OPINION OF ADVOCATE GENERAL ALBER

delivered on 21 October 1999 *

A — Introduction

1. By this action Belgium seeks the annulment of Commission Decision 97/333/EC of 23 April 1997 on the clearance of the accounts presented by the Member States in respect of the expenditure for 1993 on the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (hereinafter EAGGF) [1] in so far as it disallowed, in respect of the applicant, Community financing to the amount of BEF 413 309 611 for expenditure on the advance payment of export refunds.

2. During inspections carried out in 1993 and 1994 the Commission had found grave deficiencies in the control system [2] in Belgium and consequently applied financial corrections. For Belgium, expenditure to the amount sued for in this case on the prefinancing of export refunds [3] in the beef and veal and cereals sectors was not recognised.

3. To summarise, Belgium raises four complaints against the Commission, in the following order:

1. It infringed the principle of sincere cooperation, since it disregarded the observations made by Belgium. There was thus also a breach of the duty of care and the duty to state reasons.

2. It wrongly applied a flat-rate reduction (of 10%) to all expenditure reported by Belgium in the sectors mentioned.

* Original language: German.

1 — OJ 1997 L 139, p. 30.

2 — On the requirements of the checks to be carried out from the Community law point of view, see paragraphs 34 to 43 below.

3 — On the prefinancing system, see paragraphs 25 to 33 below.

3. A 10% reduction did not in any case comply with the guidelines set in place by the Commission itself.

4. There was unjustified discrimination, since the reductions in the beef and veal sector for other Member States had been of only 5%.

B — Facts of the case

4. In connection with the clearance of the accounts for the 1993 (and 1994) financial years the Commission had carried out checks between 12 and 16 September 1994 at the customs offices of Leuven and Aalst, and between 7 and 14 November 1994 at the customs offices of Beauraing and Dendermonde. These checks concerned in particular the prefinancing systems in the cereals sector (Leuven and Aalst) and the beef and veal sector (Beauraing and Dendermonde).

5. The Commission notified the competent Belgian authorities of the results of the checks carried out in Leuven and Aalst, first in French on 24 November 1994 and then in Dutch on 5 January 1995. The Belgian (customs) authorities replied by letter dated 29 December 1994.

6. The Commission communicated its results for the customs offices of Beauraing and Dendermonde by letter dated 2 March 1995, to which it received a reply on 16 May 1995.

7. On 27 September 1995 a meeting took place between the Commission and representatives of the Belgian authorities, at which the results of the checks carried out by the Commission's staff were discussed. Following this meeting the Commission, by letters dated 7 November 1995 (French version) and 21 November 1995 (Dutch version), conveyed the results of the checks carried out in connection with the clearance of the accounts. At the same time it requested additional documentation from the Belgian authorities. The documents requested were sent by the Ministry of Agriculture by letters dated 22 December 1995, 15 January 1996 and 16 February 1996. The customs administration also sent a letter on 28 March 1996.

8. The Commission conveyed the conclusions of its investigations by letters dated 8 July 1996 (English version) and 19 July 1996 (Dutch version). In this document the Commission set out in detail its objections and the associated financial consequences for the clearance of the accounts.

9. The Commission indicated in a letter dated 19 July 1996 the level of financial correction to be applied for the 1993 financial year.

10. The Belgian Government thereupon requested on 1 October 1996 the conciliation procedure provided for under Article 2(1) of Decision 94/442/EC.[4] In the context of this conciliation procedure, a meeting took place on 5 December 1996 between the parties concerned. The conciliation body's report was adopted on 13 February 1997.

11. The Commission had already completed a draft of its Summary Report on 31 December 1996, largely informed by the remarks made in its conclusions of 8 and 19 July 1996.

12. The Summary Report was discussed in the Commission's EAGGF committee on 3 March 1997.

13. On 23 April 1997 the Commission adopted the contested decision on the basis of the Summary Report. For Belgium, France, Germany and the Netherlands the decision imposed flat-rate reductions of 10% of reported expenditure in the cereals sector. For the prefinancing of export refunds for beef and veal, reductions were fixed at 5% for France, Germany, Italy and the Netherlands, but at 10% for Belgium.

14. The Belgian Government takes the view that the Commission, in adopting the contested decision, has

1. infringed Article 5(2) of Regulation (EEC) No 729/70,[5] the principle of sincere cooperation resulting from Article 5 of the EC Treaty (now Article 10 EC), Article 190 of the EC Treaty (duty to state reasons) (now Article 253 EC) and the duty of care by the fact that it disregarded the facts produced by the Belgian authorities without giving any reasons for doing so. If these submissions had been taken into account and examined, the Commission would have had to refrain, completely or partly, from applying a flat-rate correction or to apply a lower correction factor.

4 — Commission Decision 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).

5 — 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), last amended by Council Regulation (EC) No 1287/95 of 22 May 1995 amending Regulation (EEC) No 729/70 on the financing of the common agricultural policy (OJ 1995 L 125, p. 1). On the contents of Article 5 of Regulation No 729/70 see paragraph 21.

2. imposed a flat-rate correction in breach of Regulations Nos 729/70 and (EEC) No 1723/72 [6] and of the duty to state reasons under Article 190 of the EC Treaty. However, the Belgian system did not present deficiencies as a whole; a 10% reduction is not justified and, moreover, is applied to areas in which no deficiencies had been found.

3. infringed the principle of legal certainty, the legal maxim *patere legem quam ipse fecisti* [7] and the provisions of Article 190 of the EC Treaty. The Commission set a correction factor of 10%, contrary to the provisions in force and the guidelines it had itself set in place, without giving any reasons or justification for doing so.

4. infringed the principle of equal treatment and is in breach of the duty to state reasons since it has imposed a reduction of only 5% for other Member States, but 10% for Belgium, without giving sufficient reasons for doing so.

6 — Regulation (EEC) No 1723/72 of the Commission of 26 July 1972 on making up accounts for the European Agricultural Guidance and Guarantee Fund, Guarantee Section (OJ, English Special Edition, Second Series III, p. 109).

7 — This legal maxim, which translates as 'Suffer the law which you yourself made', means that a body is bound by the rules which it has itself adopted.

15. The Kingdom of Belgium has therefore brought an action against the Commission and claims that the Court should:

1. annul Commission Decision 97/333/EC of 23 April 1997 on the clearance of the accounts presented by the Member States in respect of the expenditure for 1993 financed by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) in so far as it disallowed, in respect of the applicant, Community financing to the amount of BEF 413 309 611 for expenditure on the prefinancing of export refunds;

2. order the Commission to pay the costs.

16. The Commission contends that the Court should:

1. dismiss the action of the Kingdom of Belgium;

2. order the Kingdom of Belgium to pay the costs.

17. The Commission takes the view that the deficiencies it found in the Belgian control system justify a flat-rate reduction of 10% of the expenditure declared. The correction applied is, moreover, proportionate and does not constitute unjustified discrimination.

18. The further submissions of the parties are dealt with in the analysis below.

C — Relevant legal provisions

19. The provisions of Community law relevant in this case are listed below. In so far as these have to be returned to within the context of the Analysis, reference will be made to the paragraph numbers of this list.

Basic provisions

20. The basic provisions on the financing of the common agricultural policy are contained in Regulation No 729/70 (see footnote 5). Thus, under Article 2(1), the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) finances refunds on exports to third countries granted in accordance with the Community rules within the framework of the common organisation of the agricultural markets.

21. According to Article 5(2)(c), amended by Regulation No 1287/95 (see footnote 5), the Commission decides on the expenditure to be excluded from Community financing where it finds that expenditure has not been effected in compliance with Community rules. Before any decision to refuse financing is taken, the results of the Commission's checks and the replies of the Member State concerned must be notified in writing. Moreover, under Article 5, the two parties are to endeavour to reach agreement on the conclusions to be drawn. If no agreement is reached, the Member State may request the initiation of a conciliation procedure. Ultimately, the Commission evaluates the amounts to be excluded having regard in particular to the degree of non-compliance found. In so doing, according to Article 5, it is to take into account the nature and gravity of the infringement and the financial loss suffered by the Community.

22. Article 8(1) defines the obligations of the Member States as follows:

'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.

...'

23. According to Article 8(2), 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.

24. The basic rules governing the common organisation of the market for beef and veal are contained in Regulation (EEC) No 805/68, [8] and those for the cereals sector in Regulation (EEC) No 2727/75. [9] According to both those regulations, export refunds can be allowed only if evidence is adduced that the products have been exported out of the Community.

25. Exceptions to this principle are provided, in particular by Regulation (EEC) No 565/80, [10] in which basic rules are laid down for the payment, prior to export, of a sum equal to the export refunds for beef and veal or cereals. This regulation gives two options for prefinancing — 'prefinancing storage' and 'prefinancing processing'.

On the prefinancing system

26. Article 5 provides as follows:

'(1) An amount equal to the export refund shall, at the request of the party concerned,

8 — 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).

9 — Regulation (EEC) No 2727/75 of the Council of 29 October 1975 on the common organisation of the market in cereals (OJ 1975 L 281, p. 1).

10 — Council Regulation (EEC) No 565/80 of 4 March 1980 on the prefinancing of export refunds in respect of agricultural products (OJ 1980 L 62, p. 5).

be paid as soon as the products or goods have been brought under the customs warehousing or free zone procedure with a view to their being exported within a set time-limit.

(2) The arrangement provided for in this Article shall apply to products and goods intended for export without further processing when the products or goods are of a kind that can be stored.

...'

This system is also called prefinancing storage.

27. The second prefinancing option is given in Article 4:

'(1) An amount equal to the export refund shall, at the request of the party concerned, be paid as soon as the basic products are placed under customs control ensuring that the processed products or the goods will be exported within a set time-limit.

(2) The arrangement provided for in this Article shall apply to processed products and goods obtained from basic products provided that inward processing arrangements are not prohibited for comparable products.

...'

This system is also called prefinancing processing.

28. According to Article 2, for the purposes of this regulation, the following definitions apply:

'(a) — "products" means the products referred to in Article 1;

— "basic products" means products intended to be exported after processing into processed products or into goods;

(b) "processed products" means products:

— obtained from the processing of basic products, and

— to which an export refund is applicable,

...'.

29. Title II, Chapter 3, of Regulation (EEC) No 3665/87 [11] lays down the rules for advances on refunds where goods are processed or stored prior to export and thus for the application of Regulation No 565/80.

On the payment declaration and the information necessary for it

30. Under Article 25(1), admission to the prefinancing processing or prefinancing storage systems is subject to the lodging with the customs authorities of a declaration of intention (payment declaration) by the exporter. This request for payment is in practice referred to as the COM-7 declaration. According to Article 25(2), this payment declaration must '... include all such particulars as are necessary for determining the refund and, where applicable, the monetary compensatory amount in respect of the products or goods to be exported, in particular:

...

(b) the net mass of the product or goods, or, where applicable, the quantity expressed in the unit of measurement to be taken into account in calculating the refund or the monetary compensatory amount;

...

Furthermore, in cases where basic products are to be processed, the payment declaration shall include:

— a description of the basic products,

— the quantity of basic products,

11 — Commission Regulation (EEC) No 3665/87 of 27 November 1987 laying down common detailed rules for the application of the system of export refunds on agricultural products (OJ 1987 L 351, p. 1).

— the rate of yield or similar information.'

31. Article 26(1) provides that '[A]t the time of acceptance of the payment declaration, the products or goods shall be placed under customs control until they leave the customs territory of the Community or until they have reached their destination.'

On the prefinancing processing system and the principle of equivalence

32. For prefinancing processing, Article 27 provides as follows:

'(1) In respect of processed products or goods obtained from basic products, the result of a scrutiny of the payment declaration, whether or not combined with inspection of the basic products, shall be used for determining the refund and monetary compensatory amount.

...

(3) Basic products must form all or part of the processed products or goods which are exported. However, the basic products may, provided the competent authorities agree, be replaced by equivalent products, falling within the same subheading of the Combined Nomenclature, of the same commercial quality, having the same technical characteristics and meeting the requirements for the granting of an export refund.

...'

This provision contained in the third paragraph is also called the principle of equivalence.

On the prefinancing storage system

33. In connection with prefinancing storage, Article 28 provides as follows:

'(1) In respect of products or goods to be exported after having been under a customs warehousing or free zone procedure, the result of the scrutiny of the payment declaration and of the products or goods themselves shall be used for determining the refund and the monetary compensatory amount.

...

On special refunds

(4) Products or goods under a customs warehousing or free zone procedure may be subjected there, as provided by the competent authorities, to the following operations:

(a) stocktaking;

(b) the affixing to the goods or products themselves, or to their packings, of marks, seals, labels or other similar distinguishing signs, ...

...

Any refund or monetary compensatory amount applicable to goods or products which have been subjected to the forms of handling referred to above shall be determined in accordance with the quantity, nature and characteristics of the goods or products on the date laid down for the calculation of the refund, in accordance with the provisions of Article 26.

...'

34. Regulations (EEC) No 32/82 [12] and (EEC) No 1964/82 [13] laid down conditions for the granting of special export refunds on certain cuts of beef and veal. Under the former regulation, exports to certain non-member countries of fresh or chilled meat in the form of carcasses, half-carcasses, compensated quarters, forequarters and hindquarters are eligible for such refunds. Under the latter regulation, individually packaged boneless cuts from fresh or chilled hindquarters of adult male cattle are eligible.

35. In both cases the applicant has to submit proof that the goods intended for export also meet the requirements of both regulations. In addition, the Member States are obliged to carry out checks to ensure that the provisions of both regulations are complied with.

12 — Commission Regulation (EEC) No 32/82 of 7 January 1982 laying down the conditions for granting special export refunds for beef and veal (OJ 1982 L 4, p. 11).

13 — Commission Regulation (EEC) No 1964/82 of 20 July 1982 laying down the conditions for granting special export refunds on certain cuts of boned meat of bovine animals (OJ 1982 L 212, p. 48).

On checks

...

36. Article 3 of Regulation No 32/82 provides as follows:

'The Member States shall lay down the conditions for checking the products and for issuing the certificate ... These conditions may include the indication of a minimum quantity.

The Member States shall take the necessary measures to ensure that no substitution of products takes place between the time they are checked and the time they leave the Community's geographical territory ... These measures shall include identification of each product by means of an indelible mark on each quarter or by individual seal on each quarter. The slaughter and identification shall take place in the abattoir indicated by the party concerned ...'

37. According to Article 8 of Regulation No 1964/82, the Member States are to

'... determine the conditions for supervision and shall inform the Commission accordingly. They shall take all necessary measures to make substitution of the products in question impossible, in particular by identification of each piece of meat.

The bags, cartons or other packaging material in which the boned cuts are placed shall be officially sealed by the competent authorities and bear particulars enabling the boned meat to be identified, in particular the net weight, the type and the number of the cuts and a serial number.'

38. To regulate the monitoring carried out at the time of export of agricultural products receiving refunds or other amounts, Regulations (EEC) No 386/90 [14] and (EEC) No 2030/90 [15] were adopted. Article 1(1) of the former sets down 'certain procedures for monitoring whether operations conferring entitlement to the payment of refunds on and all other amounts in respect of export transactions have been actually carried out and executed correctly.'

39. The monitoring procedures to be carried out by the Member States are laid down in Articles 2 and 3 of Regulation No 386/90.

14 — Council Regulation (EEC) No 386/90 of 12 February 1990 on the monitoring carried out at the time of export of agricultural products receiving refunds or other amounts (OJ 1990 L 42, p. 6), last amended by Council Regulation (EC) No 163/94 of 24 January 1994 amending Regulation (EEC) No 386/90 on the monitoring carried out at the time of export of agricultural products receiving refunds or other amounts (OJ 1990 L 24, p. 2).

15 — Commission Regulation (EEC) No 2030/90 of 17 July 1990 laying down detailed rules for the application of Council Regulation (EEC) No 386/90 as regards physical checks carried out at the time of export of agricultural products attracting refunds or other amounts (OJ 1990 L 186, p. 6).

40. First, Article 2 states that:

'Member States shall carry out:

(a) physical checks on goods in accordance with Article 3 and Article 3(a), at the time the customs export formalities are completed and before authorisation is given for the goods in question to be exported, on the basis of documents submitted in support of the export declaration, and

(b) scrutiny of the documents in the payment application file in accordance with Article 4.'

41. This is followed by Article 3, which provides that:

'(1) Without prejudice to any specific provisions which require more extensive checks, the physical checks referred to in Article 2(a) must:

(a) take the form of spot checks conducted frequently and without prior warning;

(b) in any event, relate to not less than 5% of the export declarations in respect of which applications are submitted for the amounts specified in Article 1(1).

(2) In accordance with the detailed rules to be determined under the procedure referred to in Article 6, the rate mentioned in paragraph 1(b) shall apply:

— per customs office,

— per calendar year, and

— per product sector.

However, the rate of 5% per product sector may be replaced by a rate of 5% covering all sectors in so far as the Member State applies a selection system based on a risk analysis carried out in accordance with the procedure laid down in Article 6. In this case, a minimum rate of 2% shall be compulsory per product sector.'

42. The second regulation mentioned in paragraph 38 above, Regulation No 2030/90, lays down the following regarding physical checks on goods in the detailed rules for implementation contained in Article 5(1):

'The physical checks shall be carried out:

(a) during the period between the lodging of the export declaration and authorisation to export the goods; and

...'.

43. According to Article 6(1), 'in cases where the refund is paid in advance in accordance with Articles 24 to 29 of Regulation (EEC) No 3665/87, the physical checks carried out at the time of or during storage and, where appropriate, at the time of processing may be taken into account for calculating the minimum rate of checks referred to in Article 3 of Regulation (EEC) No 386/90 provided the following conditions are fulfilled:

(a) the physical checks carried out prior to the completion of the customs export formalities meet the same criteria of intensity as those to be carried out normally during the periods referred to in Article 5, and

(b) the products and goods which have been the subject of previous physical checks are identical to those which are the subject of the export declaration.'

On the calculation of reductions (Belle Group Report)

44. The Commission's Belle Group Report lays down guidelines to be followed when financial corrections must be applied to a Member State. In addition to three methods of calculating concrete reductions the Belle

Group Report also sets out the following 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.'

45. Where there is doubt as to the correction factor to be applied, the guidelines also allow the following points to 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.'

46. According to the guidelines laid down in this Report it is thus essential for determining the level of correction to be applied to assess first of all the risk of loss to the EAGGF on the basis of the deficiencies found. This is done essentially by taking account of the effectiveness of the entire control system, of individual elements of supervision or of the implementation of such supervision. The gravity of the deficiencies and the steps taken to combat fraud are also to be taken into consideration.

47. The Commission may, according to the guidelines, apply flat-rate corrections where it is not possible to determine the precise amounts paid out to the detriment of the EAGGF. In this event it is considered sufficient if there was merely a risk of loss.

D — Preliminary remark on the procedure for clearing the accounts — principles of case-law

48. The first thing that has to be said is that the procedure for clearing the accounts is intended to guarantee that the means made available to the Member States have been used in compliance with the Community rules prevailing in connection with the common organisation of markets.

49. According to the case-law of the Court of Justice, Article 8(1) of Regulation No 729/70 (see paragraph 22 above), which expressly lays down in that specific area 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. It imposes on the Member States the 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. [16]

50. Where the Commission refuses to charge certain expenditure to the EAGGF on the ground that it was incurred as a result of breaches of Community rules for which a Member State can be held responsible, it is, under settled case-law, required not to demonstrate exhaustively that the information supplied by the Member States is inaccurate, but merely to adduce evidence of serious and reasonable doubt on its part regarding the figures submitted by the national authorities. [17] Accordingly, if, when refusing to charge certain expenditure to the EAGGF, the Commission asserts that there has been a breach of the rules of the common organisation of agricultural markets, it has to justify its decision and state how the absence of, or deficiencies in, the inspection procedures operated by the Member State concerned were detected. [18]

51. Consequently, it is for the Member State to demonstrate the inaccuracy of the Commission's calculations or statements and to adduce detailed and comprehensive evidence that its own data and figures are correct. [19] As transpires from the aforementioned judgment, the Member State concerned cannot cast doubt on the Commission's statements by mere allegations but must cite concrete facts capable for example of proving the existence of a reliable and operational control system. (The reason for this mitigation of the

16 — See judgments in Case C-2/93 *Exportslachterijen van Oordegem* [1994] ECR I-2283, paragraphs 17 and 18, and in Case C-235/97 *France* v *Commission* [1998] ECR I-7555, paragraph 45.

17 — Thus most recently in the judgment in Case C-28/94 *Netherlands* v *Commission* [1999] ECR I-1973, paragraph 40, with further case-law references.

18 — Judgments in Case C-242/96 *Italy* v *Commission* [1998] ECR I-5863, paragraph 58, and in Case C-8/88 *Germany* v *Commission* [1990] ECR I-2321, paragraph 23.

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

burden of proof on the Commission is that it is the Member State which is best placed to collect and verify the data required for the clearance of the EAGGF accounts.)

52. If the Member State fails to prove that the Commission's findings are incorrect, then they may cast serious doubts as to whether an appropriate and efficient system of supervisory and control measures has been set up, doubts that are sufficient to warrant a reduction in payment. [20]

53. When refusing to charge expenditure to EAGGF funds, the Commission is in principle not obliged to prove any actual loss. If it cannot adduce concrete evidence it is sufficient for it to prove the risk of loss for the EAGGF.

54. Admittedly, this system of mitigating the burden of proof and of extrapolation, of taking as a basis the mere risk of loss rather than actual loss and of applying flat-rate percentage deductions, presents, in its combined form, certain problems. It would fall to the legislature to define and improve this system as appropriate.

20 — See judgments in Case C-242/96 *Italy* v *Commission* (cited in footnote 18) and C-8/88 *Germany* v *Commission* (cited in footnote 18).

E — Analysis

1. First plea: Infringement of the principle of sincere cooperation, the principle of due care and the duty to state reasons

55. In its first plea Belgium accuses the Commission of adopting the contested decision in breach of the principle embodied in Article 5(2) of Regulation No 729/70 in conjunction with Article 5 of the EC Treaty, of the principle that due care should be taken and of the duty to state reasons laid down in Article 190 of the EC Treaty.

56. The Commission had not, or at least not carefully, examined the arguments submitted by Belgium in the pre-litigation and conciliation procedure and had not gone into them in either the Summary Report or the contested decision. Thus Belgium had several times refuted findings of fact by the Commission, without the latter having noticed. An important point here is the fact that the Commission had prepared a draft of the Summary Report even before the end of the conciliation procedure. In the final version of this Report and in the contested decision there is no trace of the Belgian authorities' arguments.

57. In detail, 15 points are involved, as follows:

Beef and veal sector (points 1 to 11)

First point

58. The Commission stated in its Summary Report that the Dendermonde customs warehouse, in which goods under the prefinancing system are stored, was opened in the morning and not locked again until evening. The movements of goods therefore could not be effectively monitored.

59. The Belgian Government argues in this connection that what was involved here was a private warehouse, opened and closed by customs. The warehouse was opened and closed only for the inward or outward transfer of goods. The official responsible for supervision accompanied each lorry, opened the warehouse, was present during the loading or unloading and closed the warehouse again after leaving it. The Belgian authorities had pointed this out already in their letter of 22 May 1995. Although the Belgian provisions allowed exceptions to the rule that the official responsible for supervision was to lock the warehouse immediately after leaving it, no such exception applied in this case.

60. The Commission's response to this is that it had informed the Belgian authorities of its findings as early as 2 March 1995. The Belgian authorities' letter of 22 May 1995 had merely confirmed that the customs locked the warehouse premises in question, but had not supplied any information to the effect that the warehouse was closed immediately upon the official's departure.

61. It may be seen from the correspondence between the Commission and the Belgian authorities which is annexed to the application that this problem had been the subject of detailed discussion between the parties. This correspondence does not, however, prove, as the Belgian Government claims, that the warehouse concerned was opened only for the purposes of inward or outward movements of goods and immediately locked again. The Commission's remarks that the warehouse was opened in the morning and not closed again until evening could not therefore be invalidated. In particular, the Belgian Government could not prove the Commission's findings wrong.

62. It must therefore be concluded that the Belgian Government's submissions do not invalidate the Commission's complaint in this respect.

Second point

63. In its Summary Report the Commission states that because of a lack of staff and equipment it was not possible to carry out physical checks of the goods effectively. Thus, in Dendermonde, only one official was responsible for carrying out checks on the exports of three large Belgian exporters of beef and veal. What is more, the customs office did not have a service vehicle at its disposal, so that no unannounced checks could be made. Nor had there been appropriate scales for weighing the cartons.

The Belgian Government submits in this connection that although there had been no scales in the Dendermonde customs office capable of weighing the 20 kg cartons accurately this was irrelevant since 90% of the meat for export had been stored in the Sivafrost and Vandenavenne warehouses,[21] where there had been a sufficient number of scales to enable the prescribed checks to be made upon the inward and outward movement of goods. Besides, the Belgian rules ensured that the remaining 10%, not intended for immediate export, were also weighed. The Belgian checks also met the requirements of Regulation No 386/90 (see paragraphs 38 to 41 above), according to which the customs authorities had to carry out spot checks on only 5% of export declarations. The checks made by the inspector or official responsible for supervision upon the departure of the goods from the Sivafrost warehouse therefore satisfied the requirements introduced by Regulation No 386/90. The service vehicle which the Commission required the Dendermonde customs office to have was not indispensable. In this connection the Belgian Government had stated in its application that when the inspector decides to carry out a physical check of goods, he accompanies the registered lorry from the customs office where registration took place to the warehouse. The goods intended for delivery therefore cannot be substituted before being physically checked. The inspector makes his decision to carry out a physical check of goods independently and without notifying the haulage contractor beforehand. Such a decision is not made until registration in the customs office. Thus the contractor can never know whether or not the inspector will be accompanying him for a physical check of the goods.

64. Finally, the Belgian Government points out that three officials entrusted with carrying out checks work in Dendermonde. Their task — according to the Belgian Government — is 'carrying out administrative formalities'. Furthermore, there is an inspector employed there who is responsible *exclusively* for carrying out physical checks of the goods. In its reply the Belgian Government stated, however, that physically checking goods also involves 'carrying out administrative formalities'; the *principal* task of the inspector is therefore to carry out unannounced spot checks in the warehouses.[22]

21 — Both these warehouses are located approximately 15 km from the Dendermonde customs office.

22 — My emphasis.

65. The Commission, on the other hand, takes the view that certain categories of beef and veal for export are not weighed. The customs offices concerned are, however, obliged under the Community rules to carry out checks also of the weight of the goods. If, however, a customs office is not in a position to check weight because of a lack of equipment, this is clearly a deficiency of the control system. The reference to weight checks carried out previously in the warehouses also cannot alter this, since it cannot be ruled out that the stored goods have lost weight in the interim. Since it had not been possible to carry out effective weight checks, there was a risk in the present case of goods having been substituted.

66. As far as the question of unannounced spot checks is concerned, the Commission points to the contractual relations existing between the warehouse administrator and the undertaking depositing the goods. Since the inspector has no service vehicle at his disposal, unannounced checks are not possible. The Belgian Government also pointed out in its letter of 17 January 1996 that — contrary to what is stated in its application — the inspector lets himself be driven to the warehouse by a warehouse official and not by an employee of the undertaking to be checked. Since, therefore, either the warehouse administrator or, at the very least, the undertaking to be checked itself had been informed in advance of the check to be carried out, the unannounced check required under Article 3(1)(a) of Regulation No 386/90 had not been possible.

67. As far as the question of insufficient staff in the Dendermonde customs office is concerned, the Commission observes that it was only in the context of the present action that Belgium stated that there were three officials and an inspector employed in that customs office. However, even this does not alter the fact that the Commission had found deficiencies in the control system, since it was impossible to weigh certain categories of meat under the prefinancing regime. Besides, it remains unclear how the various tasks are distributed amongst the persons entrusted with supervision.

68. It should first be observed that it is an undisputed fact that the Dendermonde customs office lacked suitable scales for checking the weight of 20 kg cartons. Under Regulations Nos 32/82 and 1964/82, however, the Member States are obliged to carry out effective checks. In this connection, it should be noted in particular that, under Article 3(1) and (2) of Regulation No 386/90, unannounced spot checks are to be made on a representative selection of at least five per cent of export declarations in every customs office. These checks have in particular to cover every product sector. The Belgian Government is, however, unable to prove by its submission that such a check could be carried out effectively despite the lack of suitable scales. However, the fact that certain weight

checks could not be carried out casts considerable doubt on the effectiveness of all the physical checks made.

69. Contrary to the arguments of the Belgian Government, even an unannounced physical check was impossible. Since the inspector had to contact the warehouse administrator or at least the undertaking to be checked some time before the actual check, in order to be taken with them in their vehicle, there was a possibility that the goods could be substituted — perhaps less so with regard to those being delivered by that vehicle but definitely in the case of the other goods to be checked. At any rate the checks were not — as prescribed — unannounced.

70. With regard to the shortage of staff in the Dendermonde customs office, it should be noted that the Belgian Government's objection that there were three officials entrusted with supervision employed in that customs office was first made in the context of the present action. It must therefore be dismissed as having been submitted too late since, because of the preceding conciliation procedure, the relevant date is that of the adoption of the contested decision. Furthermore, the Belgian Government was unable to dispel the existing doubts in so far as the distribution of tasks amongst the persons entrusted with supervision remains unclear. There cannot be said to be an effective physical check of goods if the person responsible for the check firstly does not have the necessary equipment at his disposal and, secondly, has other duties to perform as well.

71. The Belgian Government's submission must be rejected in this respect too.

Third point

72. The Commission stated in its Summary Report that the customs authorities took as the basis for their checks neither the payment declaration nor the export declaration of the undertaking applying for payment (see paragraph 30); instead the basis for a quantity control was solely a list of the number of cartons and their weight drawn up by the undertaking concerned itself. What is worse, the customs staff did not arrive on the premises until after the weighing process. The net weight of the products or goods therefore could not have been determined with certainty.

73. The Belgian Government first of all points out that these findings of fact related only to the Beauraing customs office and did not entail any risk of unjustified payments. This follows in particular from the fact that an inspector from the Belgian customs office was always present when the goods were deposited at the warehouse. Using the list prepared by the commercial operator depositing the goods, the inspector systematically checked the weight of the

goods delivered. Wrong information could thus have been filtered out. Even if the payment declaration was not completed until later, this did not alter the accuracy of the checks carried out. In particular, a representative selection of at least five per cent was ensured for the spot checks. Furthermore, all the meat stored was inspected beforehand by a veterinary surgeon, under whose supervision the packing, sealing and weight checks were also carried out. The customs checks had therefore provided additional security. In this connection the Commission has in particular not been able to prove that there was an increased risk of abuse. In addition, the Belgian Government points to national provisions of criminal law which would make punishable any supply of false information on the weight lists.

74. The Commission points to the risk of manipulation that exists, since the inspector was not present during the weighing operation. It was therefore not certain that the quantities of stored goods as stated actually corresponded with the batches present. Thus, in particular, during one check carried out by the Commission, an error came to light in the list drawn up by the undertaking concerned. The Commission saw a further opportunity to commit fraud in the fact that initially only a list of goods was drawn up by the undertaking, and only after this had been inspected did the actual declaration follow, on the basis of which payment was arranged.

75. In detail, the Commission found the following individual deficiencies in the control system in the Beauraing customs office, in the order given below:

— checks are based purely on a list of goods drawn up by the firm concerned and not on the payment declaration — the application for a pre-financing payment — or the export declaration;

— the inspector is not present during the weighing;

— the customs staff would not open the cartons concerned;

— no quality control had taken place;

— the checks carried out were referred to as physical checks but the quantities indicated had not been verified;

— the meat had not been weighed before the net weight was entered on the

certificate prescribed by Regulation No 32/82, the weight having been calculated instead by means of a coefficient;

— it was moreover possible for the Commission staff carrying out the inspection to open the cartons without damaging the packaging or labels;

— there was no indication on the packaging of the basic products or quantities of basic products;

— there were not enough reports on the physical checks.

76. With regard to the provisions of criminal law mentioned by the Belgian Government, the Commission takes the view that problems could arise during any criminal proceedings because, on the one hand, the list of goods submitted by the undertaking does not constitute an official application for an export refund (payment declaration) and, on the other hand, intent must be proven.

77. On this point it should first be observed that the Belgian Government was unable to prove that the Commission had taken incorrect factual information as its basis. In particular, it follows from the parties' submissions that no complete weight check by means of weighing took place in the customs office. Merely verifying a list drawn up by the undertaking concerned can in particular not be regarded as a physical check in accordance with the relevant provisions of Community law. What was required, according to Article 5(1) of Regulation No 2030/90 (see paragraph 42 above), was that physical checks be carried out during the period between the lodging of the export declaration and the release of the goods for export. Since, however, as the Belgian authorities themselves concede, an inspection could also take place even before the lodging of the payment declaration, using the weight list drawn up by the undertaking concerned, it cannot be said that there were effective checks. Likewise, the Commission's findings show that it would be possible to substitute goods, which is exactly what the provisions in force are intended to exclude. The Belgian Government's reference to spot checks of five per cent of the goods for export is also not convincing. Since the inspectors did not carry out any effective weight check in the customs office themselves, there could be no guarantee of a proper physical check in this case either. In particular, the net weight of the goods for export was never determined. This, however, constitutes an infringement of Article 5(1)(b) of Regulation No 2030/90 in conjunction with Article 3 of Regulation No 386/90 (see paragraph 43 above). The reference to the Belgian provisions of criminal law is also, in the end, not convincing. It is obvious that falsification of payment or export declarations with intent to deceive must be punishable. This does not, however, mean that the

threat of punishment constitutes an efficient control system.

78. It therefore follows from the foregoing that this submission of the Belgian Government must also be rejected.

Fourth point

79. In its Summary Report the Commission states in connection with the physical checks under Article 6 of Regulation No 2030/90 (see paragraph 42 above) that the Belgian checks in the context of prefinancing had not been carried out with the same intensity — according to the wording of Article 6 — as was customary in the case of export refunds and had not related to the products and goods previously checked.

80. The Belgian Government, on the other hand, felt that the customs offices of Beauraing and Dendermonde had, as part of the physical checks of the representative 5%, sufficiently verified the weight and seals of the cartons upon entry into the warehouse and upon export. These checks had met the requirements laid down in Regulations No 386/90 and No 2030/90.

81. The Commission claims in this respect that its officers had found that the inspector in Beauraing had weighed only a few boxes upon their arrival at the warehouse and none at all upon departure. Likewise, quality control was not always carried out. What was more, the Commission staff carrying out the inspection could have substituted goods. In some cases it had not been easy to reconcile payment declarations and export declarations for the products. The Commission regards all these findings as deficiencies of the control system, since they made it possible for goods to be substituted.

82. Here again, the Belgian Government is unable to adduce evidence that the Commission's findings did not correspond to the facts. In particular, it is to be assumed that the weight checks under the prefinancing system had not been carried out with the same intensity as was customary in the case of export refunds. In this respect the Belgian Government could only make assertions, which cannot amount to evidence. Its submission must therefore be rejected.

Fifth point

83. According to what is said in the Summary Report, it was possible in the Dendermonde customs office to remove the labels from several of the boxes of male

cattle hindquarters in storage and affix them again without damaging them.

On the basis of the aforementioned incidents it must therefore be assumed that there was a considerable risk of the boxes being substituted. The mere assertions to the contrary by Belgium are in any event not sufficient to constitute evidence to the contrary.

84. Although the Belgian Government acknowledges that it was possible to remove labels without damaging them, it disputes the fact that this was effortless and points out that at temperatures of -18 °C in the cold store it was impossible to remove them undamaged. Moreover, this was not a representative spot check since approximately 400 boxes were stored there in total. Moreover, the boxes had additionally been sealed. Substituting goods was practically impossible also because there was a veterinary surgeon present at all times in the skinnery, whilst in the customs offices there were inspectors present upon the arrival and departure of goods.

Sixth point

87. As regards the Belgian Government's complaint that in its Summary Report the Commission wrongly assumed that meat from female instead of male cattle had been found during its checks, it must be observed that the Commission had first made these remarks in Annex II of 20 March 1997 to its Summary Report.

85. For the Commission, however, it is clear that in this respect serious deficiencies came to light. Thus it was possible to remove labels and reaffix them without damaging them in the process. Furthermore, the labels displayed only the number of the abattoir and not the weight or type of meat. In any event, the Commission official managed to open boxes and close them again without damaging the labels.

88. In its defence and rejoinder the Commission has withdrawn this complaint, which had proven only in retrospect, on the basis of DNA analyses, to be false. Moreover, according to the Commission, the contested decision was not based on this point.

86. Here again, Belgium's comments cannot undermine the Commission's findings.

89. Even if the Commission's initial findings did not correspond with the facts, the Belgian authorities' comments were taken into consideration and therefore had no negative repercussions as regards the correction.

Seventh point

90. It is stated in the Summary Report that in the Sivafrost warehouse in Dendermonde the only means of identifying the various cartons was a ticket bearing the COM-7 number fixed to a pallet. It was therefore not possible to positively identify the cartons stored there.

91. The Belgian Government states in response to this that labels were affixed to the cartons stored there, indicating the type, weight and number of the products. What is more, the customs offices used warehouse lists containing the same details as on the labels. This ensured that it could be checked whether the cartons intended for export did also leave the warehouse. Although the obligation to draw up such lists has existed only since 1995, they have been used since 1994, including in the Sivafrost warehouse. It was certainly not possible to substitute the goods.

92. However, the Commission is still sure that there was a risk of substitution. The ticket in question with the COM-7 number was on the pallet. It was quite possible simply to attach this piece of paper to another pallet. Likewise, individual boxes from different pallets could have been exchanged. The labels mentioned by Belgium had made no allusion to the payment declarations relating to these goods. Furthermore, the system of warehouse lists did not come into force until May 1995.

93. Here, again, the Belgian Government cannot adduce any evidence to show that the Commission's statements of fact were incorrect. In particular, it could not invalidate the complaint that the pallets had been inadequately labelled. The system of keeping detailed packing lists did not come into force until May 1995. In the present case, however, the inspections carried out in 1994 related to the 1993 financial year, with the result that it is not clear whether the system of warehouse lists could have been effective during that period already since Belgium did not claim to have been using this system in 1993.

94. Belgium's submission in this respect must therefore be rejected.

Eighth point

95. In its Summary Report, the Commission objected that the weight checks to be carried out under Regulation No 1964/82 had been carried out inadequately by official veterinary surgeons. Although they had been present at the boning, they had not determined the net weight of the goods.

96. The Belgian Government points out that the veterinary surgeons had been present throughout the boning and also at the weighing of the goods. They had supervised the automatic weighing operation and checked the indications of weight on the labels. Even though, during its checks, the Commission had found a pack containing meat that was not fit for human consumption, this was still only one pack out of a total of 379. Moreover, spot checks in October/November 1996 had shown that the meat stored at Sivafrost had been of the best quality.

97. The Commission stands by the findings in its Summary Report. When checking three or four packs, it found one containing meat unfit for human consumption. The mere presence of a veterinary surgeon at the boning and weighing certainly does not rule out the possibility that goods can be substituted. All told, it cannot be said that there were adequate checks of net weight.

98. In the result, the Commission's submission must be upheld. The Belgian Government could not adequately prove that net weight had been determined in such a way as to make substitution of the goods impossible. The mere presence of a veterinary surgeon at the boning itself is not sufficient since it cannot be concluded from this alone that there is efficient monitoring.

Ninth point

99. It is stated in the Summary Report that in Beauraing the net weight to be entered on the certificate issued in accordance with Regulation No 32/82 (see paragraph 36 above) was calculated by applying a coefficient (83.3%) to the weight indicated on the certificate in accordance with Regulation No 1964/82. The latter had, however, been determined only by means of a list of goods drawn up by the commercial operator depositing them. This procedure does not constitute a proper determination of net weight in accordance with Article 2(3) of Regulation No 1964/82 (see paragraph 34).

100. Belgium submits first of all that this method of calculating weight was applied only in Beauraing. The use of a coefficient is ultimately irrelevant for the payment of refunds since what matters for that purpose is the net weight of the boneless pieces of meat, which are weighed automatically. The certificate issued in accordance with Regulation No 32/82, however, concerns meat that has not been boned. What is more, the indication of weight on the certificate issued in accordance with Regulation No 32/82 is optional. Moreover, the coefficient was not set too high since the exported meat had the weight indicated.

101. The Commission states in response to this that Article 2(3) of Regulation No 1964/82 first of all provides that the net weight of the hindquarters to be boned

is to be established. Since, however, even this was not done in accordance with the relevant provision, applying a coefficient increased the risk of fraud. Moreover, it meant that no effective weight check had been carried out on the boned meat. Should discrepancies have in fact arisen, they would not have been noticed.

102. In this respect it should be noted that the Belgian authorities, by not weighing the boned meat, but merely calculating its weight by means of a coefficient, denied themselves an effective means of control. Since, moreover, the basis for the calculation (the value according to the certificate under Regulation No 1964/82) was not — as has been shown — adequately verified, there were also deficiencies in the control system in this respect too which brought with them the risk of fraud.

Tenth point

103. It is stated in the Summary Report that in Dendermonde the veterinary surgeon from the Zele abattoir was able to tell the Commission's staff neither who had determined the net weight indicated on the certificate issued in accordance with Regulation No 32/82, nor on what basis he could have checked the accuracy of the weight certified by him.

104. The Belgian Government's explanation for this is that the weighing took place not in the abattoir, but in the skinnery. The veterinary surgeon present there was entrusted with checking the weight. This complaint cannot therefore be used to justify the financial corrections.

105. The Commission wonders in this connection why neither the veterinary surgeon questioned nor the Belgian authorities had initially been able to give a satisfactory answer. Despite an exchange of letters relating to this problem too, the Belgian Government first mentioned it in its request for conciliation. It remains however an infringement of the provisions of Regulations No 32/82 and No 1964/82 since the veterinary surgeon responsible did not carry out the weight check himself, but was merely present at the weighing.

106. Since, here too, Belgium could not invalidate the Commission's findings, its submission taken as a whole must be rejected as unproven and accordingly unfounded.

Eleventh point

107. On this point, it is stated in the Summary Report that the individual pieces of meat for export were not stamped individually, with the result that customs

could not tell whether the meat registered had been checked beforehand by a veterinary surgeon.

108. The Belgian Government points out that there was always a veterinary surgeon present in the skinnery who checked that the carcasses had been male cattle with nine ribs and marked with an 'M'. The carcasses were then, under the supervision of the responsible veterinary surgeon, cut up and the pieces packaged individually. A label was affixed bearing the following data: Belgium, number of the abattoir and EEC. The customs offices were therefore able to tell whether the meat had been checked beforehand by veterinary surgeons. There was no legal basis for requiring any additional stamp.

109. The Commission, however, felt there was a risk that goods could be substituted. It had not been possible on the basis of the details on the label to verify whether each packaged piece had previously been subjected to a check corresponding to the provisions of Regulation No 1964/82. Thus, checked goods could have been replaced later with unchecked goods.

110. On this issue it should be noted that under Article 8(1) of Regulation No 1964/82 the very purpose of supervision by the Member States is to ensure that the products in question cannot be substituted, with identification of each piece of meat being mentioned in particular as an appropriate measure. This did not seem possible, however, with the label used in Belgium if it stated only 'Belgium, the number of the abattoir and EEC', and not the net weight, type or number of pieces of meat. Positive identification of each piece of meat was therefore not possible.

111. The Belgian Government's arguments are consequently insufficient to show that the Commission's objections in this respect are mistaken.

Cereals sector (Points 12 to 15)

Twelfth point

112. Regarding the results of the investigations in the cereals sector the Summary Report states first of all that the EAGGF staff had come to the conclusion that the customs checks carried out had been inadequate for identifying the goods stored under the prefinancing system in the period 1992 to 1994. The Commission is referring here to the number — in its opinion too low — of physical checks carried out by the customs offices of Aalst and Leuven prior to export.

113. The Belgian Government doubts the sense of such checks where goods are stored with a view to being processed. In view of the particular nature of the goods (cereals), the Belgian control system puts the main emphasis on a strict licensing system, constant checks of the quantity and composition of the goods and (subsequent) verification of export documents combined with systematic checks of goods upon export.

114. Payment under the prefinancing system is tied to possession of a corresponding licence. The granting of this licence has to be approved by the Ministry of Agriculture, the Ministry of Economic Affairs and the customs administration. Thus the commercial operators are to a certain extent preselected. The licence indicates the warehouse in which the goods are to be found. A warehouse register and worksheet are also to be used. This enables the movements of goods to be recorded in chronological order. The customs offices and other supervisory agencies are thus in a position to trace the route taken by the products. The respective supervisory measures are also indicated in the licence.

115. This system has been in existence since 1988 and has undergone only technical adjustments in 1994. There is also a storage licence, issued by the customs administration, for goods not intended for processing. Physical checks of goods are therefore unnecessary since the licensing system as a whole makes the movement of goods transparent and capable of being checked.

116. Moreover, the question of the number of physical checks was first mentioned in the Summary Report with the result that the Commission could not make use of it for the purpose of corrections.

117. The licensing system guarantees continuing monitoring of the quantity and composition of the goods. Customs are therefore at all times aware of the quantities in stock. Thus checks are possible during both storage and processing.

118. Under this system the central customs office and the Belgian Office for Intervention and Reimbursement (Bureau Belge d'Intervention et de Restitution, hereinafter referred to as BBIR) are also informed about the export declarations. The BBIR checks the declarations systematically and in detail. Physical checks of the goods are also carried out by the customs offices and the BBIR upon export. Finally, every licence-holder has to prove, using the business documentation, that the goods have actually been exported.

119. The Commission submits that the licensing system has considerable weaknesses, *inter alia* as far as the storage of goods not intended for processing is concerned. In such a case the licence is to be applied for by the warehouse operator and not the exporter. Furthermore, it was found — and Belgium has not seriously disputed this too — that, all in all, too few physical checks had taken place. The deficiencies considered to exist by the Commission had been dealt with in detail in correspondence prior to the conciliation procedure. Thus, amongst other things, the objection was made that the customs offices would not exchange information with each other and did not know what overall quantities were registered and stored in which warehouse. Thus goods were even found on railway wagons which, although registered for export, were not included in the quantity stored. Nor did the check reports allow any conclusions to be drawn about the way the checks had been carried out. In a few customs offices there had sometimes been no physical checks made at all. Nor did subsequent verification of business documentation provide any certainty as the goods concerned had already been exported by then.

120. On this point it is to be noted that it follows from the correspondence between the Commission and the Belgian authorities, which has been produced, that those authorities had been informed early on of the deficiencies criticised by the Commission. They had the opportunity to comment on the objections made and to have them heard in the conciliation proceedings. However, what they said could not cast doubt on the Commission's factual findings. Even if the licensing system described by Belgium exists in the form stated this does not alter the fact that physical checks during storage were carried out — if at all — only to a very limited extent. What makes matters worse is that no information was exchanged between the individual customs offices on the goods and quantities stored overall. Thus, according to what the Commission said, the individual customs offices could not have a full overview of the goods registered for export. Since, however, according to the Community provisions on the prefinancing system, it is of fundamental importance to be informed at all times about the actual stock and the composition of the products, it is essential to carry out a sufficient number of checks here too. Since, according to what has been said hitherto, this was not the case, Belgium's submission cannot be taken as proof that the Commission's findings in the Summary Report are incorrect.

Thirteenth point

121. In the Summary Report the Commission charges the Belgian authorities with abusing the principle of equivalence [23] by applying it also to processed products. According to the Belgian Government, it is not clear from the relevant provision of Article 27(3) of Regulation No 3665/87 whether the equivalent products had to be

23 — See Article 27(3) of Regulation No 3665/87, paragraph 32 above.

basic products or processed products. Certainly the Belgian authorities had assumed that replacement was also possible by processed products. Since there is also an adequate and efficient control system (licences), there is no obvious risk of abuse. Although physical checks were expressly provided for, they could be carried out at any time.

122. The Commission sees no problems in interpreting Article 27(3) of Regulation No 3665/87, since the wording of the provision clearly refers to basic products. The Commission also found that under Belgian law the principle of equivalence was not applicable solely to basic products. Under the Belgian rules it was, in particular, possible for goods not to be registered until after processing for prefinancing purposes, with the result that the provisions of Article 27(3) of Regulation No 3665/87 were worthless. In any event an adequate check of the basic products was no longer possible at that point.

123. Regarding this point it is to be noted that it follows from Article 27(3) of Regulation No 3665/87 that basic products can be replaced by equivalent products, falling within the same subheading of the Combined Nomenclature, of the same commercial quality, having the same technical characteristics and meeting the requirements for the granting of an export refund. However, only products processed to the same degree can be of the same commercial quality and have the same technical characteristics. This means, however, that basic products can in principle only be replaced by other basic products. The spirit and purpose of Article 27(3) are just as clear as the wording. In principle, according to the first sentence of the third paragraph, at least parts of the basic products must be found in the processed products to be exported. For economic reasons it should, however, be possible for exporters to substitute basic products for processing. In order to ensure, however, that the processed goods for export correspond in composition and quantity to the goods originally registered, substitution can only be allowed if the products to be exchanged are essentially the same. Thus a basic product can only be replaced by another basic product of the same quality and with the same characteristics. No other meaningful interpretation of this provision seems possible here.

124. Since the Belgian authorities have, however, allowed basic products to be substituted by processed goods, this must be seen as an infringement of Article 27(3) of Regulation No 3665/87. The Belgian Government therefore could not prove that the Commission's statements in the Summary Report were incorrect.

Fourteenth point

125. The Commission stated in the Summary Report that it was possible in Belgium that the person responsible at the customs office did not check on receipt of the payment declaration whether there was sufficient warehouse capacity, i.e. whether the goods were actually there.

126. Belgium gives as the reason for this that it was not possible to have a complete overview of all goods stored (under the prefinancing processing system). This would require constant physical checks which were, however, not necessary under the relevant provisions. Besides this, however, checks were made in the case of large firms as to whether the registered stocks existed. For smaller firms this was not necessary as any irregularities would be noticed. Under the current Community provisions it is not necessary for the customs offices to keep an inventory. By contrast, however, a list of the payment declarations is kept.

127. The Commission sees the Belgian Government's method of proceeding as constituting an infringement of Article 26(1) of Regulation No 3665/87. If goods are to be placed under customs control the customs offices also have to ensure that the goods are actually present. In any event, all goods registered for prefinancing have to be recorded, irrespective of where they are stored. If it were stipulated — as in this case — that the goods are to be stored under customs control, such control must actually be exercised.

128. In this connection it is to be noted that it follows from Article 26(1) of Regulation No 3665/87 that the products or goods are to be placed under customs control at the time of acceptance of the payment declaration until they leave the customs territory of the Community or have reached their destination. This means that in this respect the Belgian Government's argument that there do not necessarily have to be constant physical checks has to be accepted. On the other hand — and here the Commission's argument must prevail — effective and efficient customs control does have to be guaranteed. This may, however, mean nothing more than that the customs authorities always have to be kept informed about what quantities of goods are stored under the prefinancing system. In particular, it must not be possible for non-existent quantities of goods to be declared. In order to prevent this happening, the customs offices are obliged to satisfy themselves of the actual existence of the quantity of goods stated in the payment declaration. Even if this means greater — not negligible — expenditure, such control alone is suitable and essential for detecting any abuse at the payment declaration stage and for taking appropriate action. Since it thus follows that customs control — even if not constant — is essential from the date of

acceptance of a payment declaration for products and goods going into storage, it is clear that the Belgian provisions are not in conformity with the Community provisions.

129. The Belgian Government's submission is therefore to be dismissed in this respect as well.

Fifteenth point

130. On the last point disputed in detail by Belgium, it is stated in the Summary Report that it is possible for exporters who still have no destination for their goods to deposit an export declaration marked 'Third country warehouse' and an IM-7 certificate (temporary entry to customs warehouse) on the last day of the prefinancing period. This is allowed by the customs offices for extending the prefinancing period.

131. The Commission pointed out in both its defence and its rejoinder that this was not taken into account for the purposes of the financial correction in the contested decision. The Commission's view was that although the way Belgium operates here is undesirable it does not constitute an infringement of current Community law.

132. Since this point thus did not serve as a basis for the contested decision, there is no need to go into it further here.

133. Overall, however, it can be said on all the aforementioned points that the submissions of Belgium are not capable of showing the Commission's factual findings to be wrong. Furthermore, it follows from the extensive correspondence between the Commission and the Belgian authorities, which has been produced, that those authorities were informed early on of the alleged deficiencies found in the control system. It was obvious from this correspondence that there had been a lively exchange of information which, although it had not led to the Commission's revising its opinion on the existing shortcomings, does show that the Commission had examined each individual point. There can therefore be no question of an infringement of the principles of sincere cooperation and due care.

134. It can be inferred from the conciliation body's final report, also mentioned at the hearing and referring generally to the conciliation proceedings with Italy, Germany, the Netherlands, Belgium and France, that — apart from the alleged discovery of meat from female animals — Belgium did not dispute the Commission's main findings during the conciliation procedure. The criticisms made by the Member States affected by the corrections are con-

fined to arguing that the Commission's inspections were not representative, the risk of fraud was overestimated and there was no appropriate legal basis for the checks demanded by the Commission. Even the conciliation body assumed that the checks by the Member States were not adequate. Moreover, the Commission's inspections were representative and the deficiencies reported so important and generalised that they could not be assumed to be mere exceptions to the normal practice of supervision in the Member States. This led to a risk of losses for the EAGGF. Admittedly it was not fully proven that there was always a very high risk, and the Member States also announced measures to improve the situation. However, the steps taken by the Commission were imperative since the same or similar deficiencies had already been the subject of complaints in previous years.

135. This also shows that even during the conciliation procedure Belgium had been unable to cast any doubt on the Commission's factual findings although it had known about them. The criticism that the Commission had not cooperated sincerely with the Belgian authorities and had not examined the latter's submissions with due care, is therefore unfounded.

136. With regard to the alleged infringement of the duty to state reasons laid down in Article 190 of the EC Treaty it is to be noted that according to settled case-law this duty depends on the nature of the act in question and on the context in which it was adopted. [24]

137. In the particular context of the preparation of decisions relating to the clearance of the accounts, the statement of reasons for a decision is to be regarded as sufficient if the Member State to which the decision is addressed was closely involved in the process by which it came about and was aware of the reasons for which the Commission took the view that it should not charge the sum in dispute to the EAGGF. [25]

138. Since in the present case, however, it is clear from the extensive written correspondence between the Commission and the Belgian authorities that the Belgian Government was involved in the preparation of the contested decision and thus knew the reasons why the Commission was of the opinion that the disputed sum should not be charged to the EAGGF, there is no infringement of the duty to state reasons.

24 — Judgment in Case C-28/94 (cited in footnote 17, paragraph 81), and judgment in Case C-54/91 *Germany* v *Commission* [1993] ECR I-3399, paragraph 10.

25 — Judgment in Case C-28/94 (cited in footnote 17, paragraph 82), and judgment in Case C-27/94 *Netherlands* v *Commission* [1998] ECR I-5581, paragraph 36.

139. It follows from the foregoing that the Belgian Government's first plea must be rejected in its entirety as unfounded.

2. Second plea: Infringement of Regulations No 729/70 and No 1723/72 and of the duty to state reasons in accordance with Article 190 of the EC Treaty

140. In this plea (for the text of the regulations, see paragraph 20 et seq.) the Belgian Government states that the Commission made an error in applying a linear correction since no irregular payments had been made in respect of prefinancing. The Commission, moreover, mistakenly assumed that the entire Belgian control system displayed deficiencies, with the result that a 10% flat-rate reduction is said to be justified and applicable to all sectors for which expenditure was declared. The Commission also failed to give adequate reasons for its negative decision in the Summary Report. This constitutes an infringement of the provisions of Regulation No 729/70 and No 1723/72 and of Article 190 of the EC Treaty.

141. According to Belgium, the checks carried out by the Commission concerned only four customs offices. Even though no irregular payments were discernible, the Commission still extrapolated the alleged deficiencies to the entire Belgian territory. Moreover, these deficiencies were disputed and yet still used as a basis by the Commission. [26]

142. Even though, of course, no control system could function 100% perfectly, the Commission was not justified in applying a flat-rate reduction of the level mentioned, since its checks were not representative. Thus, for example, there were 54 customs offices in Belgium, of which 15 were regularly involved in prefinancing. The Commission, however, checked only four customs offices. The alleged deficiencies therefore could not be extrapolated to the other customs offices. The Commission has in any case provided no evidence of the legality of its method of proceeding.

143. Nor were parallel deficiencies observed simultaneously in all the customs offices checked. They were therefore not systematic deficiencies of the control system.

144. Also, in the individual customs offices, only the goods of individual firms were inspected; the other products were not also subjected to a check. In the cereals sector checks were made only in respect of a few budget items — malt (item No 1001) and other cereals (item No 1003) — and not at all in respect of others.

26 — What is involved here is essentially the Commission's factual findings as already examined.

145. The Commission also, when assessing risk, started out from incorrect factual findings and was thus unable to demonstrate a causal link between the deficiencies and the losses to be feared. There is therefore a grave procedural error here as insufficient reasons were given for the risk of losses alleged by the Commission.

146. The Commission's method of proceeding is therefore to be regarded overall as an infringement of Article 5(2)(c) of Regulation No 729/70, of its own principles on cooperation and loss assessment as laid down in the Belle Group Report and of the duty to state reasons.

147. The Commission takes the view that the reductions were applied lawfully. The deficiencies it found in the Belgian control system justified a flat-rate reduction. In particular, the extrapolation of the shortcomings to the entire system cannot be criticised. The inspections it carried out were, all in all, representative. In the beef and veal sector, firms had been checked which had received 22.8% of the advances for 1993. Also, when selecting the customs offices, it chose those which had dealt with over 25% of the advances. In the cereals sector too, the checks concerned 32.3% of expenditure. Since, moreover, the current Belgian provisions had been valid for the entire territory, extrapolation was in conformity with the law in this case too.

148. Inadequate physical checks were likewise a cause for objection; in the individual customs offices there was a substantial risk of loss also because of the opportunities for substitution. Moreover, Belgium had been obliged to demand the return of money since, during the checks, meat had been found that was not fit for human consumption.

149. In the present case a flat-rate reduction is possible also under case-law of the Court of Justice since the Belgian control system did not meet the requirements of Community law. Moreover, Belgium has not been able to adduce evidence that the conditions existed for charging the expenditure to the EAGGF.

150. On this point it is to be noted that, according to settled case-law of this Court, the EAGGF finances only those interventions within the framework of the common organisation of the agricultural markets carried out in accordance with the Community provisions. The Commission thus has to prove that there has been an infringement of the rules of the common organisation of agricultural markets.

151. In the present case, the Commission was able to prove several such infringements. The Belgian Government, on the other hand, could not provide any evidence that the Commission's findings were incorrect. Consequently, serious doubts remain as to whether an appropriate and effective

system of measures for monitoring and checking had been introduced.

152. In particular, the Commission carried out its checks to a sufficient extent and inspected a representative proportion of the customs offices and undertakings concerned. On the basis of its spot checks the Commission was able to draw conclusions about the control system in Belgium as a whole. The subject of the investigation was the entire control system, and the extent of turnover involved in the Commission's inspections is as such sufficiently representative to allow extrapolation to the whole. Whether the spot checks are representative does not depend only on the number of customs offices inspected; it is sufficient if the percentage of the amount or extent of prefinancing checked is sufficiently high to enable representative conclusions to be drawn for the overall situation. Since in the present case no concrete (individual) payment or export declarations were criticised, but the control system in Belgium displayed deficiencies as a whole, the Commission could quite legitimately refuse to recognise expenditure of an amount calculated by extrapolating its own results.

153. The Belgian authorities were given adequate opportunity to comment. The Commission's method of proceeding was perfectly valid also with regard to the guidelines laid down in the Belle Group Report. It was able to justify its risk assessment by the extent of the deficiencies found. No evidence of actual loss is required by the current rules or the case-law of the Court (see above, paragraphs 48 to 54).

154. A flat-rate reduction of the expenditure declared is therefore lawful.

155. The Belgian Government has argued in the alternative that the Commission should not have applied the disputed correction to all sectors for which refunds had been paid under the prefinancing scheme, but only to those which had also been inspected.

156. Firstly, a flat-rate correction was also extended to export refunds for common wheat even though no applications for refunds had been made for the years 1993 and 1994 by the firms inspected and therefore no deficiencies in control could have been found here. If the Commission wanted to apply reductions here too it would have had to check other undertakings in this field.

157. This also follows from the Belle Group Report, according to which flat-rate corrections must only be applied to the expenditure sector for the region or administrative area in which deficiencies were found, unless it is proven that the same deficiency is also to be found in other

regions or throughout the entire territory of the Member State. In the present case, the findings on other budget items should not have been carried over to the common wheat sector. The alleged deficiencies are not systematic and do not entail any risk of loss for the EAGGF.

158. Moreover, in response to the Commission's request, it had been possible to demonstrate that this sector (common wheat) had its own particular control system.

159. Finally, the Commission's spot checks also have to be representative, which was not the case here since the common wheat sector did after all account for 27% of overall expenditure on prefinancing for cereals.

160. The Commission first of all points out that the correction applied concerns only advance payments made by Belgium within the framework of the prefinancing scheme. This method of proceeding is justified, even according to the Belle Group Report, since the export refunds had concerned the beef and veal and cereals sectors. The Commission's inspections did not target individual undertakings but were intended to shed light on the entire control system in the sectors mentioned.

161. The subject of the investigations was therefore the checks carried out by the customs offices. If, however, the entire control system in the cereals sector displays deficiencies, a correction can also be applied to the budget item 'common wheat'.

162. Belgium's argument that special provisions on control apply to the prefinancing of common wheat must be rejected as out of time since it was put forward for the first time at the reply stage in the present action.

163. The Belgian Government's arguments are not convincing in this respect either. First, the passage of the Belle Group Report mentioned refers to geographical and administrative areas and not to different budget items, with the result that it cannot be concluded on this basis that the Commission acted unlawfully. Next, the Commission's checks related to both the beef and veal and the cereals sectors. Since considerable deficiencies were found there, the Commission was in principle entitled to apply flat-rate reductions, in particular even where no specific losses to the detriment of the EAGGF through unjustified payments under the export refund scheme could be demonstrated.

164. At the time when the Summary Report and the contested decision were

issued, the Commission had been compelled, for lack of other information, to assume that the deficiencies found in the control system concerned the entire cereals sector. The fact that other provisions might apply to common wheat was put forward by the Belgian Government for the first time at the reply stage of the proceedings and must therefore be rejected as submitted out of time under Article 42 of the Rules of Procedure of the Court of Justice. [27]

165. Since, therefore, the Commission's inspections concerned the cereals sector as a whole, and deficiencies were found in the related control system, a correction in respect of all expenditure declared was justified.

166. Secondly, Belgium criticises (in the alternative) the correction for the beef and veal sector. The Commission only pointed out deficiencies in the checks for the special refund scheme in accordance with Regulations No 32/82 and No 1964/82 (see paragraph 34). In this area, however, there were specific demands in respect of checks. It cannot automatically be concluded from deficiencies found in this area that there were deficiencies in supervision in other areas of the beef and veal sector too. Any financial correction would therefore have required separate examination and justification. Thus, in particular, the checks in respect of export refunds with regard to beef and veal from female cattle are fundamentally different from those to be carried out in respect of special refunds.

167. In the Commission's view, there are no errors of law to be found in this respect either. Its checks had related to the entire control system in the beef and veal sector. Above all, the shortcomings which had emerged in the on-the-spot checks, such as shortage of staff in the customs offices and lack of (testing) equipment, are independent of the type of refund system. These deficiencies emerged at every check, regardless of context. Other exporters too had conducted their business in the customs offices checked, with the result that the deficiencies found had also had repercussions on them. The Commission's inspections were also directed to compliance with the provisions of Regulation No 565/80, concerning the prefinancing of meat from female cattle and forequarters of male cattle.

168. In response to this criticism it has to be said that, since the Commission's inspections related to the entire beef and veal sector and are for this reason to be regarded as representative, the financial correction

27 — This provision reads:
'1. In reply or rejoinder a party may offer further evidence. The party must, however, give reasons for the delay offering in it.
2. No new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.
...'

was rightly applied to the entire sector. Moreover, deficiencies were found in the control system which would inevitably have an unfavourable effect on any control procedure. The lack of staff and equipment give rise to considerable doubts as to whether effective checks could be carried out. These doubts could not be dispelled by the Belgian Government's submission, with the result that a financial correction for the beef and veal sector investigated seems justified.

169. Thirdly, the Belgian Government claims (in the alternative) in its application that it had already, during the conciliation procedure, pointed out that a correction in the cereals sector should not be applied to expenditure that could not be attributed to the system of prefinancing export refunds. Since the Commission's inspections had only concerned such prefinancing, other areas should not have been included in the correction. In its reply it further states that the inspections related only to prefinancing processing. For this reason, Belgium had cleared the accounts for cereals not intended for processing. These sums, for prefinancing storage, had mistakenly not been indicated by Belgium in the conciliation procedure. This information had, however, been available to the Commission during the conciliation procedure, as is shown by a BBIR document dated 25 September 1996.

170. The Commission explains in this respect that the correction was applied with regard to the prefinancing system. The Commission was guided by the data and documents made available by the Belgian authorities. The inspections had concerned both the prefinancing processing and the prefinancing storage systems. Both the firm Boormalt, which made use of the latter, and the Sobegra customs warehouse, which belonged to the Antwerp customs office, were checked. Belgium's argument that the prefinancing storage system should not have been taken into consideration was put forward for the first time in this form in the reply and must thus be rejected as being submitted out of time.

171. In the final analysis, the Commission's submission must be upheld. According to the documents produced, inspections had been carried out in the aforementioned areas of prefinancing. The correction could therefore be applied to both systems. The Belgian Government's further plea, calling for the prefinancing storage system to be left out of consideration, must be rejected as put forward too late, since it was introduced only at the reply stage of the proceedings and therefore neither had to be taken into consideration when the decision mentioned was adopted nor needs to be considered when the Court makes its decision according to Article 42(2) of the Rules of Procedure.

172. Moreover, the Member States are obliged to make the necessary information available to the Commission, so that in the present case the Commission did not need to have any knowledge of the BBIR documents.

173. It follows from the foregoing that the three heads of the Belgian Government's alternative plea must also be rejected. A flat-rate correction could therefore lawfully be applied by the Commission.

3. Third plea: Infringement of the principle of legal certainty, of the legal maxim *patere legem quam ipse fecisti* and of the duty to state reasons

174. By this plea the Belgian Government essentially criticises the fact that the Commission, in both its Summary Report and the contested decision, disregarded the guidelines it had itself set in place in the Belle Group Report — see paragraphs 44 to 47 above — without stating adequate reasons for doing so. The Commission therefore committed an error at law in arriving at the result of a 10% flat-rate reduction for the beef and veal and cereals sectors.

175. The Belgian Government feels that it already follows from its arguments in support of the first two pleas that a 10% correction could not be justified. Thus, neither deficiencies in the entire control system, or essential elements thereof, nor the risk of very high losses for the EAGGF had been proven. Neither did the Commission take into account in its considerations the fact that Belgium tried taking effective action to remedy the shortcomings criticised. For example, an improved check report system was introduced, and attempts were made to improve the inspectors' working methods. Additional provisions were brought into force in respect of physical checks and the application of the principle of equivalence, and the instructions relevant to the beef and veal sector have been updated. Moreover, as the submissions in the first and second plea (principle of equivalence, physical checks) show, problems arose in the interpretation of Community provisions since the wording was sometimes unclear and there were several possible interpretations.

176. Finally, the financial correction should have been confined to the areas inspected and not applied to the entire Belgian territory.

177. The Commission points out that it did not apply the highest possible correction as it could even, under certain circumstances,

have refused all of the expenditure. Besides, a 10% reduction had been decided also for Germany, France, Italy and the Netherlands in the cereals sector. It was only in the beef and veal sector that the reduction for the other Member States concerned was lower.

178. In the case of Belgium it was found that the deficiencies affected either the control system as a whole or essential elements thereof. Because of the lack of checks or because of shortcomings in the checks it was not possible to guarantee that the expenditure was actually justified.

179. For the beef and veal sector there was a considerable risk of substitution, with the result that goods could have been exported in smaller quantities and of a lower weight than registered.

180. A similar risk arose in the cereals sector, compounded by the fact that the customs offices concerned were not informed about the actual warehouse stock.

181. The main objections justifying the correction applied were listed in the Summary Report.

182. In 1993, expenditure on prefinancing totalled ECU 1 600 million, corresponding to 15.8% of total expenditure on export refunds. Belgium was one of six Member States in receipt of the majority of this. If considerable deficiencies were found, this entailed the risk of very high losses. Since there had been no doubts about a 10% correction, no mitigating circumstances had been taken into consideration either. Furthermore, there had not been any. The same deficiencies as had come to light in the 1994 inspections had been the subject of repeated reminders in the Summary Reports of previous years (1987, 1988, 1989, 1990 and 1992).

183. There was no trace of the improvements mentioned by Belgium either — at least not by November 1994. Nor were there any problems of interpretation as the Commission had already advised on the current interpretation and application of the provisions in previous years in its Summary Reports and circulars.

184. As already stated in paragraph 49, it is settled case-law of the Court that the EAGGF only finances interventions within the framework of the common organisation of the agricultural markets carried out in accordance with Community provisions. Since the Member State concerned is in the best position to provide and verify the information necessary for clearing the accounts of the EAGGF, it is for that State to prove in full detail the accuracy of its figures and where necessary to demonstrate the inaccuracy of the Commission's calculations.

185. As far as the level of financial correction is concerned, it clearly follows from case-law of the Court that the Commission could even refuse all costs incurred if it finds that there are no adequate control mechanisms in place.

186. Moreover, the Member State must prove that the criteria applied by the Commission for treating irregularities differently — according to the extent of the lack of checks and the degree of risk for the EAGGF — are arbitrary and unfair. The Belgian Government was, however, unable to provide such evidence.

187. The deficiencies found by the Commission related at the least to essential elements of the control system or to the implementation of checks of vital importance for assuring the legality of expenditure.

188. The Commission was also able to prove the risk of correspondingly higher losses for the EAGGF. In view of the high sums of expenditure in the area of prefinancing and the deficiencies found, the Commission rightly had to assume that the risk was considerable.

189. A flat-rate correction of 10% was, in view of all the foregoing, justified. The Belgian Government's submission in this respect must be rejected.

4. Fourth plea: Infringement of the principle of equal treatment and the duty to state reasons

190. In the beef and veal sector the Commission applied a reduction of 10% for Belgium, but only 5% for Germany, France, Italy and the Netherlands.

191. The Belgian Government sees this as unjustified discrimination. Although the list of the essential objections was longer for Belgium than for the other Member States it was legally flawed since it was based on incorrect factual findings.

192. Similar deficiencies were found for the Netherlands but the level of correction was lower. The situation of both Member States is comparable but resulted in different assessments. The other Member States also displayed comparable deficiencies, but the sanctions against Belgium are higher.

193. In the Commission's view, a mere look at the list of deficiencies, which was longer for Belgium than for the other Member States, suffices to show that the Community provisions had been infringed to a greater extent in that State.

194. For example, besides deficiencies in the implementation of checks, shortcomings in staffing and equipment had been found in particular. These problems were not observed in the other Member States.

195. In particular, the checks under Regulations No 32/82 and No 1964/82 were much more efficient in the other Member States investigated. In the latter, inspectors were present at the boning, who had stamped the pieces of meat, monitored exports, determined weight and applied seals. Such tight control was not observed in Belgium.

196. In this respect it is to be noted that a prohibited inequality of treatment could only occur if the same circumstances were treated differently without any objective justification. However, this is not the case here. As the Belgian Government has itself conceded, the list of deficiencies for this Member State is longer than for the other Member States investigated. Moreover, it has transpired that the deficiencies and shortcomings of the Belgian control system were greater than in the other Member States affected by the contested decision. Since, therefore, the circumstances are not in fact comparable, there cannot be any infringement of the principle of equal treatment.

197. Nor is there any infringement of the duty to state reasons, as the Belgian authorities knew in good time about the Commission's criticisms and had been given the opportunity to comment on them.

198. It therefore follows from the foregoing that the Belgian Government's action must be dismissed in its entirety as unfounded.

Costs

199. Under Article 69(2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs, if applied for by the successful party. Since the Commission has applied for costs against the Kingdom of Belgium, the latter, as the unsuccessful party, must pay the costs.

F — Conclusion

200. For the reasons given above, it is proposed that the Court decide as follows:

(1) The action is dismissed.

(2) The Kingdom of Belgium shall pay the costs of the proceedings.