JUDGMENT OF THE COURT (Fifth Chamber)
1 October 1998 *

In Case C-238/96,

Ireland, represented by M. A. Buckley, Chief State Solicitor, acting as Agent, assisted by M. Finlay SC and D. Barniville, Barrister-at-Law, with an address for service in Luxembourg at the Irish Embassy, 28 Route d'Arlon,

applicant,

v

Commission of the European Communities, represented by X. Lewis, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment in part of 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 of the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) and in respect of certain expenditure for 1993 (OJ 1996 L 117, p. 19),

* Language of the case: English.

THE COURT (Fifth Chamber),

composed of: C. Gulmann, President of the Chamber, M. Wathelet (Rapporteur), J. C. Moitinho de Almeida, J.-P. Puissochet and L. Sevón, Judges,

Advocate General: S. Alber,
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 4 February 1998,

after hearing the Opinion of the Advocate General at the sitting on 24 March 1998,

gives the following

Judgment

1 By application lodged at the Court Registry on 10 July 1996, Ireland brought an action under the first paragraph of Article 173 of the EC Treaty for the annulment in part of 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 of the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) and in respect of certain expenditure for 1993 (OJ 1996 L 117, p. 19, 'the contested decision'), in so far as it related to Ireland.

2 The application seeks the annulment of that decision in so far as the Commission declared that the following amounts could not be charged to the EAGGF:

— £26 222 656.62, being 10% of the expenditure declared by Ireland for public storage of beef for 1990, on the ground that it infringed Article 8 of 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);

— £24 020 455.26, being 5% of the expenditure declared by Ireland for public storage of beef for 1991, on the ground that it infringed Article 8 of Regulation No 729/70;

— £9 613 206, being 2% of the expenditure declared by Ireland for public storage of beef for 1991, on the ground that the tender procedure for beef was unlawful;

— £8 862 144, being 2% of the expenditure declared by Ireland for public storage of beef for 1992, on the ground that the tender procedure for beef was unlawful.

The corrections with regard to the public storage of beef

3 The regulations concerning intervention purchases provide that only meat of a certain quality, deboned and packed to certain standards can be accepted into intervention. In addition, the competent national authorities must carry out checks to ensure compliance with provisions requiring a specified result.

4 In this connection, Articles 2 and 3 of Regulation No 729/70 provide that refunds on exports to third countries granted in accordance with the Community rules are to be financed, as is intervention intended to stabilise the agricultural markets, provided it is undertaken according to those rules.

5 Article 5 of Regulation No 729/70 provides that Member States must transmit certain documents at regular intervals to the Commission.

6 In addition, Article 8(1) of Regulation No 729/70 requires Member States to satisfy themselves that transactions financed by the EAGGF are executed correctly and are actually carried out, to prevent and deal with irregularities and to recover sums lost as a result of irregularities or negligence. Article 8(2) provides that the financial consequences of irregularities or negligence attributable to administrative authorities or other bodies of the Member States are not to be borne by the Community.

7 Finally, account should also be taken of the Commission's Belle Group Report which lays down guidelines to be followed when financial corrections must be applied to a Member State.

8 In addition to three principal calculation techniques which the Commission and Ireland agree are inapplicable in the present case, the Belle Group Report also sets out a flat-rate method for difficult cases:

'As the systems audit approach has become more widely applied, EAGGF has had recourse increasingly to an assessment of the risk which a systems deficiency presents. By the very nature of ex-post auditing, it can rarely be established at the time of audit whether a claim was valid when paid — the number of olive trees may be verifiable at any later time, as this does not normally change, but the number of sheep or the quality of an exported cheese cannot be verified at a later date. The

loss to the Community funds must therefore be determined by an evaluation of the risk to which they were exposed by the control deficiency, which may concern as much the nature, or quality, of the controls operated as the quantity of controls effected. This approach in no sense introduces a principle of proportionality into the clearance of accounts, but is concerned with establishing a link between cause and effect.

In determining whether a financial correction should result and, if so, at what rate, the general consideration shall be the assessment of the degree of risk of losses to Community funds having occurred as a consequence of the control deficiency. The specific elements to be taken into account should include the following:

1. whether the deficiency relates to the effectiveness of the control system generally, to the effectiveness of a particular element of the system, or to the operation of a control or controls under the system;

2. the importance of the deficiency within the totality of the administrative, physical and other controls foreseen;

3. the vulnerability to fraud of the measures, having regard particularly to the economic incentive.'

9 The Belle Group Report proposes three categories of flat-rate corrections:

'A. 2% of expenditure — 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.

B. 5% of expenditure — 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.

C. 10% of expenditure — 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.'

10 The guidelines laid down by the abovementioned report further provide that, where there is doubt as to the correction to be applied, the following points may be taken into account as mitigating factors:

'— whether the national authorities took effective steps to remedy the deficiencies as soon as they were brought to light;

— whether the deficiencies arose from difficulties in the interpretation of Community texts.'

11 On 2 April 1990 DG VI of the Commission initiated an inquiry into public storage of beef and veal in Ireland pursuant to Article 9(2) of Regulation No 729/70, which empowers officials appointed by the Commission to check whether administrative practices are in accordance with Community rules, whether the requisite supporting documents exist and the conditions under which transactions financed by the EAGGF are carried out and checked. It transpired from that inquiry that in more than 10% of the samples the required result had not been achieved. It also revealed various irregular purchases. The weaknesses of the Irish control system related to

the quality of meat offered for purchase in certain cases, the amount of meat obtained from deboning in other samples and packaging in others.

12 Those deficiencies were brought to the attention of the Irish authorities by letter dated 11 October 1991 sent by Mr Legras, Director-General of DG VI.

13 Further inspections were carried out in Ireland by Commission officials in December 1991. A consignment of boneless Irish beef was inspected in Italy in March and June 1992, and Irish bone-in beef stored in the Netherlands was inspected in July and August 1993.

14 By letter dated 3 May 1995 from Mr Legras to the Secretary of the Irish Department of Agriculture, Food and Forestry, the Irish authorities were formally notified of DG VI's conclusion that the total financial corrections for 1990 and 1991 should be £74 263 567.90, that is to say a 10% flat-rate correction for each year.

15 In an endeavour to have the rejected expenditure accepted, the Irish authorities initiated the conciliation procedure 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 European Agricultural Guidance and Guarantee Fund (EAGGF) Guarantee Section (OJ 1994 L 182, p. 45).

16 On 22 November 1995 the Conciliation Body issued its final report in which it considered that it was 'difficult to justify blanket corrections at the level currently proposed'. It also thought it advisable to differentiate between the level of corrections according to the years for which improvements in control procedures had

been introduced and invited the parties to exchange views on the appropriate level of financial correction.

17 In its 1992 Summary Report, the Commission set the corrections at 10% for 1990 and 5% for 1991 on the following grounds:

'A correction is necessary because in 1990_91 the Irish authorities did not fulfil their obligations under Article 8 of Regulation (EEC) No 729/70. The weaknesses inherent in the monitoring system occurred in areas considered essential by the Commission. Furthermore, anomalies had already been reported for 1991 in Summary Report VI/320/94. Very large amounts had been wrongly charged to the Fund as a result.

As the loss suffered by the EAGGF cannot be measured accurately, it is necessary to make a flat-rate assessment which, in view of the efforts made by the Irish authorities to improve their monitoring system, will amount to 10% of the expenditure charged to the Community budget for 1990 and 1991 in respect of the public storage of beef and veal.

After carefully examining the report of the Conciliation Body of 21 November 1995 on case 95/IR/013, the Commission considered that the proposed correction for 1990 should be maintained, in view of the gravity of the deficiencies found during their controls and that for 1991 fixed at 5%, in view of the measures taken during that year to improve the effectiveness and reliability of controls and the consequent lesser risk of irregularities.'

18 Ireland does not dispute the conclusion of the Commission that it was in breach of Article 8 of Regulation No 729/70 in 1990 and in 1991. It acknowledges that weaknesses existed in 1990 and, to a much lesser extent, in 1991 in the system of permanent presence. Nevertheless, it disputes certain of the other reasons advanced by the Commission in support of that conclusion.

19 It is in this context that Ireland puts forward five pleas in law alleging, respectively, failure to state reasons, failure to make a proper assessment of the risks to the EAGGF, incorrect assessment of the alleged losses incurred by the EAGGF, infringement of the guidelines laid down in the Belle Group Report and lack of legal basis.

Failure to state reasons

20 By its first plea, Ireland alleges that the Commission failed to supply any reasons to support its conclusion that very large amounts were wrongly charged to the EAGGF.

21 According to settled case-law, the extent of the obligation to state reasons depends on the nature of the measure in question and on the context in which it was adopted (see Case 327/85 *Netherlands* v *Commission* [1988] ECR 1065, paragraph 13, and Case C-54/91 *Germany* v *Commission* [1993] ECR I-3399, paragraph 10).

22 In this regard, it is sufficient to point out that decisions concerning the clearance of accounts do not require detailed reasons if they are taken on the basis either of summary reports or of any correspondence between the Member State and the Commission, which implies that 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 (Case 347/85 *United Kingdom* v *Commission* [1988] ECR 1749, paragraph 60).

23 It is clear from the correspondence between the Commission and the national authorities (see paragraphs 12 and 14 of the present judgment) that the Commission informed them of the weaknesses in the control system which, moreover, had already been mentioned in the 1991 Summary Report. Furthermore, in the 1992 Summary Report the Commission found that those weaknesses concerned essential aspects and, in view of the impossibility of determining with any certainty the extent of the loss to the EAGGF it followed the guidelines contained in the Belle Group Report, in setting a flat-rate correction of 10% in respect of 1990 and of 5% in respect of 1991, having regard to the improvements made and the consequent reduced risk to the Community budget.

24 In view of the foregoing considerations, the first plea in law must be rejected.

Failure to assess the risks to the EAGGF

25 By its second plea in law, the Irish Government alleges that the Commission failed to demonstrate that very large amounts had been wrongly charged to the EAGGF in 1990 and 1991 as a result of the alleged failure of the Irish authorities to fulfil their obligations under Article 8 of Regulation No 729/70.

26 The Irish Government submits that it follows from Articles 5 and 8 of Regulation No 729/70, from the case-law of the Court, from the principle of legal certainty and from the guidelines published by the Commission that, in making any financial

corrections by reason of a Member State's having been in breach of its obligations under Article 8(1), the Commission must first assess the probable extent of the irregularities which have occurred as a result of the alleged control deficiencies and then estimate the financial consequences of such irregularities. It should therefore make an assessment of the causal link between the absence of controls and the quantum of probable losses to Community funds.

27 In that connection it must be borne in mind first of all that, as the Court has consistently held, Articles 2 and 3 of Regulation No 729/70 permit the Commission to charge to the EAGGF only sums paid in accordance with the rules laid down in the various sectors of agricultural production, leaving the Member States to bear the burden of any other sum paid, and in particular any amounts which the national authorities wrongly believed themselves authorised to pay in the context of the common organisation of the markets (Case 11/76 *Netherlands* v *Commission* [1979] ECR 245, paragraph 8; Case 18/76 *Germany* v *Commission* [1979] ECR 343, paragraph 7; and Case C-48/91 *Netherlands* v *Commission* [1993] ECR I-5611, paragraph 14).

28 Although it is therefore for the Commission to prove an infringement of the Community rules, the Member State concerned must demonstrate that the Commission committed an error as to the financial consequences to be attributed to it (see, to this effect, Case 49/83 *Luxembourg* v *Commission* [1984] ECR 2931, paragraph 30).

29 The Commission is not compelled to prove that there have been losses but may simply adduce highly significant evidence to that effect. The reason for this mitigation of the burden of proof on the Commission lies in the division of powers between the Community and the Member States concerning the common agricultural policy (see, to that effect, Case C-48/91 *Netherlands* v *Commission*, cited above, paragraph 17).

30 The management of EAGGF finances is principally in the hands of the national administrative authorities responsible for ensuring that the Community rules are strictly observed. That system, based on trust between national and Community

authorities, does not involve any systematic supervision by the Commission, which moreover would in practice be quite unable to carry it 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 (Case C-48/91 *Netherlands* v *Commission*, cited above, paragraph 11).

31 The limits to the extent of the evidence which the Commission must provide are confirmed by the guidelines laid down in the Belle Group Report according to which, for those difficult cases where the extent of the losses cannot be ascertained, 'the losses to the Community funds must ... be determined by an evaluation of the risk to which they are exposed by the control deficiency'.

32 As has been stated at paragraph 23 of the present judgment, the Commission properly assessed that causal link.

33 In those circumstances, the second plea in law must be rejected.

Incorrect assessment of the alleged losses incurred by the EAGGF

34 By its third plea in law, the Irish Government alleges that the Commission undertook an incorrect assessment of the amount of the alleged losses incurred by the EAGGF.

35 In the Irish Government's submission, the risk of loss to the EAGGF in 1991 was no more than 1% of the sale price of the quantity of beef bought into intervention, which is the equivalent of the difference between the deboning yield obtained in Ireland and that obtained in the other Member States.

36 First of all, it must be noted here that, as the Court has consistently held (Case 347/85, cited above, paragraph 13) where it proves impossible to establish with certainty the extent to which a national measure that is incompatible with Community law has caused an increase in the expenditure entered under a budgetary item of the EAGGF, the Commission has no choice but to disallow all the expenditure in question.

37 It must further be observed that, where the Commission, instead of rejecting all the expenditure affected by the infringement, has endeavoured to establish the financial impact of the unlawful action by means of calculations based on an assessment of what the situation on the relevant market would have been if the infringement had not occurred, the burden of proving that those calculations are not correct rests on the Member State (Case 347/85, cited above, paragraph 15).

38 In this connection, it is noteworthy that in the light of the Commission's arguments in its defence, Ireland acknowledged that the difference in yield obtained by comparison with the other Member States was 1.96%. It follows that, on the basis of Ireland's own statements alone, a 2% correction was already justified.

39 The Commission has also demonstrated other weaknesses in the control system. In particular it found that the quantity of meat after deboning had not been checked at all. In addition, it found upon checking that more than 10% of the meat sampled did not meet the standards for quality, fat-content and offal.

40 In those circumstances, the amount of the reduction imposed by the Commission does not appear unjustified.

41 In view of the foregoing considerations, the third plea in law must be rejected.

Infringement of the guidelines laid down in the Belle Group Report

42 By its fourth plea in law, Ireland claims that, when setting rates of correction, the Commission should have taken account of the mitigating circumstance that the national authorities had taken effective steps to remedy the deficiencies as soon as they were brought to light.

43 The short answer to that point is that the mitigating circumstance relied upon by Ireland was duly taken into account by the Commission, since the correction applied in respect of 1991 was reduced from 10 to 5% (see paragraphs 16 and 17 above).

44 The fourth plea must therefore also be rejected.

Lack of legal basis

45 By its fifth plea in law, the Irish Government submits that the Commission seeks to apply deductions to perfectly valid expenditure incurred by Ireland in 1992 in accordance with Articles 2 and 3 of Regulation No 729/70 and therefore chargeable to the EAGGF. By refusing to charge to the EAGGF any amount in excess of its probable losses by reason of weaknesses in control procedures of Ireland, the Commission is effectively imposing a penalty on Ireland for which no jurisdiction exists under the Treaty or any relevant regulation.

46 It need only be observed here that, where it proves impossible to establish with certainty the extent to which a national measure that is incompatible with Community law has caused an increase in the expenditure entered under a budgetary item of the EAGGF, it is open to the Commission to disallow all the expenditure in question (see Case 347/85, cited above, paragraph 13).

47 For the reasons given in paragraphs 23, 38, 39 and 43 of the present judgment, there is, moreover, nothing to indicate that the corrections applied exceed the losses to the Community budget.

48 Since it is based on a false premiss, the fifth plea in law must therefore be rejected.

The financial corrections in respect of intervention measures in the beef and veal sector

49 The basic rules for the common organisation of the market in beef and veal are contained in Regulation (EEC) No 805/68 of the Council of 27 June 1968 (OJ, English Special Edition 1968(I), p. 187). Article 6 of that regulation authorises the Commission to intervene with a view to maintaining prices on the Community markets. Regulation No 805/68 was amended in particular by Council Regulation (EEC) No 571/89 of 2 March 1989 (OJ 1989 L 61, p. 43), the version as thus amended (hereinafter 'Regulation No 805/68') being that applicable to the relevant period in the present case (1992 and 1993).

50 Until 1989, there was a system of automatic intervention buying when prices fell below certain thresholds, with the result that very large quantities were purchased by the intervention agencies at prices exceeding the market price.

51 In order to remedy that unsatisfactory situation, the system was reformed in 1989. Whilst preserving automatic buying-in in the event of a very large fall in prices, a system of buying-in by tendering procedures was introduced with a view to ensuring that the quantities bought in and the prices paid out did not go beyond what was required for reasonable support of the market.

52 Thus, under Article 6(2) of Regulation No 805/68, the Council sets the intervention price each year. When market prices in the Community fall below certain percentages of the intervention price, the intervention agencies in one or more Member States may buy in certain categories, qualities or quality groups of beef and veal originating in the Community, under the conditions laid down in Article 6.

53 The buying-in is organised under tender procedures. Under Article 6(1), such purchases may not exceed a quantity of 220 000 tonnes per year for the entire Community.

54 However, under Article 6(5), in the event of a very steep fall in prices a procedure is implemented whereby all offers at or below 80% of the intervention price are then accepted and are not counted against the maximum quantity referred to in Article 6(1) (the 'safety-net' procedure).

55 Under Article 6(6), tender procedures must ensure equality of access for all persons concerned and those procedures are opened on the basis of specifications.

56 In accordance with Article 6(7), the procedures implementing the intervention system are adopted by the Commission, which also decides on the opening and suspension of tender procedures after consulting a management committee. During the period to which the present case relates, those procedures were defined by 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).

57 Article 7 of Regulation No 859/89 provides that the decision to open buying-in by invitation to tender is to be published in the *Official Journal of the European Communities* on the Saturday or the Tuesday before the first deadline for the submission of tenders. Under Article 8, during the period in which the invitation to tender is open, the deadline for the submission of tenders is 12 noon (Brussels time) on the second and fourth Wednesday of each month.

58 Article 9 of Regulation No 859/89, which lies at the centre of the dispute, provides:

'1. 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.

2. 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.

3. Tenders shall specify:

(a) the name and address of the tenderer;

(b) the quantity tendered for, expressed in tonnes, of the products and categories specified in the notice of invitation to tender;

(c) the price tendered per 100 kilograms of products of quality R3 ...;

(d) the intervention centre or centres to which the tenderer intends to deliver the product.

...'

59 Under Article 9(4)(c) of that regulation, tenderers must prove that they lodged a security for the tender by the final date for submission of tenders and, in accordance with Article 9(5) and (6), tenders may not be withdrawn after the deadline for their submission and are to be confidential.

60 It follows from Article 7 of Regulation No 859/89 that, at the opening of the invitation to tender, a minimum price may be fixed below which tenders are not accepted and from Article 8 that intervention agencies are to notify the Commission of the tenders they have received within 24 hours of the expiry of the time-limit for their submission.

61 Article 11(1) of Regulation No 859/89 provides that, in the light of the tenders received in response to each invitation to tender and after consultation of the management committee, the Commission is to fix a maximum buying-in price; a different price may be set to reflect average market prices for individual Member States or regions within a Member State if special circumstances so require. According to Article 11(2), a decision may also be taken not to proceed with the invitation to tender and, under Article 11(3), if the total of the quantities tendered at a price at or below the maximum price exceeds the quantities to be bought in, a reduction coefficient may be applied to the quantities awarded.

62 Article 12 of Regulation No 859/89 provides that tenders are not to be accepted if the price proposed is higher than the maximum price laid down and Article 10(2) provides that the security is to be released entirely if the tender is not accepted.

63 According to Article 13 of Regulation No 859/89, if the tender is accepted, the security is to be released entirely if the quantity delivered represents at least 95% of the quantity tendered. If the quantity delivered comprises between 85 and 95% of the quantity tendered, the security is to be forfeited to the intervention agencies

in proportion to the quantities lacking, except in cases of *force majeure*. In all other cases, it is to be forfeited to the intervention agencies entirely, except in the event of *force majeure*.

64 The requirement that a security be lodged was introduced in order to put an end to the practice of inflated tenders.

65 Article 12(2) of Regulation No 859/89 provides that rights and obligations arising from the invitation to tender are not to be transferable. Under Article 15 the intervention agency is to pay the successful tenderer the price indicated in his tender.

66 After the facts in the present case arose, Regulation No 859/89 was repealed and replaced by Commission Regulation (EEC) No 2456/93 of 1 September 1993 laying down detailed rules for the application of Regulation No 805/68 as regards the general and special intervention measures for beef (OJ 1993 L 225, p. 4). In place of Article 9 of Regulation No 859/89, there was a new detailed provision concerning the persons eligible to submit tenders, Article 11 of Regulation No 2456/93, which provides that:

'1. Only the following may submit tenders:

(a) slaughterhouses for bovine animals approved in accordance with Directive 64/433/EEC, and not enjoying a derogation under Article 2 of Directive 91/498/EEC, whatever their legal status, and

(b) livestock or meat traders who have slaughtering undertaken therein on their own account and who are entered in a public register under an individual number.

2. In response to invitations to tender, interested parties shall forward tenders to the intervention agencies of the Member States in which they are opened, either by lodging a written bid against a receipt or by any other written means of communication accepted by the intervention agency, with advice of receipt.

Separate tenders shall be submitted for each type of invitation to tender.

3. 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 ... 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.

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

4. ...'

67 Between 1990 and 1992, as a result of a combination of various circumstances (mad cow disease (BSE), the reunification of Germany, the Gulf War, developments in relations with Eastern Europe, etc.), the Community beef market underwent an unprecedented crisis which, as from the financial year 1991, led to a consistent increase in Community budgetary expenditure. Community beef intervention purchases rose from 540 000 tonnes in 1987 to 1 030 000 tonnes in 1991, an increase of 90.7% in the space of four years.

68 According to the Commission, a number of undertakings submitted several tenders in the context of a single tender procedure. In its 1991 Summary Report it stated:

'Ireland

... As many as nine individual offers were being made by the same group at prices within a few pence of each other. The same situation was detected in all adjudication procedures examined and must be viewed as widespread. An example best describes the general situation:

— 56th tender, closing date: 22 October 1991

* A total of 68 offers were made at prices ranging from 256.75 to 255.50 ECU/100 kg.

* Of these, 58 offers were finally accepted at prices ranging from 255.80 to 255.50 ECU/100 kg.

* By comparison of names, addresses, telefax, telex numbers etc., the audit team was able to establish that the 68 offers had originated from about 20 different sources although, naturally, company names and registration numbers were different and in all but a few cases, offers had been signed by different persons. It could also be regularly established that offers from members of the same group were made on photocopies with only the individual details per company being entered separately.

The most classic example was detected in the context of the 65th tendering procedure under Regulation No 771/92 with a closing date for tenders of 24 March 1992 where the EAGGF found in respect of one group:

— All nine offers gave the same address, telephone number, telex number, telefax number and intervention centre for delivery and even the word "manager" was clearly photocopied from an original in each case.

— All nine offers were datestamped and timed as arriving at 10h40 on 24 March 1992.

— All invoices bore the same heading details including bank account number although the originally printed company name had been replaced, sometimes crudely, with the name of the tendering company. Indeed, the invoices were even consecutively numbered.

In view of all this, the EAGGF concludes that these offers were totally connected and originated from the same source, and that this connection must have been evident to the adjudication committees in the Member States concerned. Such an example, although extreme, is typical of documentation viewed for other "group" offers. Subsequent enquiry at the companies' offices has revealed that six of the companies were all formed between 17 and 30 May 1990 and that all payments

during 1991 were registered as paid under the same trader reference number held by the Department of Agriculture.'

69 According to the Commission, those practices were expressly prohibited by the applicable Community rules and totally incompatible with the purpose of the intervention scheme. In its summary report, it found that there had been infringement of Article 9(2) (submission of a single tender per tenderer in response to each invitation to tender), Article 12(2) (non-transferability of rights and obligations arising from the invitation to tender), Article 9(4)(c) (lodging of a security by the tenderer himself) and Article 15(1) (payment of the price to the tenderer) of Regulation No 859/89.

70 The Commission concluded that this practice had been adopted by tenderers in order to sell the greatest possible amount of meat into intervention at the highest possible prices, while significantly reducing the risk of losing their security. According to the Commission, where the quantity actually delivered was lower than that which should have been delivered, the splitting of one tender into several made it possible in fact to honour at least some of the tenders and therefore to recover the relevant securities.

71 In its 1992 Summary Report, the Commission, 'in view of the serious and systematic nature of the abuses found in ... Ireland', maintained its position with regard to the 1992 accounts (p. 121).

72 In response to the Commission's argument that the competent national authorities should have intervened in order to stop such practices, the Irish authorities objected that Regulation No 859/89 did not authorise them to intervene where tenders were made by separate legal entities.

73 The matter was referred to the Conciliation Body established by the Commission on its own initiative by Decision 94/442.

74 The Conciliation Body took the view that it could not state with any certainty that the tender procedure followed by the Member States was contrary to Regulation No 859/89. It observed that, in any event, it had subsequently been deemed necessary to explain the rules contained in Regulation No 859/89. The Conciliation Body also pointed out that the Commission had failed to react before 1993 to the Member States' practice.

75 Notwithstanding the conclusions of the Conciliation Body, the Commission adopted the contested decision.

76 In support of its application, Ireland relies on three pleas in law alleging that (i) the practice followed within its territory was lawful, (ii) the EAGGF had suffered no harm and (iii) there had been a breach of the principles of legitimate expectation and proportionality and of the criteria of the Belle Group Report.

Lawfulness of the practice followed in Ireland

77 By its first plea in law, the Irish Government submits that the practice of accepting tenders from any legal entity during the relevant period was lawful. There was no legal basis in 1991 and 1992 for the national intervention bodies to reject offers made by separate legal entities on the ground that those entities were not independent of other tenderers.

78 The possibility of a connection between tenderers was not taken into consideration until after the period with which the present case is concerned, in Regulation No 2456/93, which repealed Regulation No 859/89. The second subparagraph of Article 11(3) of Regulation No 2456/93 was the first provision to require that tenderers be independent of each other.

79 The Irish Government also claims that, if Regulation No 859/89 had intended to prohibit associated companies from (each) lodging tenders, Article 9(3) of that regulation, which states clearly the information to be included in the tender, would have required the ownership or group membership of the tenderer to be specified. Failing that, a separate provision would have either precluded a Member State from accepting tenders from companies associated with each other, or provided for a register of persons entitled to tender, specifying requirements as to non-registration of companies within the same commercial group. In the present case, there are no such provisions.

80 The Commission draws a distinction between the term 'tenderer' as used in Article 9(1) of Regulation No 859/89 and the concept of 'interested parties' as used in Article 9(2). Whereas the tenderer is merely the person submitting a tender, the term 'interested party' covers a wider circle. In its view, the prohibition laid down in Article 9(2) of the regulation precluding tenderers from submitting more than one tender per category in response to each invitation to tender would be rendered redundant if it were possible for the same interested party to make several tenders through tenderers who are *de jure* separate but *de facto* connected.

81 The first point to be borne in mind here is the need to ensure legal certainty, which means that rules must enable those concerned to know precisely the extent of the obligations which they impose on them (see, to that effect, Case 348/85 *Denmark* v *Commission* [1987] ECR 5225, paragraph 19). The Commission thus cannot choose, at the time of the clearance of EAGGF accounts, an interpretation which departs from and is not dictated by the normal meaning of the words used (see, to that effect, Case 349/85 *Denmark* v *Commission* [1988] ECR 169, paragraphs 15 and 16).

82 In this regard, the last sentence of Article 9(2) of Regulation No 859/89 merely provides that interested parties may submit one tender only per category in response to each invitation to tender. That wording cannot therefore provide any support for the interpretation claimed by the Commission that, on account of the difference in meaning between the words 'interested party' and 'tenderers', the latter may submit one tender only in response to an invitation to tender where they are part of a single group.

83 It is only since the entry into force of Regulation No 2456/93 that the Community rules have contained provisions on interconnections between tenderers. To uphold the interpretation of Article 9(2) of Regulation No 859/89 suggested by the Commission would be tantamount to applying Article 11 of Regulation No 2456/93 retroactively.

84 However, the contested decision does not fall to be annulled on the basis of the plea in law put forward by the Irish Government, since it contains other factual and legal grounds which provide it with a sufficient statement of reasons.

85 The EAGGF's 1991 Summary Report stated that payments had been made to companies other than tenderers and that systematic cross-checking of names, addresses and fax, telex, bank account and invoice numbers had led to the conclusion that individual tenders came from the same source.

86 That evidence was such as to give rise to serious suspicions that the prohibition on tenderers submitting more than one tender per category in response to each invitation to tender had been circumvented by the use of other names in order to disguise the fact that the tenders in actual fact emanated from a single operator. In view of the division of powers between the Community and the Member States in the field of the common agricultural policy, those were matters which called for inspection and investigation by the latter.

87 The management of EAGGF finances is principally in the hands of the national administrative authorities responsible for ensuring that the Community rules are strictly observed. That system, based on trust between national and community authorities, does not involve any systematic supervision by the Commission, which moreover would in practice be quite unable to carry it out. Only the intervention agencies are in a position to provide the information necessary for setting a maximum buying-in price and, where necessary, a reduction coefficient, since the Commission is not close enough to obtain the information it needs from the economic operators (see, to this effect, Case C-48/91 *Netherlands* v *Commission*, cited above, paragraph 11).

88 By failing to carry out such inquiries, Ireland failed to fulfil its obligations under Article 8(1) of Regulation No 729/70 (see Case C-2/93 *Exportslachterijen van Oordegem* v *Belgische Dienst voor Bedrijfsleven en Landbouw* [1994] ECR I-2283, paragraphs 16 to 18).

89 That provision, which constitutes a specific expression in the agricultural area of the obligations imposed on Member States by Article 5 of the EC Treaty, defines the principles according to which the Community and the Member States must ensure the implementation of Community decisions on agricultural intervention financed by the EAGGF and combat fraud and irregularities in relation to those operations (see Joined Cases 146/81, 192/81 and 193/81 *BayWa and Others* v *Bundesanstalt für Landwirtschaftliche Marktordnung* [1982] ECR 1503, paragraph 13). It imposes on the Member States the general obligation to take the measures necessary to satisfy themselves that the transactions financed by the EAGGF are actually carried out and are executed correctly, even if the specific Community act does not expressly provide for the adoption of particular supervisory measures (see Case C-8/88 *Germany* v *Commission* [1990] ECR I-2321, paragraphs 16 and 17).

90 Moreover, the EAGGF found that there had been an infringement of more than Article 9(2) of Regulation No 859/89. It also pointed out that the practices referred to at paragraph 85 of the present judgment breached the prohibition on the transfer of rights and obligations arising from the tender procedure (Article 12(2) of Regulation No 859/89) and the tenderers' obligation to lodge a security (Article 9(4)(c))

and to receive payment personally (Article 15) (pp. 103 and 104 of the Summary Report).

91 The EAGGF was thereby alleging that Irish tenderers had breached the rule that tenders must be independent, an essential requirement for the validity and effectiveness of any tender procedure, which underlies not only the abovementioned provisions but also Article 9(6) of Regulation No 859/89 (confidentiality of tenders) and Article 6(6) of Regulation No 805/68 (equality of access for all persons concerned). Although that rule does not prevent several companies belonging to one group from taking part at the same time in one tender procedure, it does preclude those same companies from agreeing on the terms and conditions of the tenders which they each submit, if the tender procedure is not to be distorted.

92 In view of the foregoing considerations, the first plea in law must be rejected.

Absence of harm to the EAGGF and breach of the principles of legitimate expectation and proportionality and of the criteria of the Belle Group Report

93 By its second plea in law, the Irish Government claims, in the alternative, that the tender procedures in Ireland did not lead to the purchase of greater quantities of beef at higher prices. Indeed, during negotiations, the Commission withdrew that allegation, which appeared in the 1991 Summary Report.

94 It also disputes that the practice of submitting multiple tenders reduces the risk of forfeiting the security. It points out that the amounts forfeited in Ireland in 1991

and 1992 were very small (£18 268.44 in 1992 in respect of a total security of £86 696 135.57).

95 Furthermore, during 1991 and 1992, 63% of the total quantity of beef taken into intervention in Ireland was taken in under the 'safety-net' arrangements. Since that procedure gave rise to the acceptance of all the tenders, there was no need to make speculative offers. However, multiple tenders were also submitted during those periods, which suggests that, in Ireland, the practice was not designed to reduce the risk of incurring a security forfeiture.

96 By its third plea in law, the Irish Government claims, also in the alternative, first, that the central role of the Commission in the procedure for the acceptance of tenders requires it, where it is aware of a practice which it considers not to be in conformity with the Community rules, to inform the Member State concerned. If it fails to do so and not only continues to make advances to the Member State for payments out of the EAGGF but also permits the Member State to make such payments then it may not subsequently refuse to charge those amounts to the EAGGF.

97 Secondly, withholding 2% of the expenditure incurred in stocking the meat in Ireland would unjustly enrich the EAGGF. Ireland relies on a precedent in which the Commission, upon determining that a Member State was in technical breach of a Community rule but that the breach was unlikely to have given rise to any significant loss of Community funds, made a flat-rate deduction of 0.25% of the expenditure in question (Case C-22/89 *Netherlands* v *Commission* [1990] ECR I-4799). The principle of non-discrimination now requires that Ireland should at least be given similar treatment.

98 Thirdly, it is apparent from the Belle Group Report that, where the Commission proposes making a flat-rate deduction by reason of an alleged control deficiency by a Member State, it must make an assessment of the risk to which Community funds have been put by that deficiency. In the present case, the Commission

accepted that the practices at issue did not involve any risk to Community funds. Hence the Commission did not respect the criteria in the Belle Group Report.

99 Fourthly, Ireland alleges that the Commission was in breach of the guidelines in the Belle Group Report in so far as it made two separate flat-rate deductions (5% and 2%) in respect of the same expenditure declared by Ireland as a result of irregularities detected, first, in the control of storage of beef and, second, concerning intervention beef purchases. The criteria in the Belle Group Report clearly imply that the Commission can make only one assessment of the overall risk to Community funds by reason of alleged control deficiencies in any one sector in any one year, and only one flat-rate deduction.

100 The Court has consistently held that Articles 2 and 3 of Regulation No 729/70 permit the Commission to charge to the EAGGF only sums paid in accordance with the rules laid down in the various sectors of agricultural production, leaving the Member States to bear the burden of any other sum paid, and in particular any amounts which the national authorities wrongly believed themselves authorised to pay in the context of the common organisation of the markets (Case 11/76 *Netherlands* v *Commission*, cited above, paragraph 8; Case 18/76 *Germany* v *Commission*, cited above, paragraph 7; and Case C-48/91 *Netherlands* v *Commission*, cited above, paragraph 14).

101 Although it is therefore for the Commission to prove an infringement of the Community rules, the Member State concerned must demonstrate that the Commission committed an error as to the financial consequences to be attributed to it (see, to this effect, Case 49/83 *Luxembourg* v *Commission*, cited above, paragraph 30).

102 In the present case, it is apparent from paragraphs 85 to 90 of the present judgment that the Commission has established that Ireland infringed several Community rules in the field of agriculture.

103 In addition, it indicated how it was possible for the unlawful conduct of the Irish tenderers to have led to an erroneous assessment of the market by the Community authorities likely to result in the purchase of excessive quantities of beef and veal, possibly at higher prices. In so doing, it established the probability that harm was caused to the Community budget. The Commission cannot be required to do more than that, since it cannot carry out the systematic checks and since analysis of the current state of a given market depends on information gathered by the Member States (see Case C-48/91 *Netherlands* v *Commission*, cited above, paragraph 17).

104 In this connection, no decisive argument can be derived from the limited amount of the securities forfeited to the intervention agencies since multiple offers, as described in the summary report cited at paragraph 68 above and which lead to successful speculation, by definition do not entail any loss of security.

105 Nor has the Irish Government shown that the conduct for which it was responsible did not lead to an increase in expenditure in the context of the EAGGF.

106 Moreover, it is apparent from the correspondence produced by the Commission that the Irish authorities acknowledged on two occasions, in the course of negotiations with it, that use of the device of connected companies in order to reduce the risk of security loss was widespread (see point 90 of the Advocate General's Opinion).

107 So far as concerns the Irish Government's argument regarding reliance on the 'safety net' procedure, suffice it to observe that, even at that time, more than one third of the meat continued to be purchased in accordance with normal procedure under which the submission of linked tenders could have been advantageous to traders.

108 As for the setting of two corrections in 1991, it must be noted that, having identified separate risks arising from different deficiencies in the control system, the Commission was entitled to assess them separately. Moreover, as the Court has consistently held, the Commission, instead of seeking to establish the financial impact of the failure of the Irish monitoring authorities to fulfil their obligations, could have rejected the entire expenditure tainted by the infringement (see Case 347/85, cited above, paragraph 13).

109 Finally, having regard to the essential nature of the formalities which were not complied with and of the probability 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 (Case C-49/94 *Ireland* v *Commission* [1995] ECR I-2683, paragraph 22).

110 In the circumstances, the second and third pleas in law must be rejected.

111 In view of the foregoing considerations, the application must be dismissed in its entirety.

Costs

112 Under the first sentence of Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since Ireland has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber),

hereby:

1) Dismisses the application;

2) Orders Ireland to pay the costs.

Gulmann Wathelet Moitinho de Almeida

Puissochet Sevón

Delivered in open court in Luxembourg on 1 October 1998.

R. Grass C. Gulmann

Registrar President of the Fifth Chamber