

OPINION OF ADVOCATE GENERAL
GEELHOED

delivered on 18 November 2004¹

I — Introduction

1. In this case the Portuguese Republic is bringing an action for the annulment of Commission Decision 2003/364/EC of 15 May 2003 excluding from Community financing certain expenditure incurred by Member States under the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF).² The present case concerns the Commission's refusal to pay to the Portuguese Republic an amount totalling EUR 2 446 684.20.

II — Legal background

2. The legal background relating to the financing of the joint agricultural policy and the clearance of EAGGF accounts has been repeatedly and exhaustively considered in various opinions and judgments. For a

detailed exposition of this legal framework, see *inter alia*, the Opinion of Advocate General Jacobs of 22 January 2004 and the judgment in *Germany v Commission*.³

III — Facts and procedure

3. From 18 to 22 September 2000 the Commission carried out various checks in Portugal to determine whether there was compliance with the applicable Community regulations. These checks took place on a variety of cattle holdings in Alentejo.

4. On the basis of these checks, the Commission notified the Portuguese authorities

1 — Original language: Dutch.

2 — OJ L 124, p.45.

3 — Opinion in Case C-332/01 *Greece v Commission* [2005] ECR I-7699, 7703 points 4 to 9 and 18 to 22; judgment of 4 March 2004 in Case C-344/01 *Germany v Commission* [2004] ECR I-2081, paragraphs 2 to 14.

by letter dated 20 March 2001 that it was commencing an inquiry under Article 8(1) of Regulation No 1663/95,⁴ because the beef and veal sector was not in full compliance with Regulation No 805/68,⁵ Regulation No 3886/92,⁶ Regulation No 3508/92⁷ and Regulation No 3887/92⁸ as well as Regulation No 1254/1999⁹ and Regulation No 2342/1999.¹⁰

5. The Commission arrived at this view on the basis of the following findings. In the first place, the number of on-the-spot checks in the retention period totalled 4.4%, whereas Community law, under Article 6 of Regulation No 3887/92,¹¹ prescribes a minimum percentage of 5% of checks during the

relevant period. Furthermore, the Portuguese producers used a variety of identification markings. These comprised normal orange eartags, old metal eartags, yellow eartags, and green eartags from the Commission's (IDEA) programme which employs an electronic tagging system to register and trace animals within the Community. In addition, several animals were branded and/or tattooed on the flank. A large number of animals were not identified by means of the officially distributed eartags, but by means of the producer's own handwritten tags.

4 — Commission Regulation (EC) No 1663/95 of 7 July 1995 laying down detailed rules for the application of Council Regulation (EEC) No 729/70 regarding the procedure for the clearance of the accounts of the EAGGF Guarantee Section, OJ 1995 L 158, p. 6.

5 — Council Regulation (EEC) No 805/68 of 27 June 1968 on the common organisation of the market in beef and veal, OJ, English special edition 1968(I), p. 187, as amended by Council Regulation (EC) No 2222/96 of 18 November 1996 (OJ 1996 L 296, p. 50).

6 — Commission Regulation (EEC) No 3886/92 of 23 December 1992 laying down detailed rules for the application of the premium schemes provided for in Council Regulation (EEC) No 805/68 on the common organisation of the market in beef and repealing Regulation (EEC) No 1244/82 and Regulation (EEC) No 714/89, OJ 1992 L 391, p. 20, as amended by Commission Regulation (EC) No 2311/96 of 2 December 1996, OJ 1996 L 313, p. 9.

7 — Council Regulation (EEC) No 3508/92 of 27 November 1992 establishing an integrated administration and control system for certain Community aid schemes, OJ 1992 L 355, p. 1.

8 — Commission Regulation (EEC) No 3887/92 of 23 December 1992 laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes, OJ 1992 L 391, p. 36.

9 — Council Regulation (EC) No 1254/1999 of 17 May 1999 on the common organisation of the market in beef and veal, OJ 1999 L 160, p. 21.

10 — Commission Regulation (EC) No 2342/1999 of 28 October 1999 laying down detailed rules for the application of Council Regulation (EC) No 1254/1999 on the common organisation of the market in beef and veal as regards premium schemes, OJ 1999 L 281, p. 30.

11 — Commission Regulation (EEC) No 3887/92 of 23 December 1992 laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes, OJ 1992 L 391, p. 36.

6. The Portuguese authorities contested the observed irregularities in a letter dated 28 May 2001. In the first place, the Portuguese Government states that in the year in question they did comply with the minimum percentage of checks of 5%. In the second place, the Portuguese Government gives a more detailed explanation of the various eartags in use. The old metal tags were used for animals which were identified before September/October 1998 and which were not replaced. The yellow eartags were used by certain producers for control purposes of their own. The animals marked by means of branding and/or tattooing on the flank are fighting bulls. In the case of fighting bulls, the identification marks must be visible at a greater distance. The handwritten tags were used, according to the Portuguese authorities, because the original tags had been lost, and these were equivalent to the official identification numbers.

7. The Commission then invited the Portuguese authorities to a bilateral consultation by letter dated 31 October 2001. The Commission added that it was considering making a flat-rate correction of 2% to the expenditure declared by Portugal in respect of the premium for the suckler-cow herd in the 1999 calendar year and a flat-rate correction of 5% to the expenditure declared by Portugal in respect of the special premium for producers of beef and veal in the same calendar year.

by Member States from financing by the Fund. Under Article 1 of Commission Decision 2003/364/EC and the annex to this Decision, the following expenditures on the part of the Portuguese Republic were excluded from Community financing for the 1999 financial year:

- EUR 909 773.86 in respect of a suckler-cow premium, inclusive of the supplementary premium,

8. The bilateral consultation took place in Brussels on 21 November 2001. The Commission announced its conclusions in respect of the bilateral consultation in an official statement on 20 February 2002. The Commission then formally notified the Portuguese authorities of its conclusions by letter dated 30 May 2002, referring to Decision 94/442/EC.¹² The Portuguese authorities then requested the initiation of the conciliation procedure. This procedure did not however bring the parties' respective points of view any closer to each other. This procedure having yielded no result, the Commission adopted the contested decision on 15 May 2003.

- EUR 1 087 047.53 in respect of a special premium for beef and veal,

- EUR 376 870.71 in respect of an extensification premium,

- EUR 72 992.11 EUR in respect of direct payments to the producers Poseima.

9. In Decision 2003/364/EC the Commission excluded certain expenditure incurred

10. In an application lodged on 31 July 2003 the Portuguese Republic brought an action under Article 230(1) EC for annulment of

¹² — OJ 1994 L 182, p. 45.

the contested decision and for an order that the defendant should pay the costs. The Commission contended that the Court should dismiss the action and order the applicant to pay costs.

minimum percentage of checks laid down in Article 6(5) of Regulation No 3887/92. Article 6(5) of Regulation No 3887/92 speaks of 'the minimal checks on animals'. According to the Portuguese Government, applications for 'animal' aid and the accompanying checks must be interpreted and assessed in the light of the holding overall, or in other words, all 'animal' aid schemes must be considered jointly. Therefore, it does not follow from Article 6(5) of Regulation No 3887/92 that, as the Commission seems to be arguing, each of the aid schemes must be checked individually.

IV — The action

11. The applicant submits three pleas in support of its application: infringement resulting from the misapplication of Article 6(5) of Regulation No 3887/92; incorrect assessment of the facts regarding the expenditure declared by the Portuguese authorities for the 1999 calendar year in respect of the premium for the maintenance of the suckler-cow herd, and breach of the obligation to provide reasons under Article 253 EC.

13. The Portuguese authorities have adopted an approach whereby holdings submit an integrated application for the various 'animal' aid schemes available under the EAGGF Guarantee Section, in the context of which the checks are carried out. In the year in question, the legally prescribed minimum number of on-the-spot checks were carried out on applications during the retention period of the animals.

A — First plea: infringement resulting from the misapplication of Article 6(5) of Regulation No 3887/92

Arguments of the parties

12. The Portuguese Government asserts that in the year in question it complied with the

14. The Portuguese Government is of the opinion that Article 6(5) of Regulation (EEC) No 3887/92, in the version in force at the material time, did not distinguish between the various aid schemes in respect of the obligation to check 5% of the 'animal' aid applications during the retention period,

with the result that, contrary to the Commission's contention, the Portuguese authorities acted in compliance with the relevant provision. It also refers to Article 6(5), as amended by Regulation No 1678/98,¹³ which provides that 'on-the-spot checks pursuant to this Regulation may be carried out in conjunction with any other inspection provided for by Community legislation'.¹⁴

Regulation No 3887/92 amended by Regulation No 2801/1999.¹⁵ This provision states: '... On-the-spot checks concerning livestock premiums shall cover all livestock which are to be controlled under an aid scheme. At least 50% of the minimal checks on animals shall be made during the retention period. ... On-the-spot checks under this Regulation shall, where appropriate, be carried out together with checks provided for under other Community rules.' This version of Article 6(5) of Regulation No 3887/92 clearly distinguishes between the various aid schemes individually, but this provision only came into force on 1 January 2000.

15. The Portuguese Government argues that the percentage of checks for the totality of 'animal' aid applications is higher than 5%. It is true that the percentage of checks for the premium scheme for the beef and veal sector stood at 4.4% for the retention period. However, if the average is taken of the percentage of checks for the premium scheme for the beef sector, the premium scheme for the maintenance of the suckler-cow herd and the premium scheme for the producers of sheepmeat and goatmeat, the percentage of checks rises to 6.3%.

17. The Portuguese Government maintains that, by not applying in this case the version of Article 6(5) of Regulation 3887/92 that was in force at the material time, but rather the version as amended by Regulation No 2801/99, the Commission is retrospectively applying a new rule, thereby violating general legal principles that the Member States have in common.

16. The Portuguese Government also draws attention to the version of Article 6(5) of

18. The Commission is of the view that the position adopted by the Portuguese Government reflects an incorrect interpretation of

13 — Commission Regulation (EC) No 1678/98 of 29 July 1998 amending Regulation (EEC) No 3887/92 laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes, OJ 1998 L 212, p. 23.

14 — The provision — in amended form — is applicable to aid applications submitted on or after 1 January 1999.

15 — Commission Regulation (EC) No 2801/1999 of 21 December 1999 amending Regulation (EEC) No 3887/92 laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes, OJ 1999 L 340, p. 29.

both the spirit and the letter of Article 6(3) and (5) of Regulation No 3887/92. The Portuguese Government's point of view is diametrically opposed to the intended purpose of these provisions. Article 6(1) of Regulation No 3887/92 reads as follows: 'Administrative and on-the-spot checks shall be made in such a way as to ensure effective verification of compliance with the terms under which aids and premiums are granted.' If the contention of the Portuguese Government were to be accepted, it would suffice to check 10% of the aid applications for the premium scheme for the maintenance of the suckler-cow herd and 10% of the aid applications for the premium scheme for producers of sheepmeat and goatmeat. By so doing, the percentage of applications checked would amount to 6.66% without a single aid application for the premium scheme for the beef and veal sector being checked.

19. Such an interpretation is totally contrary to Article 7 of Regulation 3508/92, which expressly states that: 'The integrated control system shall cover all aid applications submitted, in particular as regards administrative checks, on-the-spot checks and, if appropriate, verification by aerial or satellite remote sensing.'

Appraisal

20. Article 6(3) of Regulation No 3887/92 reads as follows: 'On-the-spot checks shall cover at least a significant percentage of applications. The significant percentage shall

represent at least: — 10% of "livestock" aid applications or participation declarations, ...'. Paragraph 5 of the same Article states: 'At least 50% of the minimal checks on animals shall be made during the retention period. ...'. It follows from these provisions that the minimum number of checks carried out on animals must amount to at least 5% during the retention period.

21. The parties are divided on the interpretation of 'the minimal checks on animals'. The Portuguese Government maintains that the checks on all aid schemes pertaining to animals should be considered as a whole. The average number of checks is therefore decisive when considering whether there has been compliance with the minimum requirement of 5% as required by Article 6(3) and (5) of Regulation No 3887/92. The Commission adopts a different approach. According to it, the minimum requirement of 5% must be met in respect of each of the schemes individually.

22. It seems to me that 'the minimal checks on animals' must be interpreted to mean that each individual aid scheme must comply with the minimum percentage as prescribed by Article 6(3) and (5) of Regulation No 3887/92. If the reasoning of the Portuguese Government were to be accepted, the effectiveness of the provision would be seriously undermined. Any reading of Article 6(3) and

(5) of Regulation No 3887/92 other than that set out above would result in the Portuguese Government being able merely to check the aid applications for the premium scheme for the maintenance of the suckler-cow herd and the aid applications for the premium scheme for producers of sheepmeat and goatmeat. The situation could then arise where not a single aid application for the premium scheme for the beef and veal sector would need to be checked. Such an interpretation of Article 6(3) and (5) of Regulation No 3887/92 can therefore not be accepted.

B — Second plea: Incorrect assessment of the facts regarding the expenditure declared by the Portuguese authorities for the 1999 calendar year in respect of the premium for the maintenance of the suckler-cow herd

Arguments of the parties

23. Given that the percentage of checks in respect of the premium scheme for the beef sector during the retention period amounted to 4.4%, and given that there can be only one interpretation of Article 6(3) and (5) of Regulation No 3887/92, the conclusion must be drawn that the Portuguese Government did not comply with the minimum requirement of 5% of checks as prescribed by Regulation No 3887/92.

25. The second plea advanced by the Portuguese authorities is in three parts. The first concerns the date on which the irregularities were observed. The second deals with the validity of the observations and the third relates to the representativeness of the sample.

24. In my opinion the first plea advanced by the Portuguese Government is therefore unfounded.

26. As regards the first part, the Portuguese Government is of the opinion that the alleged irregularities in the identification of the animals, which the Commission claims to have established during verification exercises at holdings in the Alentejo region in September 2000, cannot serve as the basis for the imposition of flat-rate corrections to expenditure for the 1999 calendar year. The Commission carried out various checks in Portugal from 18 to 22 September 2000; the results of these checks should therefore be taken into account for the 2000 selling season and not for the 1999 selling season.

27. The Commission refers in its defence to Article 5(2)(c) of Regulation No 729/70 regarding the financing of the common agricultural policy as amended by Council Regulation (EC) No 1287/95 of 22 May 1995,¹⁶ which states that: '... A refusal to finance may not involve expenditure effected prior to 24 months preceding the Commission's written communication of the results of those checks to the Member State concerned. ...'

28. The Portuguese authorities contest this and submit that the Commission fails to distinguish between two separate issues. The first issue concerns the duration of the time period during which the consequences of the results of the verification exercises must be communicated, and the second issue concerns the financial year to which the verification exercise applies.

29. In the second part of its plea, the Portuguese Government contests the validity of the irregularities alleged by the Commission. Portugal has complied and continues to comply with the scheme for the identifica-

tion of bovine animals,¹⁷ also with regard to handwritten numbers. The handwritten identification numbers are merely a temporary measure. This interim solution is used so that the animals are marked with the official identification number up until the moment that the competent authority has supplied replacement eartags. The Portuguese Government points out that the handwritten identification numbers are identical to the official identification numbers as recorded in the passport of the animals concerned, so that no problems can arise with regard to the identification of the animals.

30. The Commission contests this and refers to the summary report in which the shortcomings with regard to animal identification are summarised. Local inspectors apparently accept handwritten identification numbers without any problems. Such a practice does not comply with Article 6(1) of Regulation No 3887/92¹⁸ which stipulates: 'Administrative and on-the-spot checks shall be made in such a way as to ensure effective verification of compliance with the terms under which aids and premiums are granted.'

¹⁷ — Commission Regulation (EC) No 2629/97 of 29 December 1997 laying down detailed rules for the implementation of Council Regulation (EC) No 820/97 as regards eartags, holding registers and passports in the framework of the system for the identification and registration of bovine animals, OJ 1997 L 354, p. 19.

¹⁸ — Quoted in footnote 8.

¹⁶ — OJ 1995 L 125, p. 1.

31. In the third part of its plea, the Portuguese Government complains that the Commission made an incorrect assessment of the relevant facts because it failed to make allowances for actual circumstances. As justification for its application of the financial correction, the Commission alleges that some animals wore eartags supplied by the producer and bore an identification number used by the producer which differed from the number allocated by the competent authorities. The Commission is of the opinion that this practice increases the risk of more than one premium being paid for the same animal. According to the Portuguese Government, the Commission should have given some weight to the circumstances in which the practice occurred. It involved only six producers in one region. It is claimed that this region has certain characteristics that differentiate it from the rest of the country. Cattle holdings in Alentejo are extensive, which allegedly makes it more difficult for producers to control the animals. It is claimed that the sample used was therefore not representative.

32. The Commission points out that while a region may indeed have specific characteristics, there must nevertheless still be compliance with Community rules.

Appraisal

33. In the first part of its second plea, the Portuguese Government calls into question the year to which the flat-rate corrections relate. It argues that the results of the checks should have been taken into account for the 2000 selling season and not for the 1999 selling season.

34. Article 5(2)(c) of Regulation No 729/70 gives the Commission the power, contrary to what the Portuguese Government alleges, to refuse financing for expenditure incurred during the 24 months before the Commission gives written notification of the results of the verification exercise to the Member State concerned. The Commission was therefore able to take the results of the checks performed into account for the 1999 selling season.

35. Moreover, the Portuguese Government did not deny, in its application and reply, that various animals were only marked with handwritten identification numbers. This is contrary to Article 4(1) of Regulation No 820/97. This provision stipulates that '[a]ll animals on a holding born after 1 January

1998 or intended for intra-Community trade after 1 January 1998 shall be identified by an eartag approved by the competent authority, applied to each ear'. I do not consider the justification given by the Portuguese Government, namely that a handwritten identification number is only an interim solution, to be convincing proof that the identification of the animals is sufficiently assured.

36. Furthermore, the Portuguese Government claims that the shortcomings observed in the Alentejo region are specific to that region and cannot be extrapolated to other regions.

37. It is settled case-law that, in order to prove a breach of the rules concerning the common organisation of the agricultural markets, the Commission is not required to demonstrate exhaustively that the checks carried out by the national administrations are inadequate or that the figures presented by them are irregular, but only to provide evidence of the serious and reasonable doubt it entertains about such checks and figures. The reason for this mitigation of the burden of proof on the Commission is that it is the Member State itself which is best placed to collect and verify the data required for the clearance of EAGGF accounts, and it is the Member State which is consequently required to adduce detailed and comprehensive evidence that checks have been carried out and that figures are correct and, where

appropriate, that the Commission's assertions are incorrect.¹⁹

38. The Member States are themselves responsible for breaches of the rules concerning the joint regulation of agricultural markets, as is apparent from Article 8(1) of Regulation No 729/70 which imposes a general obligation on Member States to take the necessary measures to satisfy themselves that the measures financed by the EAGGF are actually and correctly implemented, to prevent and to deal with irregularities, and to recover monies lost as a result of irregularities or negligence.

39. The extrapolation of data from a given region to other regions is therefore not forbidden in principle. It must however still be justified by the facts.

40. In this regard it should be pointed out that the Portuguese Government has not adequately challenged the Commission's contentions regarding the inadequate identification of the animals. According to the case-law cited above, it is for the Portuguese Government to prove that the Commission's

¹⁹ — Case C-377/99 *Germany v Commission* [2002] ECR I-7421, paragraph 95; Case C-278/98 *Netherlands v Commission* [2001] ECR I-1501, paragraphs 39 to 41, and Case C-329/90 *Spain v Commission* [2003] ECR I-6103, paragraph 68.

doubts were unfounded by adducing detailed and comprehensive evidence of the authenticity of its checks and figures. Merely referring to the fact that the situation is different in every region is not enough.

provide reasons is essential in order to guarantee the rights of defence of the person or body affected by the negative consequences of the measure.

41. Based on the aforementioned considerations, the applicant's arguments in respect of the rejection of certain expenditure within the framework of the premium for the maintenance of the suckler-cow herd should in my opinion also not be upheld.

43. The extensive correspondence between the Portuguese Republic and the Commission shows, according to the Commission, that the complaint of the Portuguese Republic is unfounded. In addition, the contested decision provides an overview of the legal grounds and reasons. Moreover, the seventh recital states that: 'As regards the cases covered by this Decision, the assessment of the amounts to be excluded on grounds of non-compliance with Community rules was notified by the Commission to the Member States and is set out in a summary report on the subject.' The summary report provides a detailed account of the Commission's reasons for making the flat-rate corrections.

C — Third plea: Breach of the obligation to state reasons under Article 253 EC

42. The Portuguese Government claims that the Commission did not state in its decision which aspects of the conduct of the Portuguese authorities were regarded as contrary to Community law and which Community legislation was infringed thereby. Thus, according to the Portuguese authorities, the decision does not comply with the minimum requirements necessary to fulfil the obligation to provide reasons. Those minimum requirements are even stricter when at issue are decisions that impose sanctions or entail adverse consequences, especially of a financial nature, as in the present case. In such situations, the fulfilment of the obligation to

Appraisal

44. The third plea of the Portuguese Government, alleging an inadequate statement of reasons, can also not be upheld. The Court has already held that: 'In the particular context of the preparation of decisions

relating to the clearance of accounts, the statement of reasons for a decision must be regarded as sufficient if the Member State to which the decision was addressed was closely involved in the process by which the decision came about and was aware of the reasons for which the Commission took the view that it must not charge the sum in dispute to the EAGGF.²⁰

45. The Portuguese authorities were closely involved in the preparation of the contested decision. The reasons for the Commission's findings were set out both in correspondence from the Commission to them and in the aforementioned summary report, and were also made clear to the Portuguese Government during conciliation. The last plea must therefore in my opinion be rejected.

V — Conclusion

46. In view of the above, I recommend that the Court should:

- (1) dismiss the action;
- (2) order the Portuguese Republic to pay the costs.

²⁰ — See, inter alia, Case C-27/94 *Netherlands v Commission* [1998] ECR I-5581, paragraph 36, and the Opinion of Advocate General Mischo in Case C-133/99 *Netherlands v Commission* [2002] ECR I-4943, points 125 to 127.