

JUDGMENT OF THE COURT (Fifth Chamber)  
19 September 2002 \*

In Case C-377/99,

**Federal Republic of Germany**, represented initially by W.-D. Plessing and C.D. Quassowski and subsequently by W.-D. Plessing and B. Muttelsee-Schön, acting as Agents,

applicant,

v

**Commission of the European Communities**, represented by M. Niejahr and G. Braun, acting as Agents, with an address for service in Luxembourg,

defendant,

**APPLICATION** for partial annulment of Commission Decision 1999/596/EC of 28 July 1999 amending Decision 1999/187/EC on the clearance of the accounts presented by the Member States in respect of the expenditure for 1995 of the

\* Language of the case: German.

Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) (OJ 1999 L 226, p. 26), in so far as it imposes on the Federal Republic of Germany a flat-rate correction of 5% to the expenditure declared in respect of financial support in the arable crops sector in Mecklenburg-Vorpommern, equal to the sum of DEM 30 394 115.33, instead of 2%, equal to the sum of DEM 12 157 646.13,

THE COURT (Fifth Chamber),

composed of: P. Jann, President of the Chamber, S. von Bahr (Rapporteur), D.A.O. Edward, A. La Pergola and C.W.A. Timmermans, Judges,

Advocate General: C. Stix-Hackl,  
Registrar: M.-F. Contet, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 10 January 2002,

after hearing the Opinion of the Advocate General at the sitting on 25 April 2002,

gives the following

## Judgment

- 1 By application lodged at the Court Registry on 7 October 1999, the Federal Republic of Germany brought an action under the first paragraph of Article 230 EC for partial annulment of Commission Decision 1999/596/EC of 28 July 1999 amending Decision 1999/187/EC on the clearance of the accounts presented by the Member States in respect of the expenditure for 1995 of the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) (OJ 1999 L 226, p. 26; 'the contested decision'), in so far as it imposes on the Federal Republic of Germany a flat-rate correction of 5% to the expenditure declared in respect of financial support in the arable crops sector in Mecklenburg-Vorpommern, equal to the sum of DEM 30 394 115.33, instead of 2%, equal to the sum of DEM 12 157 646.13.

### Legal background

#### *Community rules*

#### Rules on the financing of the common agricultural policy

- 2 This action concerns compensatory payments in respect of cultivated land in the arable crops sector which fall within the scope of, first, the general rules laid down in Regulation (EEC) No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy (OJ, English Special Edition 1970 (I), p. 218), and second, certain specific regulations, namely Council Regulation

(EEC) No 1765/92 of 30 June 1992 establishing a support system for producers of certain arable crops (OJ 1992 L 181, p. 12), Council Regulation (EEC) No 2078/92 of 30 June 1992 on agricultural production methods compatible with the requirements of the protection of the environment and the maintenance of the countryside (OJ 1992 L 215, p. 85), and Council Regulation (EEC) No 2080/92 of 30 June 1992 instituting a Community aid scheme for forestry measures in agriculture (OJ 1992 L 215, p. 96).

- 3 Article 3(1) of Regulation No 729/70 provides that the Guarantee Section of the EAGGF is to finance intervention intended to stabilise the agricultural markets which is undertaken according to Community rules within the framework of the common organisation of agricultural markets.
  
- 4 Article 5(2)(b) of Regulation No 729/70 provides that on the basis of documents transmitted by the Member States in accordance with Article 5(1)(b) of that regulation the Commission is to clear the accounts of the authorities and bodies empowered by the Member States to effect payment of the intervention intended to stabilise the agricultural markets.
  
- 5 Under Article 8(1) of Regulation No 729/70, the Member States, acting in accordance with national provisions laid down by law, regulation or administrative action, are to take the measures necessary to satisfy themselves that transactions financed by the EAGGF are actually carried out and are executed correctly, to prevent and deal with irregularities and to recover sums lost as a result of irregularities or negligence. Under Article 8(2) of that regulation, in the absence of total recovery, the financial consequences of irregularities or negligence shall be borne by the Community, with the exception of the consequences of irregularities or negligence attributable to administrative authorities or other bodies of the Member States.

## Integrated administration and control system

- 6 Article 1(1)(a) of 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) provides that each Member State is to set up an integrated administration and control system which applies, *inter alia*, to the support system for producers of certain arable crops instituted by Regulation No 1765/92.
- 7 Article 2 of Regulation No 3508/92 provides that the integrated administration and control system is to comprise, *inter alia*, a computerised database, an alphanumeric identification system for agricultural parcels, aid applications and an integrated control system.
- 8 Pursuant to Article 1(4) of Regulation No 3508/92, for the purposes of that regulation 'agricultural parcel' means a continuous area of land on which a single crop is raised by a single farmer. Article 4 of that regulation states that the alphanumeric identification system for agricultural parcels is to be established on the basis of, *inter alia*, land registry maps and documents. However, Article 3 of Commission Regulation (EEC) No 3887/92 of 23 December 1992 laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes (OJ 1992 L 391, p. 36) provides that, although the identification system indicated in Article 4 of Regulation No 3508/92 is to operate at agricultural parcel level, Member States may provide that another unit, such as the registered parcel or production block, be used instead of the agricultural parcel.

## Flat-rate corrections

- 9 The Commission's guidelines in respect of the flat-rate corrections applicable, *inter alia*, for the 1995 financial year were laid down in Document No VI/216/93 of 3 June 1993 ('Document VI/216/93'), which contains the following provisions:

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

1. whether the deficiency relates to the effectiveness of the control system generally, to the effectiveness of a particular element of the system, or to the operation of a control or controls under the system;
2. the importance of the deficiency within the totality of the administrative, physical and other controls foreseen;
3. the vulnerability to fraud of the measures, having regard particularly to the economic incentive.'

10 The document provides for the Commission to apply the following 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.'

#### Conciliation procedure

11 Commission Decision 94/442/EC of 1 July 1994 setting up a conciliation procedure in the context of the clearance of the accounts of the European Agricultural Guidance and Guarantee Fund (EAGGF) Guarantee Section

(OJ 1994 L 182, p. 45) established a conciliation body. Article 1(2)(a) of the decision provides that 'the position of the [Conciliation] Body shall be without prejudice to the Commission's final decision on the clearance of the accounts'.

### *National rules*

- 12 Paragraph 3(4) of the Kulturpflanzen-Ausgleichszahlungs-Verordnung (the German Regulation on compensatory payments for arable crops, BGBl. 1995 I, p. 1562; 'the KAV') provides that an agricultural parcel is 'a continuous area of agricultural land, belonging to a producer, sown with one type of crop, or set aside, made up of one or more registered parcels or parts of registered parcels. A field is an agricultural parcel within the meaning of the first sentence'.
- 13 Under Paragraph 3(3) of the KAV, a registered parcel is 'an area of land demarcated in the Land Register'.
- 14 Finally, under Paragraph 3(4a) of the KAV, a block is 'a continuous area of agricultural land, belonging to a producer, sown with one or more crops or set aside, and surrounded by natural boundaries or by land not farmed by that producer. A block may consist of one or more registered parcels or parts of registered parcels'.



## Facts and pre-litigation procedure

- 15 In the 1995 financial year, corresponding to the 1994 harvest, the German *Land* of Mecklenburg-Vorpommern granted aid in the arable crops sector. The use of that aid was governed by the integrated administration and control system instituted in Mecklenburg-Vorpommern in accordance with Regulations Nos 3508/92 and 3887/92.
  
- 16 For the purposes of clearing the 1995 accounts, the Commission carried out an inspection in Mecklenburg-Vorpommern from 23 to 27 October 1995 in order to monitor the application of Regulations Nos 1765/92, 2078/92 and 2080/92.
  
- 17 By letter of 13 February 1996, the Commission sent its observations to the German authorities and drew their attention to failings detected in the administration and control of the arable crops scheme in Mecklenburg-Vorpommern, in particular in the area under the responsibility of the Amt für Landwirtschaft Schwerin (Office for Agriculture, Schwerin; 'the Schwerin Amt').
  
- 18 The German authorities replied by letter of 25 April 1996. The parties then exchanged various letters prior to October 1996.
  
- 19 By letter of 17 June 1997, the Commission notified the German authorities of the preliminary conclusions of its inspection and proposed a correction of 5% of the expenditure, namely DEM 30 394 115.33.

- 20 A bilateral meeting was held on 24 June 1997. It was followed by a letter dated 8 July 1997, addressed to the German authorities, in which the Commission maintained its original evaluation of the findings of the inspection.
- 21 By letter of 3 September 1997, the German authorities sent their observations on the letter of 8 July 1997 to the Commission.
- 22 By letter of 12 June 1998, the Commission gave the German authorities formal notification, within the meaning of Decision 94/442, of the findings of the inspection carried out in October 1995 in Mecklenburg-Vorpommern. It stated that, in view of the explanations provided by the German authorities in their letter of 3 September 1997, it had decided not to impose a financial correction of 5% and, instead, considered a financial correction of 2%, or DEM 12 157 646.13, to be appropriate. The Commission nevertheless reserved the right to increase the correction rate if an inspection carried out during 1998 were to cast doubt on the accuracy of the explanations which had led to the adjustment in that rate. The Commission's reservation related to information supplied by the German authorities to the effect that, in Mecklenburg-Vorpommern, nearly 90% of the blocks were used for single crops or set aside. The Commission added that its findings could be the subject-matter of a request for conciliation pursuant to Decision 94/442.
- 23 By letter of 28 July 1998, the German Government requested the initiation of the conciliation procedure.
- 24 In August 1998, Commission staff carried out a second inspection in Mecklenburg-Vorpommern.

- 25 Following that inspection the Commission requested the German authorities by letter of 24 November 1998 to provide it with additional information. The letter, a copy of which was sent to the Conciliation Body, included the following passage:

‘May I also draw your attention to the following point, which could be important in the context of the conciliation proceedings. In the course of a joint inspection visit by DG VI and the financial controllers in August 1998 it came to light that, in respect of very many aid applications, the area actually farmed differed from the registered area of the parcels, or the area actually farmed had not been fully reported as an agricultural parcel. If the data on the areas of land actually farmed comes not from the land register but from information supplied by the farmer, it is all the more necessary to measure the agricultural parcels in the course of on-site checks. In that case, the German authorities’ contention that about 90% of the blocks were under a single crop or completely set aside would lose its force. The matter is currently being investigated and if you have any comments I would be grateful if you would let me have them as soon as possible.’

- 26 Various letters were exchanged between the German authorities, the Commission and the Conciliation Body in November and December 1998. By a letter of 11 December 1998, the German Government responded, in particular, to the questions put by the Commission in its letter of 24 November 1998, explaining that the apparent difference between the areas of land declared and the areas registered in the land register, and the purported corresponding need to measure the land, stemmed from the Commission’s misunderstanding of what was shown by some of the documents provided by the applicant.

- 27 In its final report, adopted on 30 December 1998, the Conciliation Body stated that it was aware of the doubts voiced by the Commission in its letter of

24 November 1998 regarding, first, the number of on-site checks carried out in the area for which the Schwerin Amt was responsible and, second, the relevance of the German authorities' argument that the measuring recommended by the Commission was in a very large number of cases superfluous. The Conciliation Body issued the following opinion:

- '(a) While it is true that no flagrant case of abuse has been detected, it is clear that there were a number of weaknesses in the control system in 1994.
  
- (b) There can be no doubt, after scrutinising the file and hearing the parties concerned, that in 1994 Mecklenburg-Vorpommern [made] serious efforts to implement a valid control system and so prevent losses to the EAGGF; in the case of a new Land not yet fully accustomed to the Community's administrative system, such efforts deserve special mention.
  
- (c) The Conciliation Body accordingly takes the view that applying a flat-rate correction of 5%, as had been originally planned by the Commission, was unjustified.'

28 In its summary report of 12 January 1999, the Commission retained its original proposal to apply a financial correction of 2%, instead of 5%, subject to the reservation that the information provided by the German authorities to the effect that in Mecklenburg-Vorpommern about 90% of all blocks were being used for a

single purpose (a single crop or set aside) was verified by a subsequent clearance check. The Commission noted that the Federal Republic of Germany had referred the matter to the Conciliation Body.

- 29 In a supplement to the summary report, dated 27 May 1999 but not received by the German authorities until 21 June 1999 ('the supplement to the summary report'), the Commission expressed its views on the Conciliations Body's final report of 30 December 1998. It claimed that the control system had not given rise to flagrant abuse but had serious shortcomings which justified a correction of 5%. It stated that the second inspection, carried out in August 1998, revealed that the situation was far more serious than it had supposed, and that it had drawn those findings to the attention of the German authorities in its letter of 24 November 1998, of which the Conciliation Body was aware although it had not taken the letter into consideration in its final report. The Commission found, in particular, that 15% of the blocks were used for multiple crops and that the agricultural parcels comprising those blocks represented 29% of the total number of parcels. The Commission also referred to the fact that almost all of the blocks consisted of a set of registered parcels and that more than half of those parcels were shared between two or more agricultural blocks, often belonging to the same producer.
- 30 By letter of 18 June 1999, the Commission, referring to the conciliation procedure, informed the German authorities of its final conclusions concerning the clearance of the 1995 accounts for the Guarantee Section of the EAGGF, arable crops sector. Those conclusions are essentially consistent with the observations made in the supplement to the summary report.
- 31 After consulting the Member States by way of the EAGGF Committee meeting on 22 June 1999, the Commission adopted the contested decision imposing on the Federal Republic of Germany a financial correction of 5% of the expenditure

declared in respect of financial support in the arable crops sector in Mecklenburg-Vorpommern, namely DEM 30 394 115.33.

## The first plea

### *Arguments of the parties*

- 32 In its first plea, the German Government submits that the reservation, stipulated by the Commission in its formal notification of 12 June 1998, concerning the application of a correction rate of 2% no longer applies.
- 33 The German Government points out that in that notification the Commission had formally proposed to lower the correction rate to 2% provided that the results of an inspection carried out in the course of 1998 did not refute the information provided by the German authorities on 3 September 1997 to the effect that in Mecklenburg-Vorpommern some 90% of the blocks were under single crops or set aside.
- 34 In fact, the inspection carried out in August 1998 confirmed that information. The German Government submits that the Commission acknowledged that nearly 90% of the blocks — 85% according to its own figures — were in fact under single crops or set aside. The difference of 5% is not significant. It can be explained by the fact that the Commission excluded blocks sown with multiple crops from its calculation, even where such blocks were eligible for exactly the same amount of aid, while the German authorities had included them. Moreover, minor differences could result from the fact that the German authorities' figures were from 1995 whereas those of the Commission were based on sampling carried out in 1998.

- 35 According to the German Government, because the information provided had been verified, the reservation had lapsed and the Commission was now no longer able to amend the proposal to apply a correction of 2% set out in its formal notification of 12 June 1998, since that proposal had formed the basis of discussions between the parties and before the Conciliation Body. The Commission was bound by the terms of the reservation.
- 36 The Commission disputes the German Government's first plea and claims, first, that that plea is based on an incorrect interpretation of the reservation set out in its formal notification of 12 June 1998 and, second, that the reservation was not binding.
- 37 The Commission explains that the reservation reflected its doubts as to the consequences for the Community budget of the information provided by the German authorities. According to that information, 90% of the declared areas did not pose any risks. The Commission points out that it was important to check that that information was not misleading and that the remaining 10% of the areas did not constitute a substantial area of land.
- 38 The second inspection, carried out in August 1998, revealed, first, that around 15%, and not 10%, of the blocks were sown with more than one crop. Whilst that finding was not, in itself, decisive, it influenced the final decision.
- 39 Second, the Commission found that 29% of the agricultural parcels were located in blocks which were used for multiple crops and could thus pose a risk.

- 40 Third, the Commission disputes the German Government's assertion that the blocks which were under single crops or set aside, and which, in that Government's view, represented 90% of the total number of blocks, did not need to be measured since a visual check would suffice. The Commission claims that measuring the blocks is unnecessary only when they consist of entire registered parcels. In that case, the checks can be carried out by the naked eye. However, the second inspection, carried out in August 1998, revealed that numerous blocks did not consist of entire registered parcels but, instead, of registered parcels which extended beyond the boundaries of the blocks. Therefore, according to the Commission, even the 90% of the blocks used for a single purpose could have posed risks and ought to have been measured.
- 41 The Commission submits that the results of the second inspection led it to conclude that the total area of land posing a risk was larger than the German Government had led it to believe. Contrary to the German Government's interpretation of events, therefore, that inspection reinforced its doubts and confirmed that the reservation was justified.
- 42 As regards the allegedly binding nature of the reservation, the Commission argues that the reservation was purely a provisional view drafted by its staff in the course of its investigation, by which it was not bound when making its final decision.

### *Findings of the Court*

- 43 The German Government's plea raises, first, a question relating to the assessment of the facts and, second, a question as to the legal consequences of the reservation made by the Commission in its formal notification of 12 June 1998.



- 44 In order to verify, first, whether the German Government's assessment of the facts is correct, the observations made by the Commission in both that notification and its letter of 24 November 1998 must be taken into consideration.
- 45 It is apparent from the formal notification of 12 June 1998 that it was the information provided by the German Government as to the very high proportion of blocks used for a single purpose which led the Commission to reduce the correction rate which it had originally proposed. The Commission considered that, in the light of that information, the risk could be less significant than it had originally supposed. It nevertheless made the implementation of its proposed revision of the correction rate subject to verification of the information which had been provided.
- 46 In its letter of 24 November 1998, which was written after the second inspection, carried out in August 1998, the Commission queried the lack of concordance between the farmed areas of land and the areas recorded in the land register, pointing out that it might be necessary therefore to measure the agricultural parcels which did not correspond to the areas recorded in the land register.
- 47 It is clear from those two documents that the Commission had doubts as to the extent of the areas of land posing risks, and the reservation must be understood as an expression of those doubts. If the planned inspection was not able to dispel those doubts, the Commission intended to apply the reservation and to reconsider the proposed rate of correction. The Commission thus intended to assess the extent of the risk of losses to the EAGGF by verifying not only the accuracy of the percentage of blocks purportedly under single crops or set aside, but also the relevance of that figure.
- 48 It is plain that the second inspection did not dispel the Commission's doubts but, instead, reinforced them. Although the information provided by the German

authorities to the effect that, in Mecklenburg-Vorpommern, 90% of the blocks were under single crops or set aside could be considered essentially correct, to the nearest 5%, the Commission was entitled to consider, following that inspection, that the risk was not confined to the remaining 10% but could be more significant given the fact that, in a considerable number of cases, the agricultural parcels located in the blocks which were under a single crop or set aside did not correspond to registered parcels. They therefore could not be checked by sight and, if no measuring were carried out, could pose the risk of exaggeration of the areas declared.

- 49 Therefore, contrary to the German Government's assertions, the second inspection, carried out in August 1998, and the subsequent exchanges between the parties did not dispel the Commission's doubts as to the potentially misleading nature of the information provided by the German authorities on the percentage of blocks under single crops or set aside. In those circumstances, the Commission was entitled, in accordance with the express terms of the reservation, to revert to the correction rate of 5% which it had originally intended to apply.
- 50 Second, as regards the legal consequences of the reservation, it should be observed that, in any event, contrary to the German Government's assertions, the reservation merely reflected the Commission's provisional conclusions and was not binding in such a way as to compel the Commission to abide by it even where this would have led the Commission to permit expenditure which it considered to be incompatible with the Community rules.
- 51 As the Advocate General pointed out in paragraph 58 of her Opinion, the procedure for clearing the accounts serves to determine not only that the expenditure was actually and properly incurred but also that the financial burden of the common agricultural policy is correctly apportioned between the Member

States and the Community, and, in that regard, the Commission has no discretionary power to derogate from the rules regulating the allocation of expenses (see Joined Cases 15/76 and 16/76 *France v Commission* [1979] ECR 321, paragraph 28).

- 52 Given the obligations imposed on the Commission in the context of the procedure for clearance of the accounts, it is clear that if — although it is not the case here — in order to comply with the terms of the reservation the Commission would have had to allow expenditure which it considered to be incompatible with the Community rules, it would not have been bound by the reservation, although it would have had to give the applicant the opportunity of commenting on the reasons underlying the Commission's change of position. The question of the right to be heard constitutes the second plea raised by the German Government and is examined below.
- 53 In the light of the foregoing observations, the first plea must be rejected as unfounded.

## The second plea

### *Arguments of the parties*

- 54 By its second plea, the German Government submits that the contested decision is vitiated by procedural errors. It claims that in the course of the procedure the

Commission belatedly introduced new arguments which extended the subject-matter of the proceedings, thereby failing to comply with the conciliation procedure and failing to observe the right to be heard.

55 According to the German Government, it was only in the supplement to the summary report that the Commission introduced four new factors which resulted in the adjustment of the correction from 2% to 5%. Those factors are as follows:

- the risk assessment does not apply to 10% or to 15% of the blocks, but to 29% of the total number of agricultural parcels;
  
- almost all the blocks are made up of more than one registered parcel;
  
- more than half the registered parcels extend over at least two blocks which frequently belong to one and the same producer. In those cases, it is possible that areas declared for agricultural parcels were exaggerated and granted a higher level of aid;
  
- there is a risk in respect of around 50% of the agricultural parcels in Mecklenburg-Vorpommern.

- 56 Those alleged findings and the proposal to impose a correction of 5% were not communicated to the Conciliation Body. Therefore, they should not have been taken into account in the contested decision.
- 57 The German Government adds that those four factors, on which the Commission largely relies in its statement of defence, were only drawn to its attention on 21 June 1999, when it was sent the supplement to the summary report, that is to say, the day before the EAGGF Committee meeting. The Government submits that the Commission did not allow sufficient time for it to be properly heard in that respect.
- 58 The Commission denies that there was any failure to comply with the conciliation procedure. It claims that the Conciliation Body was informed of all the documents that the Commission had in its possession, the results of the second inspection — carried out in August 1998 — and the Commission's concerns as to the adequacy of the on-site checks by means of measuring. It submits that it did not in fact introduce any new arguments. The fact that in the letters exchanged between the German Government and the Commission the former did not adequately address the Commission's point of view and that the Conciliation Body did not take that point of view into account in its opinion cannot be considered to be a breach of procedural requirements attributable to the Commission.
- 59 The Commission adds that the fact that, by stating that the outcome of the second inspection justified a correction of 5%, it reverted to its original proposal did not in any way give rise to an obligation to initiate a new conciliation procedure.
- 60 As to the alleged failure to observe the right to be heard, the Commission denies that new arguments were introduced to justify the higher correction rate which was finally applied. All the relevant issues, and in particular the deficiencies in the

control system and the lack of measuring carried out during the checks, had been raised in discussions between the parties. The supplementary inspections had provided only more accurate quantitative data and no new information such as to warrant a new bilateral discussion.

- 61 The Commission also adds that the German Government was still able to express its views on the information contained in the supplement to the summary report, which was communicated to it before the contested decision was adopted.

### *Findings of the Court*

#### Failure to comply with the conciliation procedure

- 62 It is necessary to consider whether, by informing the German Government of the four factors referred to in paragraph 55 of this judgment, and of the proposed correction of 5%, after the conclusion of the conciliation procedure, the Commission failed to comply with that procedure.
- 63 Regulation No 729/70, in the version applicable at the material time, does not contain provisions laying down detailed rules on the conduct of the procedure from the time of the inspection carried out by the Commission to the decision to exclude certain expenditure. It is clear from Article 1 of Decision 94/442 that a matter can be referred to the Conciliation Body after an inspection has been carried out by the Commission, a bilateral discussion of the results of that inspection has taken place and the Commission has given the Member State formal notification, making reference to that decision, of its intention to exclude certain items of expenditure.

64 In the present case, it should be observed at the outset that a first inspection was carried out by the Commission from 23 to 27 October 1995, a bilateral discussion took place on 24 June 1997 and, by letter of 12 June 1998, the Commission notified the German Government of the conclusions it had drawn from the results of its inspection. The letter made reference to Decision 94/442 and stated that the Commission intended to exclude certain items of expenditure. It therefore clearly meets the conditions laid down in Article 1 of Decision 94/442.

65 Next, it is appropriate to examine whether the belated communication of the four factors mentioned in paragraph 55 of this judgment and of the proposed correction of 5% nevertheless deprived the referral to the Conciliation Body of any useful effect, by not giving that body the means to rule on the decisive issues in the dispute, and whether the Commission ought not to have initiated a new conciliation procedure.

66 In that respect, it must be observed that even though, in accordance with Article 1(2)(a) of Decision 94/442, the position of the Conciliation Body is without prejudice to the Commission's final decision and the Commission thus remains free to adopt a decision which differs from the opinion adopted by the Conciliation Body, the conciliation procedure would be deprived of any useful effect if that body were not aware of all the decisive information which was available to the Commission when making its decision.

67 It follows from the arguments put forward by the parties and the documents before the Court that the Conciliation Body was aware of all the documents and information available to the Commission and of the Commission's principal findings. It had been informed of the results of the second inspection, carried out in August 1998, and of the Commission's concerns regarding the risk of losses to the EAGGF which stemmed from the finding that there were discrepancies between, on the one hand, the areas farmed and declared as such and, on the

other, the registered surface area of the parcels. The Conciliation Body received a copy of the letter of 24 November 1998 sent by the Commission to the German authorities and of the reply from those authorities.

68 As regards, in particular, the four factors referred to in paragraph 55 of this judgment, inasmuch as they refer to quantitative data they clarify and thus confirm the doubts previously voiced by the Commission and drawn to the attention of both the German authorities and the Conciliation Body. Therefore, contrary to the assertions of the German Government, those four factors do not extend the subject-matter of the dispute.

69 It follows that the Conciliation Body received all the documents available to the parties and all the essential arguments which they put forward. The fact that the Commission carried out a major on-site inspection during the conciliation procedure does not constitute a procedural irregularity since Regulation No 729/70, in the version applicable at the material time, did not require all the relevant inspections to have taken place before the start of the conciliation procedure, and since the Conciliation Body was kept informed of the results of the second and final inspection and the doubts it gave rise to on the part of the Commission.

70 As for the correction rate, the Conciliation Body was informed of the Commission's doubt as to whether to apply a correction of 5% or 2% and, moreover, made observations on that matter. Decision 94/442 does not require a precise assessment, at that stage in the procedure, of the expenditure that the Commission intends to exclude.

71 It must therefore be held that, by adopting the contested decision, the Commission did not fail to comply with the conciliation procedure.



## Failure to observe the right to be heard

- 72 As has been pointed out in paragraph 68 of this judgment, the four factors referred to by the Commission in the supplement to the summary report do not constitute new facts which extend the subject-matter of the dispute.
- 73 The Commission correctly informed the German Government of its doubts at the outset of the procedure. There was extensive written correspondence between the parties. After receiving formal notification, on 12 June 1998, of the outcome of the first inspection, carried out in October 1995, the applicant had enough time to submit its observations, and it did so. It was also able to do so following the letter of 24 November 1998 in which the Commission drew that Government's attention to the discrepancies between the declared areas and the registered parcels and the possible need to take measurements. The German Government considers that it responded to the Commission's concerns in its letter of 11 December 1998, but it must be observed that that response did not suffice to dispel the Commission's doubts.
- 74 By contrast, in the light of the fact that the German authorities did not receive the supplement to the summary report until 21 June 1999, that is, the day before the EAGGF Committee meeting and approximately five weeks before the contested decision was adopted, the question might arise whether the applicant had adequate time to reply to the observations contained in that document.
- 75 Nevertheless, inasmuch as all the important matters had already been brought to the attention of the German Government, and that Government was able to

express its view on, in particular, the queries raised by the Commission in its letter of 24 November 1998, more than eight months before the contested decision was adopted, it must be concluded that the procedure followed did not prejudice the right of the Federal Republic of Germany to be heard.

- 76 In the light of the foregoing considerations, the second plea must be rejected as unfounded.

### The third plea

#### *Arguments of the parties*

- 77 By its third plea, the German Government first rejects a number of the Commission's findings and its factual assessment, arguing that they led the Commission to make an inaccurate assessment of the risk of losses to the EAGGF, and secondly claims that the Commission took account of certain factors twice, initially to justify a 2% correction and then to justify a 5% correction.

Inaccuracy of the risk assessment owing to erroneous findings and assessments of the facts

- 78 The German Government submits, first, that the Commission's finding that in Mecklenburg-Vorpommern almost all of the blocks consist of more than one

registered parcel is accurate. It claims, however, that the Commission is thereby simply describing a situation of which it was already aware, and disputes the Commission's assertion that it is necessary to measure the agricultural parcels which are made up of more than one registered parcel. It also rejects the Commission's assertion that in Mecklenburg-Vorpommern half of the agricultural parcels pose risks.

- 79 Second, the German Government submits that the Commission changed the basis on which the correction rate was calculated, switching from calculation of the proportion of blocks used for multiple crops, namely 15% of the total number of blocks, to calculation of the agricultural parcels contained in those blocks, namely 29% of the total number of agricultural parcels. The new figure gives the impression that the number of areas of land posing a risk has increased. According to the German Government, however, this is merely a manipulation of the figures which does not reflect any change in the situation whatsoever. Both cases refer to the same area of farmed land as posing a risk of exaggeration of the areas declared, and carrying out checks on 15% of the blocks necessarily implies checking 29% of the agricultural parcels. Taking the figure of 29% of the agricultural parcels as the basis for the assessment of the area likely to pose risks does not therefore result in an increase in the risk of losses to the EAGGF.
- 80 Third, the German Government rejects the Commission's assertion that the risk of exaggeration is 17.3%. In its view, the exact figure is 2.4%. It rejects as erroneous the risk calculation carried out by the Commission, which consisted of applying the percentage of 17.3% to the percentage of 29%, referred to in the preceding paragraph, giving a result of 5%.
- 81 Fourth, the German Government claims that an adequate number of cross-checks were carried out.

- 82 Fifth, the German Government concedes that the Schwerin Amt carried out fewer on-site inspections in the geographical area for which it was responsible than it had claimed, but explains that this was owing to technical difficulties and unfavourable weather conditions. It asserts that that circumstance is of no importance since the checks required under Regulation No 3887/92 were indeed carried out.
- 83 Lastly, the German Government rejects the Commission's finding that all the on-site verification measures, which play a key role in the control system, are deficient and engender a risk of significant losses to the EAGGF, thereby justifying a correction of 5%.
- 84 The Commission claims that when a block is composed of portions of cadastral parcels, it poses risks which justify measuring the area in order to determine the exact dimensions of the eligible agricultural parcels. The fact that generally no such measuring was carried out led it to adopt the contested decision. The Commission states that, on the basis of the applications for aid examined by its financial controllers, it was in a position to estimate that the boundaries of more than 50% of the agricultural parcels did not correspond to the boundaries of registered parcels.
- 85 As regards the fact that the risk assessment was based on agricultural parcels and not blocks, the Commission claims that the German Government's assertion that checking 15% of the blocks necessarily amounted to the same thing as checking 29% of the agricultural parcels loses sight of the main point, namely that, in practice, not enough measurement checks were carried out. The Commission challenged the figure given for the percentage of blocks used for multiple crops on the ground that it was not relevant and created the misleading impression that the risk for the EAGGF was limited.
- 86 As regards the exaggeration of the areas declared, estimated at 17.3% of the areas of land posing a risk, the Commission notes that that fact was already mentioned

in its letter of 17 June 1997, in which it stated that in the three farms which were inspected, applications for aid had been made in respect of 17.75 hectares of land purportedly set aside, whereas in the course of the inspection the Commission officials found the actual surface area of the land to be 14.57 hectares. Taking account of the fact that this was not a representative sample, the proposed correction was not 17%, but about 5%.

- 87 The Commission explains that it applied the detected rate of exaggeration of the areas declared (17.3%) to the estimated proportion of land which posed a risk (29%), and points out that the resulting percentage of more than 5% potential exaggeration was not far from the 5% correction it applied on the basis of the rules governing flat-rate corrections. At the hearing the Commission explained that the correction rate which it applied was based more on a general assessment of the seriousness of the deficiencies in the control system and of the risk of losses to the EAGGF than on a precise mathematical calculation.
- 88 As regards the German Government's submission regarding cross-checks, the Commission points out that it does not dispute the existence of administrative checks but that it found that, as a general rule, where such checks had been carried out they did not include sufficient measuring.
- 89 The Commission takes note of the German Government's explanations for the shortcomings found in the geographical area under the responsibility of the Schwerin Amt, but submits that those explanations are of secondary importance in the light of the reasons which it has already given in justification of the increased correction rate.
- 90 The Commission points out that it is the increase in the risk, rather than the precise level of that risk, which justifies the increase in the correction.

The use of the same factors to justify different correction rates

91 The German Government claims that the Commission relied on the following factors on two separate occasions:

— the lack of detailed cross-checking;

— the fact that the Schwerin Amt had carried out fewer on-site verifications than it had claimed;

— the existence of doubts as to whether the Schwerin Amt had actually carried out the risk assessment which it claimed to have carried out.

92 According to the applicant, the Commission wrongly used those factors to justify increasing the financial correction from 2% to 5%, since it had already exhaustively and definitively taken them into account in its proposed financial correction of 2%. Applying the same data for two purposes constitutes a misuse of powers.

- 93 The Commission claims that the factors in question had not been exhaustively and definitively taken into account in the provisional reduction of the correction rate to 2%. Moreover, the Commission was entitled to consider all the relevant arguments in its final overall assessment without that being ground for the complaint that some of them had already been taken into account.

### *Findings of the Court*

Inaccuracy of the risk assessment owing to erroneous findings and assessments of the facts

- 94 The risk assessments made by the Commission and the German Government differ considerably.
- 95 It should be noted, however, that where the Commission refuses to charge certain expenditure to the EAGGF on the ground that it was incurred as a result of breach of Community rules for which a Member State can be held responsible, the Commission is required not to demonstrate exhaustively that the checks carried out by the Member States are inadequate, but to provide evidence of the serious and reasonable doubt it entertains concerning the checks carried out by the national authorities. The reason for this mitigation of the burden of proof on the Commission is that it is the State which is best placed to collect and check the data required for the clearance of EAGGF accounts, and which is consequently required to adduce the most detailed and comprehensive evidence that its checks

are actually carried out and, if appropriate, that the Commission's assertions are incorrect (Case C-242/97 *Belgium v Commission* [2000] ECR I-3421, paragraph 104).

- 96 Accordingly, it was for the German Government to show that the Commission had erred in its finding of shortcomings in the control system implemented by the German authorities and in its assessment of the risk of losses to the EAGGF as a result of those shortcomings.
- 97 The German Government did not deny that there were failings in the control system implemented in, *inter alia*, the area under the responsibility of the Schwerin Amt. While it was able to cast doubt on the accuracy of the figure of 17.3% exaggeration in the areas declared, it has not been able to demonstrate that its own figure of 2.4% was correct or that the Commission wrongly assessed the extent of the risk to the EAGGF resulting from deficiencies in important aspects of the control system.
- 98 It is clear from the arguments put forward by the parties and the documents before the Court, in particular, that the German Government has not demonstrated that the figure of 10% for the percentage of blocks used for multiple crops was relevant in reducing the extent of the consequences of the failings found in the system. On the contrary, the second inspection carried out by the Commission in August 1998 and the observations of the German Government confirmed that that figure was not relevant.
- 99 In those circumstances, it must be held that the German Government has not provided proof of the alleged errors in the Commission's assessment. The



Commission was fully entitled to consider that, in the absence of any measuring of the agricultural parcels located in the blocks used for multiple crops and in the other blocks, there was a significant risk of losses to the EAGGF which justified a correction of 5% in accordance with the criteria set out in Document No VI/216/93.

The use of the same factors to justify different correction rates

<sup>100</sup> The arguments relied on by the Commission in reaching the contested decision include, in particular, the three factors mentioned in paragraph 91 of this judgment.

<sup>101</sup> In that respect, it must be held that the Federal Republic of Germany is wrong to consider that the Commission was not entitled to take those factors into account in its decision to impose a correction of 5% on the ground that it had already taken them into account in its proposal to impose a correction of 2%.

<sup>102</sup> There was nothing to prevent the Commission from taking into account in adopting the contested decision, as it in fact did, all the findings and assessments made by its staff during the procedure which it considered to be relevant to its decision. Accordingly, the Commission was entitled to take account of the initial findings of its staff regarding deficiencies in the checks carried out by the

Schwerin Amt, then the information provided by the German authorities as to the percentage of blocks used for a single crop or set aside, and finally the results of the second inspection, carried out in August 1998, as well as the lack of a cogent answer from the German authorities to the question of the need to measure the agricultural parcels making up those blocks.

- 103 The German Government's complaint that the Commission misused its powers by taking account of the same factors on two occasions must therefore be rejected.
- 104 In the light of the foregoing considerations, the third plea must be rejected as unfounded.
- 105 Since none of the pleas raised by the applicant have succeeded, the action must be dismissed in its entirety.

### Costs

- 106 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Federal Republic of Germany has been unsuccessful in all its pleas, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. Dismisses the action;
2. Orders the Federal Republic of Germany to pay the costs.

Jann	von Bahr	Edward
La Pergola		Timmermans

Delivered in open court in Luxembourg on 19 September 2002.

R. Grass

Registrar

P. Jann

President of the Fifth Chamber