# OPINION OF ADVOCATE GENERAL ALBER

delivered on 24 March 1998 *

## A — Introduction

1. The present case concerns flat-rate reductions in EAGGF [1] financing challenged by the applicant. In both cases the reductions concern the public storage of beef but relate to the following various infringements alleged by the Commission.

2. On the one hand, allegations are made of contraventions in regard to control mechanisms. As the 1992 Summary Report shows, the Commission is alleging that the control mechanisms in place in Ireland were not capable of ensuring satisfactory protection of Community funds. The Commission alleges that yields achieved in deboning were at a lower percentage rate in the case of public storage than in the case of private storage. Furthermore, there had been found to be packaging defects and classifications in incorrect categories. Nor did the markings on cartons comply with Community rules. [2]

3. On these and other grounds the Commission concluded that the Irish authorities had not fulfilled their obligations in regard to Article 8 of Regulation (EEC) No 729/70 of 21 April 1970 on the financing of the common agricultural policy. [3]

4. A further infringement alleged by the Commission concerns the *tendering procedure*. The flat-rate reduction applied in that regard is justified by the Commission on the ground that the national authorities in their intervention purchases had accepted unlawful multiple tenders (group tenders or interconnected tenders). [4]

## B — Facts and legal provisions

### *Deficiencies in control procedures for the public storage of beef*

5. In this connection Ireland is seeking annulment of the Commission decision disallowing

* Original language: German.

1 — European Agricultural Guidance and Guarantee Fund.

2 — 1992 Summary Report (Doc. VI/6355/95-EN), pp. 130 and 131 in conjunction, *inter alia*, with Article 22 of Regulation No 859/89.

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

4 — This problem forms at least part of the subject-matter of the proceedings in Cases C-209/96 *United Kingdom* v *Commission* [1998] ECR I-5655, C-232/96 *France* v *Commission* [1998] ECR I-5699, C-233/96 *Denmark* v *Commission* [1998] ECR I-5759 and C-242/96 *Italy* v *Commission* [1998] ECR I-5863.

from the expenditure declared by Ireland in 1992 for public storage of beef for 1990 the sum of IRL 26 222 656.22 and for 1991 the sum of IRL 24 020 455.26 [5] (hereinafter the 'Decision'). These amounts correspond to a flat-rate correction of 10% of the expenditure declared by Ireland for 1990 and 5% of the expenditure declared for 1991.

6. In the Commission's view, losses could have been occasioned as a result of the irregular and defective control procedures; accordingly, the amounts declared were reduced by 10% and 5% respectively.

7. Ireland does not dispute that there were deficiencies in the control procedures. These were less significant in 1991 than in 1990. (The Commission took account of that fact in making the reductions: 10% for 1990 and 5% for 1991. This had become possible, the Commission stated, since it had been possible to organise the control procedures more effectively after the Commission had drawn the existing defects to Ireland's attention.)

8. However, Ireland puts forward a number of reasons why the reduction applied by the Commission was not justified, notwithstanding the deficiencies in the control procedures. Thus, the Commission gave no justificatory grounds for the amount of the financial correction. Nor did it explain why the Fund incurred considerable expenditure as a result of the weaknesses in the Irish control procedures. Moreover, it did not establish the amount of the losses to the Fund, as required by the Belle Group Report. According to the guidelines of the Belle Group Report, a reduction of 10% or 5% respectively was neither necessary nor justified. Since the amount of the correction thus exceeds the amount of losses incurred by the Fund, the correction amounts to a penalty for which there is no legal basis in the Treaty. In light of the inadequate statement of reasons on which the financial corrections were based, there has also been an infringement of Article 190 of the Treaty.

*Infringement in regard to tendering procedures*

9. In this connection Ireland seeks the annulment of the Commission decision disallowing from Ireland's expenditure for 1991 and 1992, which was incurred in the buying-in of beef, the amount of IRL 9 613 206 for 1991 and the amount of IRL 8 862 144 for 1992. [6] The disallowance of that expenditure is contained in Annex I to the decision. The amount disal-

5 — Commission Decision (96/311/EC) of 10 April 1996 on the clearance of the accounts presented by the Member States in respect of the expenditure for 1992 on the guarantee section of the European Agriculture Guidance and Guarantee Fund and in respect of certain expenditure for 1993 (OJ 1996 L 117, p. 19).

6 — See footnote 5.

lowed corresponds to a flat-rate correction of 2% of 1991 and 1992 expenditure.

10. In its Summary Report the Commission justifies that reduction on the ground that the approach of the competent Irish authority was not compatible with the Community rules and discriminated against participants who had observed the rules.

11. The Commission further contended that so-called multiple tenders may be of a speculative nature. If, for example, very large quantities of beef are offered for sale into intervention, it becomes necessary to reduce these quantities by application of a coefficient. [7] Since the tenderers endeavour to continue to sell the whole of their meat into intervention inflated tenders are lodged for speculative purposes. If a tenderer speculates that a specific reduction coefficient will be laid down, he offers a correspondingly higher quantity for sale into intervention. If it then turns out that the coefficient laid down is not as high as the tenderer assumed, the tenderer must deliver into intervention more meat than he actually has available. If he is unable to perform his contract with the intervention agency as to 85 or 95%, he loses in whole or in part the security deposited in respect of the total amount. [8]

12. If, however, the tenderer splits his original tender into several smaller ones which are made in the name of nominees, the risk of losing the security payment is reduced. If he is unable to deliver the full quantity tendered for, in the case of several smaller tenders he is at least in a position to honour certain of them in such a way that he does not lose the security payment. It is true that in respect of the remaining tenders which he is then no longer in a position to honour he will lose his security payment. However, that security is not calculated on the total amount of all the tenders offered by him but only on the smaller amount in each case. The amount of the security lost is thus smaller and is often exceeded by the profit achieved.

13. A clear consequence of this, in the Commission's view, is that the lodging of multiple tenders favours speculation because the effect of the security deposit is lessened.

14. Speculative tendering for larger quantities is said to run counter to the purpose of intervention, which is, for example by intervention buying-in, to stabilise the market and prevent or lessen any substantial price reduction, [9] where market prices fall below a

7 — The relevant provision is to be found in Article 11(3) of Commission Regulation (EEC) No 859/89 of 29 March 1989 laying down detailed rules for the application of intervention measures in the beef and veal sector (OJ 1989 L 91, p. 5).

8 — Article 13(4) of Regulation No 859/89.

9 — Fourth recital in the preamble to and Article 5 of Regulation (EEC) No 805/68 of the Council of 27 June 1968 on the common organisation of the market in beef and veal (OJ, English Special Edition 1968 (I), p. 187).

certain level. Regulation No 859/89 [10] introduced a tendering procedure. [11] Under that tendering procedure purchase prices and quantities are established on the basis of tenders received. [12]

15. Speculative tenders which, as has been demonstrated, are favoured by the lodging of multiple tenders make it difficult to operate intervention successfully. Since more meat is offered than is actually on the market, buying-in prices and quantities determined on the basis of tenders received can no longer be established in accordance with the actual market situation. Speculative tenders thus prevent the Commission from obtaining a precise overview of the market situation. For that reason it may almost certainly be presumed that, as a result of the speculative tenders and the multiple tenders favouring them, more meat is bought in by the intervention agencies at higher prices. In that connection it must also be borne in mind that the lodging of several tenders allows speculation as to the price. The buying-in of excessive quantities causes the EAGGF to incur higher costs than is necessary in order to support the market.

16. As is apparent from the documents and is pleaded by the Commission, in certain cases bids were made by companies which did not have their own bank account. Therefore, payments had to be made to another company, perhaps a parent company. Likewise, some companies did not have their own accounting system. This was apparent from the sequential numbering of invoices made out in the names of different companies. The Irish authority must therefore have been aware of the conduct of the tenderers from the beginning. Nevertheless, Ireland carried out no checks in this connection, as it ought to have done.

17. In the applicant's view, however, all the rules concerning intervention were observed. It did not accept more than one bid per tenderer.

18. The provision which underlies this dispute is contained in Article 9 of Regulation No 859/89, paragraph 1 of which provides: '*Tenderers* may take part in the invitation to tender only if they undertake in writing to comply with all the provisions relating to the tender concerned.' [13]

10 — Cited in footnote 7.

11 — Third recital and Article 7 et seq. of Regulation No 859/89.

12 — Second recital in the preamble to Council Regulation (EEC) No 571/89 of 2 March 1989 amending Regulation (EEC) No 805/68 on the common organisation of the market in beef and veal, repealing Regulation (EEC) No 1302/73 and renewing Regulation (EEC) No 4132/88 (OJ 1989 L 61, p. 43).

13 — Emphasis added.

19. Paragraph 2 provides: '*Interested parties* may participate in the invitation to tender issued by intervention agencies of the Member States in which this is opened either by lodging a written tender against a receipt or by any other written means of communication accepted by the intervention agency, with advice of receipt; *they may submit one tender only per category in response to each invitation to tender.*' [14]

20. The distinction between the concepts of 'tenderer' and 'interested party' is, in the Commission's view, of significance in this connection. According to the Commission, it follows from the difference in wording that interested parties are not to be equated with tenderers. 'Interested parties' are not only those persons who lodged tenders in the course of their economic activities. That concept embraces a much wider circle of persons. It is not therefore only the individual tenderer, that is to say the person who actually lodges the tender, who is prohibited from lodging more than one tender. The prohibition covers all persons tendering in respect of the same quantity of meat.

21. On the other hand, the applicant is of the opinion that persons participating in a tendering procedure are 'tenderers' and 'interested parties'. It is not possible to make a distinction between those two concepts. Accordingly, the prohibition in the last phrase of Article 9(2) merely provides that the person finally appearing as tenderer may submit only one tender.

22. A delimitation of the categories of persons who may lodge a tender is, it is submitted, apparent only on a reading of Article 11(3) of Commission Regulation (EEC) No 2456/93 of 1 September 1993 laying down detailed rules for the application of Council Regulation (EEC) No 805/68 as regards the general and special intervention measures for beef [15] which was not yet in force at the material time. That provision is as follows:

'Interested parties may submit only one tender per category in response to each invitation to tender.

The Member States shall ensure that tenderers are independent of each other in the terms of their management, staffing and operations.

Where there are serious indications to the contrary or that tenders are not in line with economic facts, tenders shall be deemed admissible only where the tenderer presents suitable evidence of compliance with the second subparagraph.

14 — Emphasis added.

15 — OJ 1993 L 225, p. 4.

Where it is established that a tenderer has submitted more than one tender, all the tenders from that tenderer shall be deemed inadmissible.'

23. The applicant, which in contrast to the Commission is of the opinion that Article 9(2) was fully complied with in the context of the tender procedure operated by it, referred a request for conciliation to the Conciliation Body. [16] The Conciliation Body gave, according to the applicant, the following provisional opinion: Although Member States took no initiative to counter this practice, the Commission services themselves could not have been unaware of it, but failed to react before 1993. In light of the fact, the Conciliation Body went on, that no apparent financial loss had been caused to the Fund as a result of this practice, the financial correction of 2% of total expenditure was difficult to justify.

24. The Commission points out in that connection that, in contrast to the national authorities, it did not at first have this information available to it. Since the tenders were forwarded to it anonymously, it became aware of the irregularities only after checks carried out by it.

16 — Established by 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 EAGGF, Guarantee Section (OJ 1994 L 182, p. 45).

25. On the abovementioned grounds Ireland brought these proceedings for

'1. a declaration that, pursuant to Article 173 of the Treaty establishing the European Economic Community, the Commission decision of 10 April 1996 on the clearance of accounts presented by Member States in respect of expenditure for 1992 of the guarantee section of the European Agricultural Guidance and Guarantee Fund and in respect of certain expenditure for 1993 is void in so far as it purports to disallow a sum of IRL 26 222 656.22 (being 10% of the expenditure declared by Ireland for public storage of beef for 1990) from the expenditure declared by Ireland for public storage of beef for 1992;

2. a declaration that, pursuant to Article 173 of the Treaty establishing the European Economic Community, the Commission decision of 10 April 1996 on the clearance of accounts presented by Member States in respect of expenditure for 1992 of the guarantee section of the European Agricultural Guidance and Guarantee Fund and in respect of certain expenditure for 1993 is void in so far as it purports to disallow a sum of IRL 24 020 455.26 (being 5% of the expenditure declared by Ireland for public storage of beef for 1991) from the expenditure declared by Ireland for public storage of beef for 1992;

3. a declaration that, pursuant to Article 173 of the Treaty establishing the European Economic Community, the Commission decision of 10 April 1996 on the clearance of accounts presented by Member States in respect of expenditure for 1992 of the guarantee section of the European Agricultural Guidance and Guarantee Fund and in respect of certain expenditure for 1993 is void in so far as it purports to disallow a sum of IRL 9 613 206.00 from expenditure declared by Ireland for public storage of beef for 1991 being 2% of such expenditure;

4. a declaration that, pursuant to Article 173 of the Treaty establishing the European Economic Community, the Commission decision of 10 April 1996 on the clearance of accounts presented by Member States in respect of expenditure for 1992 of the guarantee section of the European Agricultural Guidance and Guarantee Fund and in respect of certain expenditure for 1993 is void in so far as it purports to disallow a sum of IRL 8 862 144.00 from expenditure declared by Ireland for public storage of beef for 1992 being 2% of such expenditure;

5. such further or other order as may be necessary and appropriate for the purpose of the relief which Ireland seeks in these proceedings;

6. an order that the Commission of the European Communities pay the costs of these proceedings.'

The Commission contends that the Court should:

(1) dismiss the action;

(2) order Ireland to pay the costs.

## C — Opinion

*Deficiencies in control procedures for public storage of beef*

26. The applicant does not dispute that there were deficiencies in the Irish control procedures. None the less, it is of the opinion that the corrections of 10 and 5% applied respectively by the Commission were not justified.

27. In order to deal with this question, it is first necessary to review the Court's case-law

on clearance of accounts, primarily in regard to the establishment of damage and the burden of proof.

28. According to the Court's case-law, 'as the Court has already observed, only refunds granted and intervention undertaken in accordance with the Community rules within the framework of the common organisation of agricultural markets are to be financed by the EAGGF ...'. [17] In that connection it is for the Commission to prove an infringement of the rules governing the common organisation of the agricultural markets. [18]

29. Such proof was not even necessary in the present case, since, as already stated, the applicant does not dispute that there were weaknesses in the system of controls in Ireland. Nor does it contest the infringement of Article 8 of Regulation No 729/70 alleged by the Commission. Article 8 of the regulation, which reflects these recitals, provides in paragraph 1 thereof:

'The Member States in accordance with national provisions laid down by law, regulation or administrative action shall take the measures necessary to:

— satisfy themselves that transactions financed by the Fund are actually carried out and are executed correctly;

— prevent and deal with irregularities;

— recover sums lost as a result of irregularities or negligence.

...'

30. If there is such an infringement, the Court has held that the Member State concerned must show that the Commission misdirected itself in regard to the financial consequences of such infringement. [19]

31. In the applicant's submission, however, the samples made by the Commission were

17 — Judgment in Case C-48/91 *Netherlands* v *Commission* [1993] ECR I-5611, paragraphs 13 and 14, with further references.

18 — Judgments in *Netherlands* v *Commission* (cited in footnote 17, paragraph 18, with further references); Case C-281/89 *Italy* v *Commission* [1991] ECR I-347, paragraph 19, with further references; Case 347/85 *United Kingdom* v *Commission* [1988] ECR 1749, paragraph 16; and in Case C-55/91 *Italy* v *Commission* [1993] ECR I-4813, paragraph 13, with further references.

19 — Judgment in Case C-281/89 *Italy* v *Commission* [1991] ECR I-347, paragraph 19.

not representative. For that reason, the Commission could not be said to have correctly assessed the risk to the Fund. In that connection it should be said that, under the guidelines adopted by the Commission upon a proposal by an inter-service group (Belle Group Report), the checks carried out cannot and need not be used in each case as the (sole) basis for assessing financial loss. In cases, such as the present one, where it is not possible to give a precise assessment of the loss, provision is made for a flat-rate correction procedure on the basis of the risk incurred by the Fund.

32. Thus, it cannot be concluded, as Ireland indeed so concludes, that the corrections applied were to that extent disproportionate.

33. The applicant also refers to the alleged defects in the context of deboning of the beef. In that connection the Commission claimed, *inter alia*, that after deboning the quantity of meat was not established. On that point the applicant made submissions as to whether and why the quantity of meat achieved on deboning in Ireland was less than, for example, in other Member States. Even if the applicant were thereby able to prove that the yield on deboning was scarcely less than in other Member States and was delivered in its entirety to the intervention agencies, that remains merely a theoretical consideration so long as the relevant checks are not made. Even if, therefore, the deficiencies alleged by the Commission had not been present, none the less the correction applied would have been justified on the grounds of other deficiencies. The decisive factor in that connection is that no checks at all were made and there was no ascertainment of the remaining quantity of meat. On that ground it cannot be ruled out that the EAGGF incurred a loss. That alone is decisive since, as stated, it is a matter of establishing the financial risk incurred by the Fund.

34. In order to show that, in its view, the EAGGF incurred no loss, the applicant finally focuses on sales into intervention. It submits that the yields achieved in respect of sales of meat in storage were scarcely less than those achieved in other Member States. Since there were scarcely any complaints, no inference could be drawn that the quality of the meat was lower. However, this argument concerns only certain of the possible causes for losses in the context of the EAGGF.

35. The applicant claims finally that, under the Commission's guidelines, neither a reduction of 5% nor one of 10% is justified. Those guidelines propose three possible percentages for the flat-rate reduction:

— 2%, where the deficiency is limited to parts of the control system of lesser importance, or to the operation of controls which are not essential to the assurance of the

regularity of the expenditure, such that it can reasonably be concluded that the risk of loss to the EAGGF was minor;

— 5%, where the deficiency relates to important elements of the control system or to the operation of controls which play an important part in the assurance of the regularity of the expenditure, such that it can reasonably be concluded that the risk of loss to the EAGGF was significant;

— 10%, where the deficiency relates to the whole of or fundamental elements of the control system or to the operation of controls essential to assuring the regularity of the expenditure, such that it can reasonably be concluded that there was a high risk of widespread loss to the EAGGF.

36. As demonstrated, the applicant has been unable to show that the deficiencies in control procedures did not entail a risk for the Fund. As regards the individual percentages, these are related to the seriousness of the deficiencies.

37. Further, it should be recalled that, under the Court's case-law, financing of expenditure can be disallowed even as to 100%, if the precise financial consequences of a measure contrary to Community law cannot be established. [20]

38. In that connection it should also be pointed out that the Commission has maintained that in the course of its checks it established that more than 10% of the meat inspected did not satisfy quality requirements and other criteria. The amount of the correction appears to be justified by calculations of that level. No error of appraisal or calculation is apparent.

39. Moreover, reference should be made to the Court's case-law in regard to cases in which the Commission does not disallow the total expenditure affected by the infringement but endeavours to establish the financial consequences of the unlawful action by means of calculations. These calculations are based on an assessment of the situation which would have prevailed on the market in question had it not been for the infringement. In such cases, the Court has held, it is for the Member State to show that the conditions for obtaining the financing disallowed by the Commission are fulfilled. [21] Thus, in this case too, it is for the applicant to show that the Commission's

20 — Judgments in Case C-50/94 *Greece* v *Commission* [1996] ECR I-3331, paragraph 26, Joined Cases 15/76 and 16/76 *France* v *Commission* [1979] ECR 321, paragraph 32 et seq., and Case 347/85 *United Kingdom* v *Commission* (cited in footnote 18, paragraph 13).

21 — Judgment in *United Kingdom* v *Commission* (cited in footnote 18, paragraphs 14 and 15).

assessment is erroneous. As demonstrated above, [22] it has been unable to do so.

40. For that reason, there was also no infringement of Article 190 of the EC Treaty since the Commission discharged its burden of proof. Nor, for the reasons mentioned, may the correction proposed by the Commission be regarded as a penalty.

41. Moreover, reference should be made to the Court's case-law under which decisions concerning the clearance of accounts do not require detailed reasons if the government concerned was closely involved in the process by which the decision came about and is therefore aware of the reason for which the Commission considers that it must not charge the sums in dispute to the EAGGF. [23]

42. The applicant further points out that expenditure for 1991 was already reduced by 2% on account of the multiple tenders to be dealt with in the second part. If, however, that expenditure were to be further reduced by 5% on the grounds of deficient control procedures, that would represent a reduction of 7%, which is not permitted. In the case of a uniform assessment of risk by the Commission — contested by the applicant — the Commission can merely apply a uniform rate of correction.

43. However, since this case involves different risks attributable to different deficiencies in the system, it was entirely proper for the Commission to assess them differently and to apply an appropriate correction, all the more so since under the Court's case-law the entirety of the expenditure could have been disallowed.

44. Moreover, in the applicant's view, the Commission decision is tantamount to a penalty because the reduction in expenditure for 1990 and 1991 was sought in the context of the clearance of accounts for 1992. There is thus no link between the reduction and any loss to the Fund.

45. In that connection it should be said that the decisive factor is whether there is a link between deficiencies found to exist and any loss or financial risk to the Fund. That is independent of the question as to the time when the resulting reduction in expenditure is made. Clearance at a subsequent date is possible where, as in the present case, an earlier decision is stated to be without prejudice to subsequent financial consequences. This may be justified by the fact that the relevant

22 — Cf. para. 36.

23 — Judgment in *United Kingdom* v *Commission* (cited in footnote 18, paragraph 60).

investigations had not yet been concluded. [24] Under the Court's case-law it is sufficient in that connection for the recitals of the decision to contain reservations of a general nature. [25]

46. There is thus no ground apparent for annulment of the Commission decision as regards this part of the claim.

*Infringement in regard to the tendering procedure*

Meaning and purpose of the last phrase of Article 9(2)

47. First of all, the applicant claims that the Commission misinterpreted Article 9(2). In its submission it is clear from Regulation No 859/89 that all tenders from a company registered in the register of companies had to be accepted. This was checked in each case by the national authority. Whether the individual undertakings which submitted a tender may have belonged to the same group of companies was not examined in Ireland because there was no provision in Regulation No 859/89 for this to be done.

48. According to the Court's case-law, it is for the Commission, it is submitted, in the context of the clearance of the accounts of the EAGGF, to show that a Member State has contravened Community rules. The Commission, as has been demonstrated, was not able to adduce such proof. Moreover, the applicant points out that rules which may have financial consequences for the Member States must be clearly and precisely formulated.

49. Under the Court's case-law, it is for the Commission to prove an infringement of the rules governing the common organisation of the agricultural markets. [26]

50. Moreover, in regard to the requirements which the formulation of provisions must satisfy, the Court has held: 'Since a rule whose breach inevitably entails financial conse-

24 — Seventh and seventeenth recitals in the preamble to Commission Decision 94/871/EC of 21 December 1994 on the clearance of the accounts presented by the Member States in respect of the expenditure for 1991 of the European Agricultural Guidance and Guarantee Fund (EAGGF), Guarantee Section (OJ 1994 L 352, p. 82). Nineteenth recital in the preamble to Commission Decision 93/659/EC of 25 November 1993 on the clearance of the accounts presented by the Member States in respect of the expenditure for 1990 of the European Agricultural Guidance and Guarantee Fund (EAGGF) Guarantee Section (OJ 1993 L 301, p. 13). See in this connection judgments in Case C-61/95 *Greece* v *Commission* [1998] ECR I-207, paragraph 30 and *Greece* v *Commission*, cited above in footnote 20, paragraph 6.

25 — Judgment in Case C-335/87 *Greece* v *Commission* [1990] ECR I-2875, 1st introductory sentence.

26 — See footnote 18.

quences must be sufficiently clear and precise, the Commission was not entitled to rely on the terms of subheading ... as a basis for imposing, at the time of the clearance of EAGGF accounts, an interpretation which was not dictated by the normal meaning of the words used.' [27]

51. Accordingly, it must be examined whether the terms in which Article 9(2) of Regulation No 859/89 are couched satisfies these requirements and whether they allow of a construction of the kind placed on them by the Commission. In that connection it would appear appropriate to examine first the manner in which the Commission seeks to interpret Article 9(2). The pleadings mainly speak of multiple tenders. Those cannot be tenders submitted by one and the same tenderer under one name, for such tenders are not lawful in Ireland either. As is also clear from the pleadings, the Commission is also not challenging every kind of connection between the individual tenders. For example, it states that where a person operates two independent slaughterhouses, both may submit a tender. As the Commission explained in the hearing in its view only tenders *relating to the same quantity of meat* are unlawful under Article 9(2). Where an interested party therefore offers his meat not only himself but through the intermediary of nominees, that is in breach of Community provisions and must be prohibited by the authorities of the Member States.

52. The Commission points out that, according to the Court's case-law, a provision is not merely to be construed literally but also in accordance with its meaning and purpose. [28] Accordingly, the Commission contends that the provision at issue in these proceedings would be deprived of its purpose if it were possible to submit several tenders via nominees, thus circumventing the prohibitive provision.

53. The intervention scheme is jeopardised, as has been demonstrated, by the practice in regard to intervention buying-in in Ireland. By the buying-in of excessive quantities greater costs arise, it is submitted, than are necessary in order to support the market. Moreover, equality of access for all interested parties required under Article 6(6) of Regulation No 805/68, as amended by Regulation No 571/89, is not guaranteed.

54. The last phrase of Article 9(2) of Regulation No 859/89 must therefore, it is contended, be interpreted according to its meaning and purpose in such a way that intervention measures are not frustrated. If tenders relate to the same quantity of meat they are in reality only from one single tenderer. Such tenders are therefore unlawful.

27 — Judgment in Case 349/85 *Denmark* v *Commission* [1988] ECR 169, paragraph 16.

28 — Judgment in Case C-283/91 *Contarini* [1992] ECR I-6359, paragraph 14 and judgment in Joined Cases C-296/93 and C-307/93 *France and Ireland* v *Commission* [1996] ECR I-795, paragraph 21.

55. In the Commission's view, this follows from the wording. In this connection it should be said that a difference in wording as between paragraphs 1 and 2 of Article 9 could certainly point to a difference in meaning. It could be inferred therefrom that it is not sufficient to check whether the person who in actual fact submits the tender only submits a single one, that is to say whether in each case an independent (legal) person participates in the procedure. Thus the term '*interested party*' could be understood as including a person interested in selling his meat into intervention. As has been seen, that person must not necessarily be the same person as the tenderer, that is to say the person who actually submits the tender. If, for example, the meat is offered via nominees, in that case there is one interested party but several tenderers. But if one looks at the way in which those two concepts are used in other regulations dealing with intervention measures for beef, it may be seen that the abovementioned distinction is not always adhered to. Thus, for example, the first recital in the preamble to Regulation No 2271/90, [29] provides that '... tenderers should only be allowed to submit a single tender ... for each category in response to each invitation to tender.' Moreover, the German version of Article 11(3) of Regulation No 2456/93, which replaced Article 9 of Regulation 859/89, uses the terms 'Interessent' (interested party) and 'Bieter' (tenderer) in connection with the submission of tenders. [30]

56. Thus, no further conclusions may be drawn from the distinction between 'tenderer' and 'interested party' in Article 9.

57. However, it is more instructive to have regard to the provisions which preceded those at issue in the present proceedings. Thus, in 1990 it was made possible to submit several tenders at different prices. Under Regulation No 1282/90 [31] the last phrase of Article 9(2) received the following formulation:

'They may submit more than one tender, at different prices, for each category in response to each invitation to tender.'

58. That provision was, however, repealed shortly afterwards in August 1990. Amending Regulation No 2271/90 stated in the first recital to the preamble thereof: 'Experience shows that tenderers should only be allowed to submit a single tender for each category in response to each invitation to tender.'

59. In the applicant's view that formulation shows why the Commission inserted the last phrase of Article 9(2) in the version contained in Regulation No 2271/90. The tenderer may submit only one tender. At the same time, however, it is clear that after repeal of the provision in Regulation No 1282/90 the tenderer may no longer submit several tenders in respect of the same quantity of meat. The

29 — Commission Regulation (EEC) No 2271/90 of 1 August 1990 amending Regulation (EEC) No 859/89 laying down detailed rules for the application of intervention measures in the beef and veal sector (OJ 1990 L 204, p. 45).

30 — This distinction is also reflected in the English version which speaks of 'interested parties' and 'tenderer'.

31 — Commission Regulation (EEC) No 1282/90 of 15 May 1990 amending Regulation (EEC) No 859/89 and laying down detailed rules for the application of intervention measures for beef (OJ 1990 L 126, p. 31).

meaning and purpose of the provision here at issue in the last phrase of Article 9(2) is thus that several tenders may not be submitted in respect of a specific quantity of meat. That provision would become meaningless if it could readily be circumvented by recourse to nominees.

60. The applicant must also have been aware of that fact when it received the tenders. On the one hand, it is true of any rule that it becomes meaningless if it is circumvented, for example, as is maintained, by virtue of the fact that the same meat is offered by several persons. Secondly, the applicant was aware of the meaning and purpose of intervention. To that extent it must also have been aware of the fact that it runs counter to the purpose of intervention if multiple tenders are submitted in respect of the beef available on the market.

61. Moreover, the Court has held that even in cases where Community law is applied objectively but incorrectly as a result of an interpretation in good faith by national authorities, costs incurred in that connection must, under Articles 2 and 3 of Regulation No 729/70, be borne by the Member States. [32] This narrow interpretation of the criteria for allowing expenditure under the EAGGF is dictated by the objective pursued by Regulation No 729/70. Since implementation of a common agricultural policy must ensure equal treatment as between citizens of the Member States, national authorities of a Member State are not permitted, by means of a broad interpretation of a given provision, to favour citizens of that State as against those of other Member States in which a stricter interpretation is applied. [33]

62. Admittedly, the applicant rightly points out that the last phrase of Article 9(2) is silent as to the fact that separate tenders may not be submitted by undertakings in the same group. There is, however, no requirement to this effect. It follows from the meaning and purpose of the last phrase of Article 9(2) that it is prohibited to offer meat by way of nominees. The applicant cannot rest content in the assertion that it is under no obligation under the terms of Article 9 to examine possible connections between individual tenderers. That is merely a question as to the manner in which observance of a prohibitive provision such as that contained in the last phrase of Article 9(2) can be monitored.

63. Accordingly, it is right to uphold the Commission's submission that the last phrase of Article 9(2) also prohibits tenders which, whilst coming from different legal persons, are made in respect of the same beef, with the

32 — Article 3(1) of Regulation No 729/70 provides:
'Intervention intended to stabilise the agricultural markets, undertaken according to Community rules within the framework of the common organisation of the markets, shall be financed under Article 1(2)(b).'

33 — Judgment in Case 11/76 *Netherlands* v *Commission* [1979] ECR 245, paragraphs 8 and 9.

result that the tenders may be assumed to have been submitted by nominees.

64. In that way, contrary to the applicant's submission, a basis is provided for such tenders to be rejected, namely the last phrase of Article 9(2) aforesaid.

Monitoring obligation on the Member State

65. In the Commission's view, the disallowance made in the context of the clearance of accounts is justified on the ground that the applicant did not ensure compliance with that provision.

66. It is clear that in Ireland tenders are examined only to see whether they originate from companies registered in the register of companies. No further examination was undertaken. In what follows it will be a matter of examining whether on that basis the applicant may be said to have failed to observe a provision of Community law, since the Commission has mentioned no actual example where tenders were actually submitted via nominees.

67. However, the Commission is unable to adduce such proof because in this connection the applicant carried out no checks. The only check made was whether the tenders were from independent (legal) persons. Thus, the Commission has no information before it as to the further details of specific circumstances. Admittedly, the Commission may also carry out its own checks. However, under the Court's case-law on the implementation on EAGGF financing it is primarily for the national authorities to ensure precise compliance with Community provisions. As the Court went on to point out, 'that system, based on trust, does not involve any systematic supervision by the Commission, which moreover would in practice be impossible for it to carry out ... Only the Member State is in a position to know and determine precisely the information necessary for drawing up EAGGF accounts since the Commission is not close enough to obtain the information it needs from the economic operators.' [34]

68. Thus, since in the context of the clearance of EAGGF accounts the Commission is dependent upon information provided by the Member States, it is not possible for it here to give a specific example of an infringement under the tendering procedures. The Commission is able — and required — merely to show that the applicant failed to examine all the criteria necessary for the purposes of compliance with the relevant provision. That the Commission did.

34 — Judgment in *Netherlands* v *Commission* (cited in footnote 17, paragraph 11).

69. In connection with the question whether there is thus shown to be an infringement by the applicant, a matter also to be considered is whether the applicant was required to carry out any additional examination. In that connection reference should be made to Regulation (EEC) No 729/70. In the recitals in the preamble to that regulation it is stated, *inter alia*: 'Measures must be taken to prevent ... irregularities.' [35] The eighth recital states: 'Community expenditure must be made subject to close supervision. In addition to supervision carried out by the Member States on their own initiative, which remains essential, provision should be made for verification by officials of the Commission and for it to have the right to enlist the help of Member States.' Article 8 of the regulation is in accordance with those considerations.

70. Under the Court's case-law it is for the national authorities to monitor precise compliance with Community provisions. [36] The extent of this obligation on the Member States in regard to the financing of the EAGGF was decided by the Court in its judgment in *Exportslachterijen van Oordegem*. In that judgment it was held in regard to Article 8(1) of Regulation No 729/70:

'That provision, which expressly lays down in that specific area the obligations imposed on Member States by Article 5 of the Treaty defines, the Court has said, the principles according to which the Community and the Member States must ensure the implementation of Community decisions on agricultural intervention financed by the Fund and combat fraud and irregularities in relation to those operations (*BayWa*, cited above, paragraph 13).

That article thus imposes on the Member States the general obligation to take the measures necessary to satisfy themselves that the transactions financed by the Fund are actually carried out and are executed correctly, even if the specific Community act does not expressly provide for the adoption of particular supervisory measures (Case C-8/88 *Germany* v *Commission* [1990] ECR I-2321, paragraphs 16 and 17).' [37]

71. It follows therefrom that an obligation on the part of Member States to carry out checks may subsist even if such a requirement is not expressly provided for in the relevant provision.

35 — Seventh recital.

36 — Judgment in *Netherlands* v *Commission* (cited at footnote 17, paragraph 11), in Case C-366/88 *France* v *Commission* [1990] ECR I-3571, paragraph 20, in Case C-8/88 *Germany* v *Commission* [1990] ECR I-2321, paragraph 17 and in Joined Cases 146/81, 192/81 and 193/81 *BayWa* [1982] ECR 1503, paragraph 26.

37 — Judgment in Case C-2/93 *Exportslachterijen van Oordegem* [1994] ECR I-2283, paragraphs 17 and 18.

72. Thus, the question arises whether in the specific case before the Court the applicant was required to carry out further checks, that is to say whether the Member State ought to have or could have done more and, if so, what?

73. In line with the Commission's submission, the disadvantage for the Fund arises out of the fact that the submission of several tenders by an interested party by means of nominees encourages the submission of speculative tenders. Yet if one has regard to the Commission's procedure against speculative tenders, it might be queried whether the applicant was required to take any further steps.

74. In order to prevent speculative tenders whereby, in anticipation of a specific reduction coefficient, tenders are made in respect of a greater quantity of meat than is available, [38] a security payment was introduced under Article 10(1), in order to ensure that 'tenders are bona fide and that the conditions laid down are complied with.' [39] That means that in that connection the Member States are merely obliged to ensure that the appropriate amount of security is deposited. They do not have to check whether the individual tenderer has offered more beef than is in his possession.

75. In the present case, however, there was a further provision to be considered which could not be circumvented. An interested party desirous of selling his meat into intervention could not submit more than one tender. That followed from the underlying rationale of intervention. It is true that that idea was only subsequently given concrete shape in Regulation No 2456/93. [40] However, that does not alter the fact that already prior thereto there must have been awareness of that idea. Accordingly, the Commission cannot be said, contrary to the applicant's submission, to be seeking to apply Regulation No 2456/93 retroactively to the facts of the present case.

76. Thus, one arrives at the conclusion that the applicant ought to have carried out further checks in order to establish whether the tenders submitted were in fact from the same tenderer. That is particularly the case in light of the clear indications already alluded to of interconnections between individual tenderers. Even if it could not with certainty be concluded from those interconnections that there was an infringement of the last phrase of Article 9(2), the indications were however of such a nature as to necessitate more specific checks, and that was the sole decisive factor.

77. It must therefore be held that the applicant ought to have carried out further checks which it failed to do.

38 — Article 10 of Regulation No 859/89.

39 — Third recital in the preamble to Regulation No 859/89.

40 — Third recital in the preamble to Regulation No 2456/93.

Proof of loss occasioned to the EAGGF — burden of proof

78. It now falls to examine whether a reduction in the context of the clearance of accounts, as applied by the Commission, was justified. As the applicant claims in the alternative, that is not the case since the reduction made is disproportionate in the absence of any loss to the Fund.

79. In order to answer that question, regard must again be had to the Court's case-law on proof of loss and the burden of proof in the context of the clearance of EAGGF accounts. Thus, the Court has stated that it is for the Member State to show that the conditions for obtaining the financing refused by the Commission are fulfilled, where the Commission refuses to charge certain expenditure to the EAGGF on the ground that such expenditure was incurred as a result of breaches of Community rules attributable to that Member State. [41]

80. In that connection, a further question is as to the requirements which the Commission's submission with regard to the occasioning of financial loss must satisfy. Under the Court's case-law, in cases where it cannot be established to what extent a national measure incompatible with Community law has led to an increase in expenditure under a budgetary heading of the EAGGF, the Commission has 'no choice' but to disallow the questionable expenditure altogether, and not merely a certain percentage of it. [42]

81. There may be a case of that kind here since, precisely because the necessary checks were not made, the Commission was unable to establish to what extent the applicant's conduct has occasioned loss to the EAGGF. Hypothetically, it may only be speculated what costs would not have been incurred if the applicant had carried out the proper checks.

82. Conversely, in a case in which the Commission called in question the correctness of figures notified by a Member State, the Court held: 'The Commission is required not to demonstrate exhaustively that there are irregularities in the data submitted by the Member States but to adduce evidence of serious and reasonable doubt on its part regarding the figures submitted by the national authorities. The reason for this mitigation of the burden of proof on the Commission is that ... it is the State which is best placed to collect and verify

41 — Judgment in Case C-48/91 (cited in footnote 17, paragraph 16) and judgment in Case 347/85 (cited in footnote 18, paragraph 14).

42 — Judgments in Case C-50/94 *Greece* v *Commission* [1996] ECR I-3331, paragraph 26, in Joined Cases 15/76 and 16/76 *France* v *Commission* [1979] ECR 321, paragraph 32 et seq. and in *United Kingdom* v *Commission* (cited in footnote 18, paragraph 13).

the data required for the clearance of EAGGF accounts; consequently, it is for the State to adduce the most detailed and comprehensive evidence that its figures are accurate and, if appropriate, that the Commission's calculations are incorrect'. [43]

83. That case is not directly comparable with the present case since the Commission is not alleging that the figures communicated to it by the applicant are incorrect. It is rather the case that the figures could have been different if the applicant had carried out adequate checks. But, also in that connection, the Commission did not merely submit that the EAGGF suffered no loss. Rather it showed that the applicant had infringed Community law and the manner in which it had done so. It explained, furthermore, how that may have favoured speculative bids by tenderers. It explained, finally, that that may have led to an erroneous appraisal of the market and thus to excessive buying-in of beef, in some cases, at increased prices. Thus, in any event, it adduced credible evidence that it was possible for loss to have been incurred by the EAGGF.

84. A more extensive evidentiary obligation cannot be imposed on the Commission since the abovementioned grounds for easing the burden of proof also subsist in this case. Nor can it be ruled out beyond doubt that the applicant's conduct jeopardised the functioning of the common organisation of the market.

85. It is therefore for the applicant — as is apparent from the judgment cited in paragraph 30 — to show that the conduct alleged against it did not lead to an increase in expenditure in the context of the EAGGF. The applicant submits that tendering procedures in Ireland did not lead to more meat being bought in at higher prices. The allegation in that regard in the 1991 Summary Report was finally withdrawn. From that it may be inferred that the Irish at any rate did not benefit from the practice of multiple tenders.

86. The Commission, on the other hand, further claims that it cannot be ruled out that as a result of the acceptance of multiple tenders and the resulting speculation more beef was bought in at higher prices.

87. In that connection it should be said that it cannot be inferred from the mere fact that the relevant allegation no longer appears in the Summary Report that the conduct of the Irish authorities did not in fact have those consequences. Secondly, it is not apparent why the acceptance of multiple tenders should

43 — Judgment in *Netherlands* v *Commission* (cited in footnote 17, paragraph 17).

only in Ireland not have given rise to excessive buying-in of beef.

88. Ireland also claims that speculation by means of inflated tenders in order to reduce the risk of forfeiture of security payments is only of limited interest to Ireland. Thus, in many cases in Ireland the safety net procedure was applied. [44] Under that procedure all bids were accepted which was why there was no need to submit speculative tenders. None the less, even during that procedure the multiple tenders criticised by the Commission continued to be made. It may be inferred from that fact that the purpose of multiple tenders was not to diminish the effect of the security deposit.

89. The Commission contends, however, that almost one-half of the beef was bought in not under the safety net procedure but under the normal procedure in the context of which inflated tenders may be advantageous. Thus, also in Ireland the practice of multiple tenders may have had negative consequences. As the Commission submits, this is all the more so since expenditure during the relevant period was unusually high.

90. On the other hand, it could be inferred from the applicant's submissions that there was a practice in Ireland of multiple tenders, that is to say tenders made by undertakings belonging, for example, to the same group of companies. The Commission further points out that the applicant stated in a letter that, also in relation to intervention sales, it was not uncommon for large contracts to be divided amongst subsidiary companies to diminish the risk of security loss. In a further letter the applicant stated that the practice of using subsidiary companies as a means of minimising the risk of security loss was widely known at the time. Such a business policy had to be considered both a legitimate and prudent practice. However, in the Commission's view, that practice led to an increase in the financial risks to the Fund. That view of the matter must be upheld.

91. Since the Commission has thus at least adduced credible evidence that the applicant's conduct may have occasioned loss to the EAGGF, it is for the applicant to show that this was not the case.

92. To distribute the burden of proof in that manner, as in the present case, also appears to be reasonable against the background of other judgments of the Court in regard to clearance of accounts. Thus, in cases where Community rules authorised payment of aid only on condition that certain formalities relating to proof or supervision were observed, the Court held that aid was not granted in conformity

44 — Safety-net measures are adopted if the market price falls particularly sharply. Under those measures all bids at or under 80% of the intervention price are accepted (Article 6(5) of Regulation No 805/68 as amended by Regulation No 571/89).

with Community law if those preconditions were not observed. The expenditure incurred in connection therewith could not be charged to the EAGGF even if it was clear that there had been no substantive irregularity. [45]

93. Likewise in connection with the observance of formalities, the Court has held: 'In view of the essential nature of the formalities which were not complied with and of the fact that it was not possible to check that the time-limit within which the products were to be exported was observed, and in view, therefore, of the possibility of losses, or even fraud, to the detriment of the Community budget, the amount disallowed by the Commission, which was limited to 2% of the expenditure involved, cannot be regarded as excessive and disproportionate'. [46] Thus, even the mere likelihood of losses may be used as a criterion for the purposes of the assessment. Such likelihood subsists in the present case in light of the abovementioned factors and the absence of checks.

94. The sole matter to be determined is therefore whether the applicant can successfully plead that no loss was incurred by the EAGGF.

95. The applicant submits that during the relevant period security payments were retained only in a few cases. Only small amounts of security were forfeited. Accordingly, there could have been no extensive speculation in regard to tenders. However, it is the Commission's view that this shows precisely how successfully the practice of multiple tenders reduces the risk to the individual tenderer.

96. As the Commission rightly argues, the practice of so-called multiple tenders enables the tenderer to speculate with several tenders whereby, in the event of an unsuccessful speculation, the loss is reduced because the security is smaller for the smaller quantity.

97. On the other hand, the practice of so-called multiple tenders need not necessarily lead to a reduction in cases in which the security is forfeited.

98. It does not follow absolutely from the fact that security payments were forfeited only in a few cases that more beef than necessary was not sold into intervention. Those tenderers who had submitted an excessive bid and speculated on a higher reduction co-efficient are also able to avoid losing the security payment by purchasing the missing quantity on the free market. This is of course not in keeping with the intervention scheme but is apparently practised. Thus, under Article

45 — Judgment in Case 327/85 *Netherlands* v *Commission* [1988] ECR 1065, paragraph 25.

46 — Judgment in Case C-49/94 *Ireland* v *Commission* [1995] ECR I-2683, paragraph 22.

12 of Regulation No 859/89 a tender is to be refused if the proposed price is above the maximum price applicable to that tendering procedure. Therefore, a quantity of beef rejected on that ground could be purchased by a tenderer who has put in a bid in respect of a greater quantity of beef than he has at his disposal.

99. Moreover, the applicant gives examples where alleged multiple tenders were of no advantage to tenderers. If in cases which according to the Commission are open to challenge multiple tenderers had submitted only one overall tender, smaller amounts in respect of security payments would have been forfeited; in some cases the security payment would not have been forfeited at all. The applicant is assuming in that connection that tenders were submitted in respect of different quantities of beef which, if appropriate, could be added to an overall quantity. In the Commission's example, however, tenders were made in respect of the same quantity of meat.

100. Thus, it is clear that the applicant has been unable to refute the Commission's argument concerning financial loss incurred by the EAGGF.

Possibility of a flat-rate calculation of the financial loss

101. The applicant also challenges the flat-rate calculation of the financial loss undertaken by the Commission. The Commission, it is submitted, did not assess the actual risk to the Fund. Had it done so, it would have concluded that no correction was to be made.

102. In that connection it should be said that the applicant is incorrectly assuming that no connection with a loss can be established. As demonstrated above, [47] a loss to the EAGGF cannot be precluded. Moreover, it is sufficient to refer to the Court's case-law. [48]

103. The applicant finally claims an infringement of the principle of the protection of legitimate expectations. In its view, the Commission must have been aware of the practice under tendering procedures in Ireland. It must also have been aware that there are 29 approved slaughterhouses in Ireland, a list of which was forwarded to the Commission. Moreover, it was clear from the list of unnamed tenders forwarded to the Commission that far more than 29 tenders had been submitted. The Commission must also have been aware of the fact that certain slaughterhouses belonged to the same group of companies. If, however, the Commission was aware of the practice, it was under an obligation to inform the Member State that in its opinion that practice was not consistent with Community law. If it did not do so it cannot subsequently be heard to say that it is disallowing the relevant expenditure.

47 — See paragraphs 94 to 100.
48 — See paragraph 85.

Certainly, it is true that under the Court's case-law it is primarily the responsibility of the Member State to ensure that all monies are paid in accordance with Community rules. However, this represents a special case because the Commission was directly involved in the procedure.

104. The Commission counters those arguments by pointing out that under the tendering procedure it receives only an anonymous list which does not show who submitted the tenders. For that reason it could not have been aware of the practice of multiple tenders. Furthermore, it should be pointed out that it is not only slaughterhouses which are entitled to submit tenders for purposes of intervention. As the Commission has submitted, there is in fact no restriction as to the characteristics of the tenderer. For that reason the number of authorised slaughterhouses in Ireland can be of no relevance to the question whether under a tendering procedure multiple tenders were submitted or not. It cannot therefore be assumed that the Commission was aware of the approach adopted by Ireland from the outset. It is therefore not possible to discern any infringement of the principle of the protection of legitimate expectations.

105. Accordingly, the objections made against the Commission decision cannot avail the applicant. The reduction proposed by the Commission is thus well founded and also entirely proportionate.

### Costs

106. Under Article 69(2) of the Rules of Procedure of the Court the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleadings.

## D — Conclusion

107. I therefore propose that the Court should:

(1) dismiss the action;

(2) order Ireland to pay the costs.