance erred in failing to attach significance to the lack of precision of area data produced by the GIS, which is common ground in these proceedings. [57] The Belgian Government has set out at length — first during the administrative procedure, then before the Court of First Instance and finally before the Court of Justice — the reasons why the GIS area did not necessarily exactly reflect the true area of the agricultural parcels. It mentioned problems linked to the fact that the outline of the parcels was traced by hand, the less than optimum graphic encoding of that tracing in the GIS and the use of older aerial photographic images — problems which were in no way challenged by the Commission or refuted by the Court of First Instance.

81. While it true that the Belgian authorities should have drawn the appropriate conclusions from the area data produced by the GIS, it seems to me to be equally true that they had inevitably to take account of the nature of that data and, therefore, also of the fact that it was imprecise. Basically, the GIS should have been seen for what it was, given that the criticism could not be levelled at the Belgian authorities — nor has it been — that the GIS should have been different from what it was.

82. In that sense, I therefore agree with the Belgian Government that, in view of that lack of precision, a positive discrepancy between the declared area and the GIS area could not *per se* be considered to be 'an anomaly indicating a potential irregularity in the application', such as to require, in any event, either calculation of the amount of the aid on the basis of the GIS area or an on-the-spot check.

83. The calculation of the amount of the aid on the basis of an area that has been reduced, as compared with the declared area, is a measure which was provided for at the material time by Article 9(2) of Regulation No 3887/92, the first sentence of the first subparagraph of which indicates that if the area actually determined is found to be less than that declared, the area actually determined on inspection is to be used for calculation of the aid. However, as the Belgian Government has pointed out, in paragraph 48 of the abovementioned judgment in *Agrargenossenschaft Pretzsch*, the Court held that 'the first and second subparagraphs of Article 9(2) of Regulation No 3887/92 seek to establish a comparison between the statements made in the aid application and the result of the *on-the-spot checks*', [58] the latter reference apparently clarifying the more general reference to 'checks carried

57 — See judgment under appeal, paragraph 48.

58 — Case C-417/00, paragraph 48.

out by the competent authorities' contained in paragraph 40 of that same judgment and cited by the Commission, according to which it is clear from Article 9(2) of Regulation No 3887/92 that 'the finding of a difference between the area declared and the area actually determined in the course of checks carried out by the competent authorities entails, by itself, the application of a penalty'.

84. It therefore seems to me that, as the Belgian Government maintains, according to Article 9(2) of Regulation No 3887/92, the calculation of the amount of the aid on the basis of an area which is reduced, as compared with the declared area, is possible only if the area has been measured during an on-the-spot check.

85. In any event, as far as these proceedings are concerned, that question may be left open. In fact, while acknowledging that that rule also covers the possibility of the area being actually determined during an administrative check, it really does not seem to me to be possible, in the light of the specific characteristics and purpose of the GIS which the Belgian authorities used during the material period, and which complied with the Community rules then in force, to regard the GIS area as an 'area actually determined', within the meaning of Article 9(2).

86. I would, moreover, point out that the Commission's position, which the Court of First Instance endorsed, according to which, when faced with a positive discrepancy between the declared area and the GIS area, the Belgian authorities ought either to have reduced the area or to have carried out an on-the-spot check is clearly self-contradictory. If, in fact, the GIS area is regarded as an 'area actually determined', within the meaning of Article 9(2) of Regulation No 3887/92, then, pursuant to Article 9(2), a discrepancy of that nature could give rise only to a reduction in the area (and, consequently, in the amount of the aid) but not to an on-the-spot check. However, to consider the alternative of an on-the-spot check to be permissible for the purpose of determining the true area, implies refusal to accord the GIS area the status of an 'area actually determined'.

87. Moreover, if I consider that a positive discrepancy between the declared area and the GIS area did not of itself require the Belgian authorities to adopt the measures omitted, then I also consider to be justified the complaints which the Belgian Government has made in relation to the view taken by the Court of First Instance that the Belgian Government's response to the identification of that discrepancy was, in any event, inappropriate.

88. It should first be pointed out that, as stated in paragraph 58 of the judgment under appeal, during the material period, in the context of the risk analysis designed to identify which files should be subject to an on-the-spot check, the Belgian authorities applied, among other criteria, the criterion of a discrepancy between the area declared

and the GIS area. The Belgian Government explained that significant weight was attached to that criterion in the context of the risk analysis. As is clear from paragraph 58 of the judgment under appeal, it is common ground that, during the material period, on-the-spot checks were carried out on 10% of area aid applications, double the minimum percentage required under Article 6(3) of Regulation No 3887/92.

89. However, the Court of First Instance considered to be unacceptable the fact that only the files in which that discrepancy, whether positive or negative, exceeded a 5% tolerance margin were taken into consideration, pursuant to that criterion, in the context of the risk analysis. [59]

90. On that point, I concur with the Belgian Government when it points out that, if a tolerance margin is permitted for the purposes of measuring on the spot the area of agricultural parcels, pursuant to Article 6(7) of Regulation No 3887/92, there was nothing to prohibit the Belgian authorities from applying a tolerance margin in the context of an administrative check which was based, at the unexceptionable and freely-taken decision of those authorities, on area data obtained using a system, the GIS, which displayed unquestionable technical limitations in terms of area measurement. [60] The observation of the Court of First Instance that 'the anomalies do not reflect an error of measurement due to the lack of precision of the GIS to which the Belgian Government has drawn attention but reflect the inconsistency between the declared data and the administrative data available to the Belgian authorities', does not, in my view, invalidate the point set out above. The fundamental issue remains that this data, which the Court of First Instance described as 'administrative' was in fact subject to a reservation to the effect that it was not necessarily reliable, in so far as it was itself subject to verification; the Belgian Government had in fact already explained to the Court of First Instance that, in various cases in which a positive discrepancy was identified between the area declared and the GIS area, verification of that data — by checking the accuracy of the graphic encoding of the area produced by tracing the outline of the agricultural parcels on the aerial photographic images by hand — resulted in that data being corrected to eliminate the discrepancy. [61]

91. I therefore consider that the Court of First Instance erred in law when it found, in this case, pursuant to Article 8 of Regulation No 3508/92 and Articles 6(1) and 9(2) of Regulation No 3887/92, and with reference

59 — Judgment under appeal, paragraphs 60 and 61.

60 — The Court of First Instance pointed out, at paragraph 60 of the judgment under appeal, that the application of a tolerance margin in the context of on-the-spot checks, expressly provided for under the Community rules, is justified 'because of the technical limitations of the instrument of measurement'.

61 — See, in particular, paragraphs 45 and 61 of the application to the Court of First Instance, as well as paragraph 58 of the judgment under appeal. The application of a tolerance margin in the context of the administrative checks appears, moreover, to be all the less problematical in that, as the Belgian Government stated before the Court of First Instance — and the Commission did not dispute this — during the material period, the total area declared for Belgium was, in any event, smaller than the total GIS area.

to the first complaint which the Commission addressed to the appellant, that the Commission had adduced sufficient evidence of the existence of serious and reasonable doubt concerning the effectiveness of the controls carried out by the Belgian authorities during the material period.

92. In my view, the judgment under appeal should, therefore, be set aside in that respect.

(b) The fourth limb of the ground of appeal (the complaint based on late graphic data input)

(i) Arguments of the parties

93. According to the appellant, the Court of First Instance also infringed Article 8 of Regulation No 3508/92 and Articles 6 and 9 of Regulation No 3887/92, when it took the view that, pursuant to those provisions, the control system set in place by the Belgian authorities was not effective because of the delay in graphic data input.

94. The appellant points out that, contrary to what is stated in paragraph 68 of the judgement under appeal, the arguments which it had put to the Court of First Instance to refute the complaint concerning graphic data input did not merely consist in the inference, set out in that paragraph in the following terms, that 'the risk analysis was made on the basis of all the criteria other than that of the belated graphic data input, and … those which posed a risk were subject to accelerated graphic data input before 31 August'. [62]

95. In the proceedings before the Court of First Instance, the appellant in fact advanced other arguments as well to refute that complaint.

96. In the first place, the appellant had pointed out that the risk analysis made after 31 August had been just as effective as the risk analysis made prior to that date — a date which was not, moreover, taken into consideration by the Belgian authorities, since it was not prescribed by any of the legislation. In point of fact, even if the agricultural parcels were graphically encoded in the GIS after 31 August, the area declared would have been compared with the GIS area for each file, and those files relating to groups

62 — That passage in the judgment is not immediately comprehensible. However, a reading of paragraphs 57 and 67 of the application submitted to the Court of First Instance makes it easy to understand that the criterion of 'belated graphic data input', to which that passage of the judgment incorrectly refers, should be read as the criterion relating to the discrepancy between the declared area and the GIS area. Furthermore, the pronoun 'those' which appears in the same passage of the judgment must be read as referring to the aid application files and not the risk analysis criteria.

of crops displaying the greatest discrepancy between the declared area and the GIS area would have been taken into consideration, in accordance with that criterion, in the risk analysis and, if necessary, selected for on-the-spot checks.

97. Secondly, the appellant had pointed out, without this being disputed by the Commission, that the date of 31 August had no particular relevance as far as the carrying out of physical on-the-spot checks was concerned, since the checks carried out after that date were just as effective as those carried out before it. According to the appellant, those checks can still be usefully carried out in the months of September and October, since, although many crops have already been harvested, for most crops, the agricultural parcels have yet to be ploughed or, at any rate, still contain crop residue; while for other crops (in particular, maize — one of Belgium's largest crops), the harvest takes place between late October and early November.

98. In any event, since it failed, in the judgment under appeal, to respond to those arguments or to state the reason why graphic encoding or a risk analysis made after 31 August should be regarded as late, the Court of First Instance was in breach of the obligation to state reasons.

99. The Commission points out that, according to the summary report, the delays in graphic data input meant that 'it was not possible to make the required computerised cross-checks on the whole population at an early stage, and a large number of files could not be included in the risk analysis and eventual selection for on-the-spot control'. [63] The complaint therefore related not to the late conduct of on the-spot checks, but to the fact that delays in graphic data input meant that it was impossible to carry out the administrative checks in due time, and that made it impossible to carry out the additional on-the-spot checks appropriately. The Commission points out that the Belgian authorities themselves recognised that the delays had an effect on the selection of aid applications in the context of the risk analysis.

(ii) Assessment

100. By the fourth limb of this ground of appeal, the appellant is alleging further errors of law which it claims the Court of First Instance committed in interpreting Article 8 of Regulation No 3508/92 and Articles 6 and 9 of Regulation No 3887/92 as requiring the Belgian authorities to complete graphic data input in the GIS by 31 August of every year, or by failing to satisfy the obligation to state reasons for its findings.

63 — Unofficial translation of a passage from the summary report.

101. The complaint concerning delays in the abovementioned graphic data input — that is to say the entering into the GIS, by a technician from the Bureau provincial, of the outline of the agricultural parcels traced by hand by farmers on the aerial photographic images — as formulated in the Commission's summary report and recorded in paragraph 65 of the judgment under appeal, is based on the following reasoning: those files in respect of which graphic data input had not been completed by the end of August could not be taken in account in the risk analysis or selected for an on-the-spot check.

102. On that point, the appellant had in fact argued, however, on several occasions during the proceedings before the Court of First Instance, [64] in particular, that for those files in respect of which the graphic data input in question was completed after 31 August, the areas declared and GIS areas were compared, and, as in the case of the files for which graphic data input had been completed before that date, the applications for groups of crops which displayed more marked differences between the areas declared and GIS areas were reviewed in the context of a risk analysis and may have been selected for physical on-the-spot checks.

103. By that argument, the appellant is essentially pointing out that graphic data input completed after 31 August had in no way precluded either the inclusion of the file concerned in the risk analysis or the carrying out of on-the-spot checks, albeit after that date.

104. The appellant had, moreover, made it clear that the on-the-spot checks could also usefully be carried out during the months of September and October, even after the harvest, and had set out reasons in support of that assertion (see point 97 above). [65]

105. Consequently, in paragraph 68 of the judgment under appeal, the Court of First Instance wrongly found that — as regards the alleged impossibility of carrying out in due time administrative checks and, therefore, on-the-spot checks, because of the delays in graphic data input — the applicant '[had] merely asserted that the risk analysis [had been] made on the basis of all the criteria other than that [of the discrepancy between the area declared and the GIS area], [66] and … those which posed a risk were subject to accelerated graphic data input before 31 August'.

106. The arguments cited in points 102 to 104 above, on which the Court of First

64 — See paragraph 68 of the application and paragraphs 35 and 37 of the reply.

65 — See paragraph 80 of the application to the Court of First Instance.

66 — See footnote 62 above.

Instance failed to give a view in the judgment under appeal, in fact supplement that assertion to the effect that, in reality, for all the files in respect of which graphic data input was not completed until after 31 August, it was nonetheless possible to draw up a valid risk analysis by applying the criterion of the discrepancy between the area declared and the GIS area, and that the requisite on-the-spot checks could be carried out effectively, even after 31 August.

107. Those same arguments, which the Commission has not adequately disproved, have, therefore, the effect of refuting the assumption which the Commission essentially relied on in making the complaint at issue, that is to say that graphic data input after 31 August made it impossible to take the relevant files into account in the risk analyses and, therefore, to select them for on-the-spot checks.

108. Those arguments appear all the more persuasive, since the date of 31 August as the absolute deadline for the graphic data input in question or for the risk analysis does not appear in any legislative provision, and since the Commission no longer contends, as it did during the first stage of the administrative procedure, that on-the-spot checks carried out after that date, because of the alleged delays in graphic data input, were ineffective. [67]

109. Although the case has now been heard by both the Court of First Instance and the Court of Justice and, more particularly, although a question on the point was put to the Commission's representative at the hearing before the Court of Justice, it is still not clear — in the absence of any legal provision requiring the observance of that date and in the light of all of the evidence which the appellant has cited — why graphic data input and, consequently, a risk analysis after 31 August should be regarded as late. The reference by the Commission's representative to paragraphs 33 to 35 of the judgment in *Italy* v *Commission*, [68] from which, in his view, that absolute deadline of 31 August can be inferred, does not appear to be relevant. In those paragraphs, the Court of Justice upheld the Commission's complaints against the Italian Republic that on-the-spot checks made in the month of September were unreliable because they took place after the harvest. The Court of Justice took that view, however, because the on-the-spot checks were late, whereas, as is clear from the judgment under appeal (paragraph 66) and confirmed by the Commission in its response (paragraphs 56 to 57), in this case the complaint addressed to the Kingdom of Belgium is not that the on-the-spot checks were late, but that they were not carried out because of the *alleged delays in graphic data input*. Moreover, in those paragraphs, the Court did not even

67 — See paragraph 66 of the judgment under appeal, where the Court of First Instance notes that the complaint concerning the lateness of the on-the-spot checks, made in the initial stages of the administrative procedure, was abandoned in the summary report.

68 — Judgment of 10 November 2005 in Case C-307/03.

refer generally to 31 August as the appropriate deadline for on-the-spot checks, but merely found that the Italian Government had failed to provide evidence to refute the abovementioned contentions of the Commission. [69]

110. I therefore consider that the Court of First Instance wrongly upheld the Commission's complaint that the completion of the graphic data input after 31 August had made it impossible to carry out the administrative checks in due time and, therefore, to conduct on-the-spot checks. Consequently, the Court of First Instance could not validly find that the complaint in question constituted evidence establishing the existence of serious and reasonable doubt concerning the effectiveness of the controls carried out by the Belgian authorities during the material period.

111. I therefore consider that the judgment under appeal should be set aside in that respect also.

3. Fifth limb of the second ground of appeal and third and fourth grounds of appeal — No need for examination

112. If the first four limbs of the second ground of appeal were accepted, as suggested above, it would not be necessary to consider the fifth limb of that ground of appeal, alleging a breach, in several respects, of the obligation to state reasons, or the third and fourth grounds of appeal, which relate to those sections of the judgment in which the Court of First Instance ruled on the appellant's request in the alternative for a reduction of the amount of expenditure excluded from EAGGF financing. In point of fact, if the judgment under appeal were set aside on the basis of the fifth limb of the second ground of appeal, or the third or fourth ground of appeal, that would not have any more extensive effect than acceptance, as suggested above, of the first four limbs of the second ground of appeal. [70]

113. For those reasons, since it is unnecessary, in the light of the conclusions which I have reached after examining the first four limbs of the second ground of appeal, I shall refrain from considering either the fifth limb of that ground of appeal or the third and fourth grounds of appeal.

69 — It should also be pointed out that the period of the harvest may vary, depending on the crop and geographical area, so that, even on the assumption that on-the-spot checks ought necessarily to take place before the harvest, it would not be possible to specify a single deadline for carrying out such checks for all crops throughout the whole of the Community.

70 — See Joined Cases C-83/01 P, C-93/01 P and C-94/01 P *Chronopost and Others* v *Ufex and Others* [2003] ECR I-6993, paragraph 43.

B — *The action against the Commission's Decision*

114. Under Article 61 of the Statute of the Court of Justice, the Court, if it quashes a decision of the Court of First Instance, may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment.

115. In my view, in this case, the state of the proceedings permits the Court to give final judgment on the appellant's action for annulment.

116. In the first ground of challenge in the action for annulment, which is set out as the principal ground in relation to the grounds set out thereafter, the appellant alleged that the Commission was in breach of Article 8 of Regulation No 3508/92 and of Articles 6 and 9 of Regulation No 3887/92 because, in its view, it is not possible, in this case, to conclude from those provisions that the Belgian authorities are under an obligation either to adopt the measures omitted or to complete the GIS graphic data input in respect of the agricultural parcels by 31 August.

117. It is in fact clear from my analysis of the first four limbs of the second ground of appeal, set out in points 67 to 92 and 100 to 111 above, that the Commission has failed to provide appropriate evidence to corroborate the existence of serious and reasonable doubt as to the effectiveness of the checking carried out by the Belgian authorities during the material period, in relation both to the conduct of those authorities when confronted with a positive discrepancy between the area declared and the GIS area and to the delays in the GIS graphic data input in respect of the agricultural parcels.

118. In my view, the contested decision must, therefore, be annulled in so far as it imposes on the Kingdom of Belgium a 2% flat-rate reduction in the expenditure declared for the purposes of EAGGF Guarantee Section financing.

119. If the first ground of challenge in the action for annulment at first instance were accepted, that would clearly make it unnecessary to consider the other pleas in that action, which were submitted in the alternative only.

C — *Costs*

120. Under the first paragraph of Article 122 of the Rules of Procedure of the Court of

Justice, where the appeal is well founded and the Court itself gives final judgment in the case, it is to make a decision as to costs. Under Article 69(2) of the Rules of Procedure, applicable to appeals by virtue of Article 118, the unsuccessful party is to be ordered to pay the successful party's costs if they have been applied for in the successful party's pleadings.

121. Since I am proposing that the Court of Justice should uphold both the action for annulment and the appeal brought by the appellant, I therefore also propose that the Commission should be ordered to pay the costs of the proceedings before both the Court of Justice and the Court of First Instance, in accordance with the form of order sought by the appellant to that effect.

VI — Conclusions

122. In the light of the foregoing, I propose that the Court should declare that:

(1) The judgment of the Court of First Instance of the European Communities of 25 July 2006 in Case T-221/04 *Belgium* v *Commission* is set aside.

(2) Commission Decision No 2004/136/EC of 4 February 2004 is annulled in so far as it imposes on the Kingdom of Belgium a flat-rate correction of 2% of the expenditure declared for the purposes of financing through the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) for the financial years 2000-2002.

(3) The Commission of the European Communities is ordered to pay the costs of both the proceedings before the Court of First Instance and the present appeal proceedings.