

I

(Information)

COURT OF AUDITORS

SPECIAL REPORT No 1/87

on

THE QUALITY OF FOOD AID

The extent to which food aid products comply with the applicable rules as regards quality, quantity, packaging, time and place together with the Commission's replies

(Observations pursuant to Article 206 a (4) of the EEC Treaty)

(87/C 219/01)

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1. INTRODUCTION

1.1. Food aid cannot properly meet the needs which it is intended to satisfy unless it arrives at its destination on the right date and in the stipulated quantity and unless the nature, characteristics and packaging of the products are satisfactory and comply with the conditions laid down in the supply agreement and the applicable regulations. Legislation cannot, however, provide for all possible cases and will never serve as a substitute for common sense and obvious facts.

1.2. The operations leading up to the distribution of food aid are numerous, complex and politically sensitive:

- (a) they include the processing, packing, handling, storage, transport and analysis of products;
- (b) the Council and the Commission plus a whole host of economic operators, acting both within and outside the Community, make up the links in a long chain of responsibility;
- (c) the inter-institutional balance within the Community and the latter's relations with the Member States are to be understood in the light of the overall development-aid policy and the common agricultural policy.

1.3. In a previous special report, adopted on 30 October 1980, the Court of Auditors presented a general survey of the system for managing food aid. This report takes that analysis a stage further by examining whether or not the products delivered comply with the standards required by law and common sense. The Court has compiled a list of all the unsatisfactory cases — about 90, some relating to one single consignment and others to a series of consignments — which it found during audit visits performed between 1981 and 1985 in over 20 countries and as a result of an enquiry into the cases handled by the food-aid disputes department at the Commission's Directorate-General for Development. These cases are classified and described in Annex 1.

1.4. The number of lots ⁽¹⁾ of food aid delivered during the period in question (1976—1985) is large and may be estimated at about 8 000. As for the 90 cases of faulty deliveries described in Annex 1, they represent a number of lots to which it is difficult to put a figure, but which must be in the region of between 200 and 400. In any case, the problem is not so much one of assessing how representative these few hundred lots are in relation to the 8 000, as of

using this sample to analyse the reasons for the shortcomings and to suggest remedies. The shortcomings and contradictions in the present system, which are to blame for these failings, have been detected with regard to:

- (a) the applicable rules;
- (b) the checks made;
- (c) and the guarantees implemented.

The report concludes with recommendations for reforming the system.

1.5. This report was sent for the first time by the Court of Auditors to the Commission on 16 January 1987 in order to allow the latter to draw up its replies. A few days beforehand the basic regulation on food-aid policy and food-aid management (Council Regulation (EEC) No 3972/86, published in the Official Journal of the European Communities of 30 December 1986) had entered into force. Obviously, all the observations in the report concern operations which took place before the entry into force of Regulation (EEC) No 3972/86, on 2 January 1987. However, the Court has noted that the reforms introduced by this new regulation, which should soon be supplemented by the reform and standardization of mobilization procedures relating to these products, (the draft regulation of the Commission having already been made), agree with its own recommendations on several important points.

2. THE APPLICABLE RULES

2.1. The basis for any supply of food aid is a supply agreement. The Community undertakes to deliver a certain tonnage of a particular product. The recipient undertakes to abide by certain terms regarding the taking-over and use of the product and to account for the way it has been used. The supply agreement, which is drawn up and negotiated by the Directorate-General for Development (DG VIII), lays down the recipient's rights and duties.

2.2. Food aid is governed by a number of regulations:

- (a) the only text that is entirely general in scope is Council Regulation (EEC) No 3331/82 of 3 December 1982 ⁽²⁾ on food-aid policy and food-aid management, which remained in force until 1 January 1987;
- (b) two regulations lay down implementing provisions for the mobilization of products:
 - (i) Commission Regulation (EEC) No 1974/80 of 22 July 1980 (cereals and rice) ⁽³⁾ ⁽⁴⁾;
 - (ii) Commission Regulation (EEC) No 1354/83 of 17 May 1983 (skimmed-milk powder, butter and butteroil) ⁽³⁾ ⁽⁵⁾;

⁽¹⁾ The footnotes are set out together at the end of the report.

- (c) furthermore, food aid is governed by various agricultural policy regulations, not only when aid is drawn from intervention stocks but also when it has to be mobilized on the European market;
- (d) the aid must also comply with the law in the Member States, for example, certain health standards;
- (e) each aid operation must be carried out in accordance with a specific mobilization regulation and a suitable notice of invitation to tender, drawn up by the Directorate-General for Agriculture (DG VI) and adopted by the Commission after it has obtained an opinion from a management committee.

supplied which does not meet the precise local requirements. The case of 240 t of butteroil supplied in 1983 to the World Food Programme (WFP) for Morocco is interesting in this respect: the percentage of aerobic germs was higher than the maximum authorized under Moroccan rules. The only way of making national regulations such as these binding would be to include them in the agreement and the mobilization regulation, because, as things are, the intervention agencies and the successful tenderers are not bound by the recipient country's regulations.

2.3. The annual programme is defined by:

- (a) the budget, which lays down the appropriations per category of product;
- (b) the Council Regulation laying down the implementing rules for the year in question (total quantities to be delivered of each category of product, detailed list of products likely to be used as food aid, list of countries and organisations likely to receive aid) (these rules were in force until the end of 1986);
- (c) the special aid allocations, decided on a case-by-case basis by the Commission.

Applicability of the agreements

2.5. In the broad sense, the supply agreement is the official letter signed by the two parties, preceded and followed by less formal correspondence, which lays down certain details of the aid (e. g. the delivery period). DG VIII defines the operations and concludes the supply agreements and then sends a 'mobilization request' ⁽⁶⁾ to DG VI, which mobilizes the aid, or arranges for the intervention agencies to do so, by drawing up the mobilization regulation ⁽⁶⁾ and the notice of invitation to tender ⁽⁶⁾.

2.6. Often the date planned for the delivery and notified by DG VIII to DG VI is not kept to because of the sluggishness of the mobilization process. Above all, the process is slow because some of the specifications in the agreements have to be transcribed by DG VIII in the mobilization request in order to be sent to DG VI and included in the mobilization regulation. Experience has shown that these three documents sometimes contradict each other:

The supply agreements

The comprehensiveness of the agreements

2.4. The supply agreements ⁽⁶⁾ specify the nature of the product, the quantity, the packaging and, sometimes, what is to be marked on the packages. However:

- (a) they fail to mention the delivery period, which is arranged informally between the Commission and the recipient. Other donors are not reluctant to commit themselves to a delivery time in their own agreements. This failure to specify the delivery period leaves the door wide open to delays in the mobilization of aid;
- (b) similarly, the port of shipment for an FOB ⁽⁷⁾ delivery is never specified in the agreements. The tenderers select the port of shipment unilaterally. This practice is such as to increase the sea transport costs for the recipient. In many cases of CIF ⁽⁸⁾ deliveries, the port of unloading is also not mentioned in the agreement;
- (c) lastly, the agreements generally confine themselves to indicating the nature of the product without specifying further details. This may result in a product being

(a) for 15 000 t of maize granted to Mozambique, the agreement laid down that the grain would be taken over at the port of unloading, whereas the mobilization regulation specified the port of shipment, in accordance with the mobilization request;

(b) for a delivery to Lebanon in 1983 of 250 t of soya oil via the UNRWA ⁽⁹⁾, under the 1982 programme, there was a contradiction in the official letter which made it unclear as to the point where the costs were divided, especially with regard to unloading costs and the transfer of total liability for the goods from the successful tenderer to the recipient. According to one interpretation, the transfer took place at the port of shipment and according to the other, at the port of unloading. The notice of invitation to tender, by defining the delivery stage as CIF, without further details, stated, by implication, that the goods were to be taken over at the port of shipment, in accordance with the recognized acceptance in commercial practice of the term 'CIF';

- (c) in respect of 500 t of skimmed-milk powder granted to Mauritius and delivered in 1982 without any added vitamins, the agreement laid down that the product should be vitaminized. The mobilization request failed to repeat this stipulation;
- (d) in the case of a delivery to India in 1982 of 5 000 t of skimmed-milk powder that was too old, the agreement specified powder which was at the most six months old at the time of shipment. The mobilization regulation authorized powder up to nine and a half months old. DG VI argued that stocks did not make it possible to supply more recent powder. In fact, the stocks of powder less than six months old at no time dropped below 5 515 t, and it was possible to make up the 5 000 t by calling on only two Member States (United Kingdom 3 140 t; Denmark 1 900 t; the remaining 475 t were located in Germany).

2.7. Situations of this kind sometimes occur because no one document serves as the basic common point of reference for all the parties concerned. The supply agreement is binding upon the recipient and the Community. The mobilization regulation is aimed at the intervention agency and the contractor. Two separate documents are therefore involved, drawn up by two separate Directorates-General. A third liaison document, the mobilization request, ought to ensure that these two documents are consistent with each other, but this is not always the case.

The regulations on the mobilization of aid

Sphere of application

2.8. Rules for mobilizing aid have been drawn up for cereals (Regulation (EEC) No 1974/80⁽⁴⁾) and for milk products (Regulation (EEC) No 1354/83⁽⁵⁾), but there are no equivalent regulations for vegetable oils, sugar or 'other products'. This serious shortcoming is compensated for by provisions inserted on an *ad hoc* basis in each notice of invitation to tender relating to these products, but this cannot be a substitute for a properly thought-out, permanent regulation. 'Delivered place of destination' deliveries are customary for all categories of products and yet Regulation (EEC) No 1974/80 on the mobilization of cereals makes no mention of them.

Complexity

2.9. A feature of the mobilization of food aid is the repetition in regulations issued for a particular, limited purpose of provisions that are permanent and

general. Admittedly, for cereals delivered at the FOB or CIF stages, and for milk products, the mobilization rules have been codified. In all other cases, however, the rules are reiterated in each mobilization regulation or notice of invitation to tender in exactly the same terms (nature of the quality controls, list of documents which the successful tenderer has to supply in order to be paid, rules regarding the packaging, compulsory lodging of a security, etc.). Conversely, separating general rules from specific provisions and incorporating them in different legislation should not be taken to ridiculous lengths: a mistake in the markings on bags of milk was due to a special regulation, requiring that the bags be marked 'to the Republic of Tunisia'. This requirement was in addition to the words 'Gift of the European Economic Community', which are stipulated as a general rule by Regulation (EEC) No 1354/83⁽⁵⁾ on the mobilization of milk products. The bags bore only the marking — itself improperly abbreviated — 'Gift of the EEC'.

2.10. The regulations are complex in another way too: some provisions relating to the agricultural policy apply to food aid but to an extent which varies from case to case. The standards as regards quality and packaging that must be observed when a product is taken into intervention are numerous and this is to the advantage of food aid if the product is drawn from intervention stocks. Furthermore, some of these standards apply to some of the food-aid products mobilized on the market (e. g. milk products).

Homogeneity

2.11. Regulation (EEC) No 1974/80⁽⁴⁾ (cereals) and Regulation (EEC) No 1354/83⁽⁵⁾ (milk products) differ in many ways that are likely to be of relevance with regard to questions of quality, and which, for the most part, cannot be justified by reference to the nature of the products themselves (see Annex 2).

Content

Packaging

2.12. In the case of butteroil, no stipulations are made concerning the shape of the canisters nor the thickness or weight of the sheet metal from which they are made. Experience has made it abundantly clear that the most commonly-used canister, which has a 5 kg capacity, is not sturdy enough. The checks made on the strength of the cartons containing these canisters are inadequate and the cartons frequently arrive damaged and open. The stipulation as to the water-resistance of the glue used does not guarantee that it will also be long-lasting. No provision is made for securing the cartons with metal hoops. The Commission will succeed in preventing damage only by laying down technical specifications, defined after investigating the cases of damage.

2.13. As regards the milk-powder bags, Regulation (EEC) No 1354/83⁽⁵⁾ quite simply refers back to the provisions of Commission Regulation (EEC) No 625/78⁽¹⁰⁾ of 30 March 1978 on public storage of skimmed-milk powder in the Community. The conditions prevailing overseas do not make it possible simply to use the same packaging as is specified for Europe.

2.14. For vitaminized milk, Regulation (EEC) No 1354/83⁽⁵⁾ provides for the possibility of shipping the powder in 1-kg or 2-kg sachets packed in lots of 20 kg. This method is better but is little used, and it clearly cannot compare with the method adopted by Switzerland and the United States, which is to use tins containing between 2 kg and 5 kg.

Markings

2.15. As regards the markings on the packages, some defects can be attributed to the contractors, as in cases where the words 'Gift of the European Economic Community to (name of country)' or the product's date of manufacture are missing. It is the regulations that are at fault, however, for failing to specify the instructions for use and the last date for consumption for milk products.

Transport

2.16. The stipulation 'Community port of shipment with regular connections with the country of destination', which DG VIII was trying to make compulsory in its mobilization requests at the FOB stage, was often curtailed in the mobilization regulations to 'Community port'. It was therefore left up to the contractor to select the port and the recipient sometimes had to charter a ship to transport the goods from this port. A new clause was inserted into the milk products Regulation (EEC) No 1354/83⁽⁵⁾; 'This port shall be selected because of the existence of a connection with the country of destination during the shipment period specified in the notice of invitation to tender. This connection may involve one transshipment in another European Community port'. This clause, which does not appear in the cereals Regulation (EEC) No 1974/80⁽⁴⁾, is included in every mobilization regulation relating to an FOB delivery of cereals. The fact still remains that it is the contractor who unilaterally selects the port of shipment. This choice may affect the costs borne by the recipient just as much as, and probably more than, it affects those which the contractor has to pay, and may thus reduce the net economic value of the aid.

2.17. Similarly, the stipulations regarding sanitary conditions and the age of the ships are laid down only for the CIF stage and not for the 'delivered place of destination' stage. The Commission should take steps to eliminate the many unscrupulous shipowners whose prices appear to be

competitive only because of the dangerous conditions under which they transport goods and the deplorable state of the ships they transport them in, or because of dumping practices on the part of some countries.

3. Monitoring the application of the rules

3.1. The following checks exist to safeguard the quality of food aid and to ensure that it conforms with the rules:

- (a) procedure for approving the contractor;
- (b) procedure for approving the manufacturer of the product;
- (c) supervision of manufacture of the product;
- (d) the Member State's health check;
- (e) check to determine whether goods may enter intervention stores;
- (f) quality control carried out by the contractor;
- (g) customs check on the quantity;
- (h) quality control with a view to shipment, conducted on the initiative of the intervention agency;
- (i) the recipient's quality control with a view to shipment; and, in some cases:
 - (j) a check at the time of unloading;
 - (k) a check upon arrival at the destination.

3.2. Some checks are specific to food aid — for example, those referred to under (a), (f), (h), (i) and, when they apply, (j) and (k). Food-aid operations are subject to the other checks that apply under the ordinary law of the Member States or of the Community. This applies to the checks mentioned under (d), (e) and (g). Depending on the case, the checks referred to under (b) and (c) may or may not be specific to food aid.

Non-specific checks

Adequacy of the non-specific checks

Lack of sufficient evidentiary effect

3.3. The evidentiary effect of the non-specific checks is sometimes questionable. They are not carried out with the active involvement of the other parties concerned, insofar as the recipient is not party to, nor even present at, the

check. With the exception of the customs check, moreover, all these checks are no longer up-to-date by the time of shipment. A quality certificate rapidly becomes out of date. This applies to the health checks carried out by the Member States with reference to their own standards. Furthermore, the results of these health checks in the Member States are sometimes shown to be incorrect by other subsequent checks.

3.4. Products to be drawn from intervention stocks are subject to the standards and the checks required for entry into the intervention stores, where such standards and checks exist, which is not always the case:

- (a) as regards cereals, there is no requirement that they should be subject to a full check before being taken into store. Samples taken by both parties have to be submitted for analysis by an approved laboratory only 'where agreement as to the quality and characteristics of the cereal offered cannot be reached'. Conversely, if agreement is reached, no provision is made for a laboratory analysis;
- (b) for milk products, the procedure for approving the manufacturer constitutes an initial form of screening and a second screening is carried out through checks during the process of manufacture. But this does not apply to butter, which is produced by too large a number of farmers and cooperatives. When it is taken into store, samples are usually taken to check whether it conforms to quality standards. In addition, butter has to undergo a trial storage period of two months, after which, if quality standards are not met, it is rejected.

3.5. The Court's investigations into the quality of products in store cast doubt on whether all these checks are carried out (see the Court's annual report on the financial year 1985, Chapter 4). Furthermore, three comments must be made:

- (a) once the product has been taken into store, the regulations do not provide for subsequent regular checks;
- (b) by the time it is mobilized, the product may have deteriorated;
- (c) instances of poor quality are most frequent where the product comes from intervention stocks.

3.6. The Commission became so concerned about this that it decided systematically to finance checks concerned specifically with supplies drawn from intervention stocks; the results were striking (see paragraph 3.30 below), thus providing proof a contrario that the checks carried out prior to entry into intervention stores are not sufficient.

3.7. The customs check on quantities that is supposed to be made prior to shipment covers no more than 0,8 %, 1 % or 2 % of the total quantities exported ⁽¹¹⁾.

Failure to take account of requirements peculiar to food aid

3.8. The requirements regarding food aid are stricter than the rules applying under common law. For cereals and rice, the stipulated standards as regards quality are sometimes higher than the minimum conditions required for entry into intervention. The bags used for milk powder are sometimes different from those specified in the common agricultural policy regulations, and for cereals, which are usually stored in bulk, the process of putting them in bags is part of the act of mobilization. Lastly, the markings are specific to food aid. Thus, even if they were always reliable in themselves, the non-specific checks would not be adequate, because they do not take account of the requirements that are peculiar to food aid. The regulations do not always arrange for these checks to be supplemented by specific checks.

Complementarity with the specific checks

The approval of the manufacturer

3.9. There is no approval procedure for cereals. For milk products, things are somewhat complex:

- (a) the process of manufacture may be in two stages:
 - (i) first stage: manufacture of butter or of skimmed-milk powder;
 - (ii) second (possible) stage: processing of the butter into butteroil;
- (b) normally, vitamins are added to the powder during its manufacture and the two stages are then inseparable.

3.10. For the first stage of manufacture, the current provisions do not always have the same scope:

- (a) where the product has been purchased on the market, Article 3 ⁽³⁾ of Regulation (EEC) No 1354/83 ⁽³⁾ refers back to the approval procedure for entry into intervention stocks. But it goes on to say that 'only undertakings which have the appropriate technical facilities for meeting the requirements laid down in this Regulation) (i. e. laid down specifically for food aid) 'may be approved';
- (b) if they have been drawn from intervention stocks, the food-aid products automatically benefit from the approval procedure for the entry into store. But this does not mean that they necessarily 'meet the requirements' specific to food aid. Since the regulations on food aid are stricter than the general regulations, the possibility that they may fall short of the requirements does exist.

3.11. The approval of the manufacturer carrying out the second processing stage is not laid down any more uniformly by the regulations:

- (a) for butteroil (manufactured almost solely for food aid), the approval procedure is specific and includes a stipulation requiring 'appropriate technical facilities for meeting the requirements' peculiar to food aid;
- (b) in the case of the vitaminization of skimmed-milk powder, the Regulation contains no provision corresponding to that for butteroil. This omission could appear to be due to a simple oversight.

3.12. If there is an infringement of the conditions on which approval was granted, approval is temporarily or permanently withdrawn. This rather complex set of provisions results in a legal structure that lacks homogeneity and certainty. One of the main consequences is that manufacturers supplying food aid from intervention stocks are not required to observe the approval conditions peculiar to food aid.

Manufacturing supervision

3.13. In respect of milk products, manufacturing supervision is specific and systematic only in the case of butteroil and the vitaminization of skimmed-milk powder. For butter, no manufacturing supervision is required by the Community regulations. For milk powder, Regulation (EEC) No 1354/83⁽⁵⁾ extends the manufacturing supervision that is stipulated for products taken into intervention to products purchased on the market.

3.14. These inspections at the first manufacturing stage, being provided for by a common agricultural policy regulation, are not specific to the field of food aid. They are periodic, 'frequent', as the Regulation specifies, but not systematic, i. e. they are not carried out for all the batches. So in no way can they be considered to confer a guarantee of quality on every supply of food aid.

3.15. Checks on whether the raw materials used are solely milk or the permitted constituents of milk can only be carried out during manufacture. The laboratories say that, on the basis of existing analyses, it is impossible to establish with absolute accuracy whether or not the finished butteroil contains vegetable fats. From the point of view of the production cost, it is very tempting to substitute vegetable oil for butter: in 1986, vegetable oil was fetching about 1 100 ECU/tonne and butter 3 100 ECU/tonne. The same factors apply to the skimmed-milk powder and to powdered whey.

3.16. Certain precautions are taken when approving the undertakings. For skimmed-milk powder, the production plant cannot be granted approval unless it undertakes to

keep permanent records listing the origin of the raw materials, the quantities treated and produced, the type of manufacturing process and the identification of each lot produced. Similarly, for the manufacture of butteroil, 'approval may be granted only to undertakings which have ... premises where any stocks of non-butter fats may be kept separately and identified'.

3.17. But even if the plant clearly separates the production rooms and lines relating to authorized products from those relating to other products, checks would still have to be made to ensure that there was no fraudulent interference during the process of manufacture and that no fraud had been committed in keeping the records. In order to be effective, these checks, even if they are not systematic, need at least to be unexpected and to be carried out at any time. An occasion has already occurred when, during a check on an undertaking manufacturing butteroil, the Court of Auditors chanced to find a large number of empty drums of vegetable oil on the premises. In order to ascertain what the oil had been used for, it would have been necessary either to have been present when it was utilized or else to have carried out a close examination of the commercial documents. A contractor who had committed a fraud of this type was identified by the Commission in connection with deliveries made in 1976 and 1977, but no financial sanctions were applied at the time of clearance. A Court audit visit to Indonesia found one case in which it was likewise suspected that vegetable fat had been used in making milk powder.

3.18. Article 7 of Regulation (EEC) No 1354/83⁽⁵⁾ lays down very generally that 'Member States shall take the measures necessary to ensure that ... there is no fat other than butterfat in the products supplied' as food aid. The contractor undertakes, if the product is drawn from intervention stocks, 'to manufacture the butteroil to be supplied only from the butter removed from the intervention agency for that purpose'. All this offers only a theoretical guarantee.

3.19. Above all, manufacturing supervision is in many cases inadequate. These checks relate solely to the nature of the raw materials assumed to be used in manufacturing the product and the quantities produced, and also to the conformity of the packaging and marking, but do not usually include chemical and microbiological analyses of the final product.

Quality control at the time of or with a view to shipment

3.20. For cereals, this control is always obligatory. This does not apply to milk products, for which quality control is obligatory only:

- (a) where the product is purchased on the market;
- (b) in the case of the vitaminization of powder or the processing of butter into butteroil.

Thus, in respect of a product of first-stage processing — butter, non-vitaminized skimmed-milk powder — drawn from intervention stocks, no quality control is as a rule provided for prior to shipment.

3.21. Of course, if the recipient is not represented at the time of shipment of an FOB or CIF delivery to hand over the taking-over certificate (which must certify that the goods are of the quality specified) to the contractor, the intervention agency must act in his place and issue a certificate with the same content as a taking-over certificate. This means that the intervention agency must check that the goods are of the quality specified, even in the case of milk products drawn from intervention stocks. However, in the case of an FOB or CIF delivery at which the recipient is represented and does not ask for a check to be carried out, and in the case of a 'delivered place of destination' delivery for which the certificate does not have to be issued at shipment, there is no quality control with a view to shipment.

Specific checks

Approval of contractors

3.22. No milk products may be supplied as food aid except by an approved undertaking, whether it manufactures the product or merely trades in or transports it. For cereals, no provision is made for approving the supplier. This omission has made it possible for one and the same contractor to make successive deliveries of 15 000 t of maize not of the specified quality to Mozambique, 8 000 t of maize not of the specified quality to Burkina Faso and several other consignments of maize of a quality disputed by the recipients.

The quality control carried out by contractors

3.23. For cereals, the contractor is not obliged to carry out any checks on the goods supplied to him. For milk products, he must verify the quantities made available to him and the quality of the packaging. There is no mention of the quality of the products, except in the case of butteroil, where the interested parties may examine the butter before committing themselves. No reason is given to justify this difference of treatment.

3.24. Of course, there is nothing to stop contractors carrying out their own quality controls, but such controls would be at their own expense. A contractor does not feel the need to make such controls as much as he would in the case of a commercial transaction, where the purchaser has

an obvious interest in ensuring that the merchandise is of good quality, since, if not, his client will hold him responsible. In a food-aid operation, the recipient, who plays the role of client, does not have the same power of inflicting a penalty as someone who is paying for the goods he receives. Furthermore, a poor country is not in a good position to take strong, effective action in European business relations. Moreover, there is the practical difficulty posed by the (sometimes extraordinary) dispersal of the warehouses from which one and the same lot has to be drawn. In the case of milk products delivered to Tunisia in 1983, 421 t of butter had to be taken from three different warehouses situated in two French departments that did not border on each other and 1 000 t of milk powder from five different warehouses spread out over the whole of France.

The quality control carried out at the initiative of the intervention agency at the time of or with a view to shipment

3.25. This quality control is carried out for cereals with the participation of both parties involved: 'The successful tenderer and the recipient's representative shall be invited to take part in the operation'. No such provision is made in respect of milk products and even in the case of cereals the sense of the word 'participer', used in the French version of the Regulation, needs to be clarified in certain language versions. The English 'take part' is a good rendering. The German 'teilnehmen' and Danish 'deltage' terms are likewise satisfactory. The Italian word 'presenziare' and the Dutch expression 'aanwezig zijn', on the other hand, have the much weaker meaning of 'be present at'.

3.26. Other differences between cereals and milk products:

- (a) for cereals, the intervention agency 'arranges for' the check, which is entrusted to an independent laboratory; for milk products, the agency itself 'checks', which does not offer the same guarantee of objectivity;
- (b) the checks are usually made at the port. The checks on vitaminized milk powder and on butteroil may be seen as identical to manufacturing supervision, the shortcomings of which have already been described. And by the time of shipment, this out-of-date check has lost some of its value.

3.27. In several cases, some intervention agencies have failed to apply the regulations correctly:

- (a) for 500 t of milk powder delivered to China in November 1981, the Belgian intervention agency did not carry out the stipulated inspection to ascertain that the product satisfied requirements;
- (b) the quality control at shipment of 15 000 t of maize delivered to Mozambique in July 1983 by the

Commission was performed by the French intervention agency itself:

- (i) it should have been carried out by independent laboratories. In the context of the infringement procedure brought against France for this mobilization, the Commission overlooked this point;
- (ii) the agency declared that the goods were of the required quality, taking as its reference the minimum quality standards stipulated for entry into intervention, which are less strict than the applicable standard-quality rules;
- (iii) the only excuse given by the intervention agency in its own defence was that the mobilization regulation did not specify that the maize had to be 'fit for human consumption'. This Regulation, which was similar to all the previous regulations, referred, as they did, to 'food aid' and to the general regulations on food aid, which specify, as if it were really necessary, that the aid is supplied 'for humanitarian purposes' in order 'to raise the standard of nutrition of the recipient peoples', thus ruling out any confusion with the supply of feedingstuffs for cattle.

3.28. The large number of instances of poor quality detected in goods that have, however, been certified as complying with the required standards, suggests that, in many cases, this attestation by the intervention agency is issued without thorough checks, because the recipient is not present at the time of shipment.

The checks requested by the recipient

3.29. For milk products, the recipient can require that, prior to shipment, the quality, quantity and packaging of the goods supplied be checked. If the recipient then disputes the goods, the intervention agency arranges for a second check to be made, the results of which are final. For cereals, the regulations only allow the recipient the possibility of taking part in the quality control arranged by the intervention agency. He may challenge the results. This leads to a second, decisive control, which must be performed by a different laboratory. Until recently, the recipient was rarely represented at the time of shipment. He was not made aware in the supply agreement of the power granted him by the regulations. And the costs relating to the requested inspections were to be borne by the losing party, which was likely to cause quite a few recipients to hesitate before asking for checks to be made. But this situation has recently changed, now that the Commission itself is financing checks.

The checks financed by the Commission

3.30. The Commission is now using a larger proportion (64 % of 1,7 Mio ECU in 1985) of the appropriations which have been reserved for quality controls but which have remained unused for a long time (less than 10 % from

1981 to 1983). Particularly in the case of milk products from intervention, it has decided to become involved in the checks by financing them itself more often. According to the Commission, this has resulted in a considerable decrease in the number of complaints about poor quality.

3.31. Certain intervention agencies have since hindered the execution of such checks, alleging that there is no legal basis entitling the Commission to carry out quality controls in its own name. The Commission has responded by deciding in future to finance checks which will be carried out on the recipients' behalf and at their request, and no longer in its own name. The supply agreements have been amended in order to inform the recipients of this change and the Directorate-General for Development has been called upon to make the recipient countries aware of this option. Even if these are not the sole measures to be taken in the area of quality control, they should already involve the recipient to a greater extent in the monitoring of the implementation of the aid and greatly reduce the incidence of cases of poor quality. The intervention agencies, however, have already indicated their opposition in this case too, despite the existence of an undeniable legal justification, at least in respect of milk products.

3.32. The Court of Auditors cannot stress too strongly how much it would like to see the Commission pursue the course of increased checks, by proposing an amendment to the legislation which would explicitly allow it also to carry out checks in its own name.

Common observations in respect of checks with a view to shipment

Shipment, the decisive stage of quality control

3.33. In comparison with all the upstream controls, the checks carried out with a view to shipment are of prime importance. They constitute the 'safety net' designed to check that the supplies satisfy not only general standards of hygiene but also the provisions specific to the aid in question, such as tonnage, specific characteristics of the products and their packaging. Their significance may also be appreciated in relation to all the subsequent downstream stages of aid implementation. With regard to the 'delivered place of destination' stage⁽⁶⁾, although the quality is assessed finally on arrival at destination, the checks at the time of loading aim to remove immediately all goods that do not comply at this stage. In respect of aid financed only as far as the port of shipment⁽⁷⁾ or port of unloading⁽⁸⁾, which is by far the largest amount, discharge⁽¹²⁾ is given to the European agents involved at the moment of shipment, and in particular to the contractor, who is entitled to demand full payment for his services immediately afterwards.

3.34. This has not always been the case. Under the former Regulation (EEC) No 303/77 of 14 February 1977⁽¹³⁾ laying down rules for the mobilization of milk products, in one case of financing as far as the port of

unloading, the delivery had been made and the risks passed from the successful tenderer to the recipient at the time of unloading. Moreover, in the case of financing as far as the port of shipment, it was not the commercial notion of FOB⁽⁷⁾ which applied but that of FAS⁽¹⁴⁾. The Commission has changed this system in order to bring it into line with current commercial practices and current interpretations of the terms FOB and CIF⁽⁷⁾⁽⁸⁾.

Excessive importance attached to taking-over or compliance certificates on shipment

3.35. The decisive importance, from the legal point of view, that is attached to the checks and taking-over procedure on shipment is not justified. Firstly, the checks carried out with a view to shipment are not complete and are not always reliable (see paragraphs 3.20, 3.21 and 3.25—3.28). Moreover, the recipient bears all the consequences of any incidents which may arise after shipment, even when the Community is financing the transaction as far as the moment of unloading. This approach is understandable within the framework of commercial exports, where the purchaser can penalize the seller for any shortcomings by refusing to pay for the delivery or by changing to another supplier in future. Such economic weapons are not, however, available to recipients of food aid. There is thus not much point in bringing the delivery stages of food aid into line with commercial practices.

3.36. That is not all. The system of issuing taking-over certificates on shipment is based on the pretence that the results of the checks are drawn up and notified immediately to the interested parties, making it possible for the recipient (or the intervention agency) to issue the taking-over certificates (or compliance certificates) in full knowledge of the facts, 'immediately after loading'. This is far from what happens in reality. It takes several days, even several weeks, for the results of quality controls, especially those in respect of milk products, to be notified by the laboratories to the intervention agencies.

3.37. The same applies when it is the recipient who makes a special request for a check. The timetable for the dispatch of 1 000 t of skimmed-milk powder and 345 t of butteroil delivered to Tunisia under the 1982 programme is instructive in this respect:

— taking of samples on behalf of Tunisia	8. 11. 1983
— Tunisia asks the Central Laboratory of Food Hygiene (France) to carry out analyses:	10. 11. 1983
— shipment at Antwerp:	14. 11. 1983
— issue of taking-over certificates:	14. 11. 1983
— unloading in Tunis:	29. 11. 1983
— results of the analyses available:	12. 12. 1983

i. e. 28 days after the boat had set sail and 13 days even after unloading.

3.38. It is in fact unthinkable that a boat should patiently await these results before sailing. Very often the boat leaves before the results of the first inspection are made known and is far away when the results of the second, 'final' inspection (the check provided for by the regulations in the event that the results of the first check should be contested) are obtained.

3.39. The argument that these taking-over and compliance certificates have unqualified discharge value is thus untenable. They should contain a compliance clause, subject to any concealed defects, which may be called into question in the light of tests results that are of genuine scientific value. Moreover, case law in the commercial field, which is less strict than the Community legislation relating to food aid, points in this direction. It lays down that, in the case of CIF or FOB sales, the acceptance of goods on loading may be called into question at the time of arrival at destination if the poor quality of the goods in question was not detectable by means of an ordinary examination before the ship put to sea. The intervention agencies' experts acknowledge that it is impossible to carry out the present system of quality controls at the time of loading. Under the current legislation, the taking-over and compliance certificates, instead of providing effective protection of the recipient's interests, serve rather to provide the contractor with instant documents with which to claim payment for his services.

Control and monitoring of implementation after shipment

3.40. The legislation in force does not provide for any check at the time of unloading, whatever the stage of delivery. However the Court has noted that, over several years, the practice has gradually been introduced of making indiscriminate checks on all products with Community financing in the following conditions and in the following cases:

- (a) on behalf of the recipient, it has become general practice for checks to be carried out at the time of shipment;
- (b) in relation to CIF deliveries, selective checks have been carried out at the port of unloading in the case of destinations which present specific risks;
- (c) in relation to delivered place of destination deliveries, systematic checks have been carried out at the place of destination, whenever material conditions have allowed;
- (d) for triangular operations, in all cases the contracts provided for checks at the time of shipment and on arrival.

Checks at the point of arrival should be prescribed systematically.

3.41. It would be all the more necessary to lay down in detail the procedure applicable to these checks as the local conditions under which they are effected are more uncertain in countries where the European intervention agencies have no *locus standi*, where well equipped and reputable laboratories are rather rare and governments do not always know how to take the immediate precautions necessary in their own interests:

- (a) the Mozambican authorities were caught unawares when it was established that part of the 1983 delivery of maize was sub-standard (see paragraph 3.27) and the various checks they carried out were so disorganized that, though there was no doubt that the quality was seriously below standard, it proved impossible to measure it accurately, despite the despatch on the spot of a Commission official in October 1984 to take part in the enquiry;
- (b) in Bangladesh the control tests carried out do not observe the same quality criteria as the checks provided for by the Community. There is a risk that this may make them unsuitable as a basis for complaint;
- (c) if the complaint is at all late, it is no longer possible for a control team to decide how much damage was sustained during unloading and how much further damage occurred as a result of handling and storage conditions in the country. This comment was made by the adviser at the Delegation in Tunisia, who had come to inspect some milk powder, the quality of which had deteriorated and which was nevertheless stored by the Tunisians in very humid premises. The adviser had arrived on the day following the complaint, which was made by the Tunisian authorities on 21 February 1984, whereas the milk had arrived almost three months earlier.

3.42. In general, the Commission's monitoring of the implementation of the aid from shipment to final distribution leaves much to be desired. There is no justification for the taking-over certificates not being centralized so that they can all be checked by the same Commission department. The Commission delegates in the recipient countries are not sufficiently involved in the *in situ* implementation of the food aid and are not adequately informed by the Commission of impending arrivals, even though the contractors are obliged to inform them of the expected date of arrival of vessels at the port of shipment. To this may be added the inadequacy, or even absence, of reports on the implementation of the aid, which the recipients are, however, bound to compile in accordance with the supply agreements — and in this respect even organizations such as the World Food Programme (WFP) are not beyond reproach. The argument that, except in cases of goods 'delivered place of destination', the Commission is no longer responsible for transport downstream of the port of unloading and is never responsible for distribution, is quite untenable. The Community cannot wash its hands of the final outcome of its own measures.

4. RESPONSIBILITIES AND GUARANTEES

Unequal value of the various delivery stages as regards quality

4.1. Responsibilities and guarantees are demarcated and defined differently at each stage of delivery. For this reason the various stages are not of equal value from the point of view of the need for quality.

4.2. The FOB stage is the most consistent in this respect, but it leaves the recipient fully responsible for organizing the chartering and unloading of the ship, transport by land to the destination and insuring the product. While this stage perfectly suits some countries, on account of their administrative and commercial traditions, another stage would undoubtedly be more suitable for other countries, to which the Community at present only delivers its aid up to the FOB stage. Moreover the latter stage, like all the other stages, has weaknesses in respect of the check carried out at the moment of shipment (see paragraphs 3.35—3.39 above) which cannot be accepted.

4.3. The 'delivered place of destination' stage involves the greatest amount of 'technical assistance' for all operations organized up to arrival at destination. Only the distribution operations have to be organized by the recipient. This stage may thus be recommended for the poorest countries and for land-locked countries, which is in line with the criteria currently adopted. This delivery stage should, nevertheless, be improved as regards quality control and reception at destination (see paragraph 3.40 above) and also as regards the necessary introduction of a proper reception procedure for the goods with both parties present and open to challenges by either side. The Commission's on-the-spot delegation should also be involved in this procedure, as is the case for supply contracts within the framework of investment projects financed by the Community (see paragraph 5.15 below). The validity of this stage therefore depends on whether analyses can be carried out in reliable laboratories in the country of destination, a condition which, unfortunately, is not always met.

4.4. The CIF system is perfectly acceptable in the context of normal commercial relations where an operation takes place between two partners who have been party to the contract from the outset and the person receiving the goods has every possibility of defending his own interests. However, the CIF system becomes inappropriate as soon as it is applied to food aid. In this case the recipient state is not a party to the contract since the contract is signed between an intervention body, acting on behalf of the Community, and an operator. Furthermore the recipient state is hardly in a position to make sure that the contract is enforced. In practice, it is left to a public service employee who has little experience of commercial practices. It is difficult for the recipient state to dispute the quality of the product since the quality is supposed to have already been accepted as satisfactory at the time of shipment when a

certificate was drawn up, even in the absence of a representative from the recipient state. Although the goods are transferred to the recipient state as from the time of loading, it has even less chance of calling into question the maritime transport methods and the insurance of the product, since, from the outset, they are the responsibility of the operator. Furthermore, in order to claim against the insurance, the recipient must prove that an incident has occurred during transport, and this is very difficult. Finally, the CIF option does not automatically make the supplier responsible for unloading costs, since the inclusion, or not, of these costs in the charter contract depends on the prevailing policy as regards chartering. Some ports usually exclude these costs from the contracts. The Community legislation, however, aims in fact to guarantee 'CIF-landed' ⁽¹⁵⁾ conditions, which always include unloading costs. This ambiguity has resulted in legal disputes. On the whole, use of the CIF system for the delivery of food aid to a distant and underdeveloped country seems inappropriate in view of the actual conditions in which the system operates.

Obligations, guarantees and penalties at the various stages

The economic operator's obligations

The contractor's obligation to implement the aid

4.5. The contractor is obliged to render the service for which he has been awarded the contract. For this purpose, the legislation lays down that:

- (a) once submitted, tenders may not be withdrawn;
- (b) a successful tenderer may not withdraw from his undertaking to render the service for which he has been awarded the contract;
- (c) a successful tenderer may not subcontract his contractual obligations;
- (d) where delivery is at the FOB stage, the successful tenderer may be granted an extension of up to 60 days, within which to fulfil his obligations without being penalized;
- (e) the tenderers enter into a series of quite varied commitments, all with the aim of observing the conditions of the invitation to tender and the applicable legislation.

The contractor's obligation to 'reimplement' the aid where implementation is unsatisfactory

4.6. The 'obligation to implement' is covered by an 'obligation to reimplement' where implementation has been unsatisfactory. Where quality does not comply with the required standard, the goods must be replaced; where there is a shortfall, the deficiency must be made good.

The intervention agencies' obligations

4.7. Even if the legislation does not state that the intervention agencies act as the Communities' agents in the field of food aid, the relations between these agencies and the Commission are marked by a series of obligations by which the former are bound to the latter: the obligation to comply with the statutory provisions; the obligation to pay the contractors if the conditions have been satisfied; the obligation to inform the Commission of the circumstances of any incidents that occur during the mobilization procedure; the obligation to obtain the Commission's prior agreement in certain cases, in particular for additional expenditure not provided for in the contract.

4.8. The intervention agencies not only have to fulfil their own obligations but, also and above all, they have to ensure that the contractor's obligations are fulfilled, if necessary by calling on existing guarantees. This may even be said to be their main responsibility.

Insurance

Insurance of cereals withdrawn from intervention storage

4.9. When mobilized goods are withdrawn from intervention storage, the tender only contains the transport costs and not the purchasing price of the goods made available to the successful contractor by the intervention agency. The Community pays the intervention agency directly in settlement of any expenditure relating to the value of the product. The goods withdrawn from intervention storage thus need to be covered by a serious guarantee. In the case of cereals, this guarantee consists of an insurance taken out by the contractor and covering the value of the product (the intervention price or, depending upon the case, the reference price). In the event of a loss, the insurer must pay compensation to the intervention agency. This insurance, laid down by Regulation (EEC) No 1974/80 (*) for the FOB and CIF stages, covers the goods from the moment when they are received by the contractor from the intervention agency to the moment of actual shipment. Thereafter, the successful tenderer is in fact no longer responsible for the goods and is released from his obligations. Moreover, in the event of a CIF delivery, the marine transport insurance replaces this first insurance.

Marine transport insurance of products delivered CIF

4.10. With a view to covering the risks to which goods are exposed during transport by sea, the successful tenderer for a CIF delivery contract is required to take out an insurance policy endorsed to the order of the recipient. By

introducing this compulsory insurance requirement into Regulations (EEC) Nos 1974/80⁽⁴⁾ and 1354/83⁽⁵⁾ laying down the general procedures for mobilizing cereals and milk products, the Commission aimed to bring financing up to the port of unloading into line with commercial CIF conditions, where provision is made for such insurance.

Transport insurance at the 'delivered place of destination' stage

4.11. In the case of delivery at the 'delivered place of destination' stage, the contractor is required to take out 'appropriate insurance cover'.

Securities

Tendering security

4.12. The tendering security, which is stipulated both for cereals and milk products, is designed to guarantee that tenderers, and subsequently the successful tenderer, fulfil their obligations as from the stage when tenders are submitted. Since its purpose is not to guarantee the product itself but to ensure that the successful tenderer fulfils his obligations, the security is a small amount in relation to the value of the goods. There are two specific aspects of the way the amount is determined which are questionable:

- (a) firstly, in the case of milk products, the amount for goods drawn from intervention stocks is not the same as that for goods purchased on the Community market (1 % of the intervention price in the first case and 3 % in the second). This difference is unjustified;
- (b) secondly, in the case of cereals, the amount is 'laid down in the Regulation opening the tendering procedure'. This unjustified difference in relation to milk products and the referral to specific regulations governing mobilization are examples of the tendency to incorporate in successive pieces of legislation provisions which are in fact of permanent validity. Moreover, in the specific regulations, the security, which is fixed in absolute terms and not as a percentage, cannot but be different from product to product and over time. Such extra complications serve no useful purpose.

The tendering security is released for those tenderers who have failed to win the contract, but in the case of the successful tenderer it is not released until he has fulfilled his obligations up to the agreed stage and has thus fulfilled the conditions for being paid. In cases where it is necessary to lodge a delivery security, however, (see paragraph 4.13 below), the latter, when provided, replaces the tendering security, which is immediately released.

Delivery securities

4.13. It was seen in paragraph 4.9 that when cereals are withdrawn from intervention storage they are insured. When milk products are mobilized from intervention storage the guarantee system is different. The successful tenderer is required to lodge a 'delivery security', the amount of which is equal to the intervention price of the product in question, plus 10 %. The delivery security is released when the successful tenderer has fulfilled his obligations up to the agreed stage and has thus fulfilled the conditions for being paid.

Securities for advances

4.14. A tenderer who has been awarded the contract for a delivery of products bought on the Community market and to be delivered at the 'delivered place of destination' stage may, on request, obtain an advance of up to 90 % of the amount to be paid for milk products and up to 80 % only for cereals. The advance may not be paid, however, until after a security has been lodged which is equal to the advance or, in the case of milk products, to the value of the advance plus 10 %. In the case of milk products, the security is not released until the whole batch has been delivered and payment is due. In the case of cereals, the security is released when the successful tenderer has furnished proof that that part of the delivery corresponding to the advance, i.e. up to 80 % of the lot, has been duly delivered. This latter procedure does not take account of the indivisible nature of the contract. Indeed, had the successful tenderer not received an advance, he would not have been able to claim a pro rata payment in respect of a partial delivery, since the taking-over certificate may be withheld for as long as the delivery has not been completed.

The financial responsibility of the economic operators

The contractor's financial responsibility

4.15. The legislation stipulates that 'the successful tenderer shall bear all the financial consequences of the non-delivery of all or part of the goods under the conditions laid down' and that he is only paid in proportion to the quantities delivered. The stipulation requiring delivery 'under the conditions laid down' makes it possible to penalize any deviation from the agreed terms and, in particular, any quality defects.

Deduction from payments made to the successful contractor and equivalent guarantee

4.16. Save for the possibility of paying an advance in the case of deliveries at the 'delivered place of destination' stage, contractors are not paid until after the contract has been fulfilled. If an advance has been paid, the security lodged against the advance provides a guarantee equivalent to a deduction from the final payment. While it is possible

to pay in instalments for milk products, the payments may only be in proportion to the parts of the deliveries that have been completed. Payment is obviously only due unconditionally where a delivery complies to standard.

Rejection by the Commission of expenditure incurred by an intervention agency

4.17 The Commission may refuse to reimburse to the intervention agencies sums that they have wrongly or irregularly expended in the implementation of Community aid. It may thus penalize an intervention agency which has overlooked a delivery that did not comply to standard.

The Community's guarantee

4.18. The recipient concludes an agreement solely with the Community. It is the latter that undertakes to supply a given quantity of products of a certain nature and quality and obviously it must honour its commitments.

Comparative assessment in the light of the quality objective

Who benefits from the guarantee?

4.19. The obligation to implement and, where necessary, to 'reimplement', aid is primarily for the benefit of the recipient, as is marine transport insurance in the case of CIF delivery and, last but not least, the Community's guarantee.

4.20. Insurance taken out for intervention cereals primarily protects the intervention agency, which will receive any sums paid out against the policy, whereas insurance for goods 'delivered place of destination' is of benefit to the contractor and is of only indirect assistance as regards the sound implementation of the aid. The three cases where it is compulsory to insure a product, which at first sight appear to cover all the stages of transport, thus actually represent guarantees of very unequal value, especially for the recipient.

4.21. While the objective of the financial responsibilities placed on the contractor and the intervention agency is to protect Community resources, the three securities serve different purposes. If it is forfeited after the contract has been awarded, the tendering security reverts to the Community. The objective of the security against advances and the delivery security, on the other hand, is to cover an intervention agency that has paid an advance or supplied a contractor with a product without requiring him to pay for it first. But obviously, once the Community has reimbursed the intervention agency for the advance or for the value of the product, the corresponding security then only exists to protect the Community's interests.

4.22. Some of the obligations placed on the intervention agencies aim to ensure that the aid is implemented soundly and in the recipient's interest, whilst others aim to protect the Community; this is true, for example, of the obligation to obtain the Commission's agreement before any additional sums are expended.

4.23. The variety of purposes that these responsibilities and guarantees are intended to serve is significant when it comes to assessing the overall cohesion of the system. Only guarantees which effectively protect the recipient should be regarded as essential.

Full guarantees or guarantees that only cover one stage in the implementation of the aid

4.24. When FOB or CIF goods are mobilized on the market, the conservation and transport of the product up to the place of delivery are not necessarily covered by insurance, unlike the case of delivery at the 'delivered place of destination' stage. Even in this latter case, the obligation to take out 'appropriate insurance cover' is vague. More specific provisions in respect of the point at which the guarantee takes effect and the level of the risks covered would be welcome.

4.25. Except for marine transport insurance in the case of CIF delivery, there is no guarantee to cover the proper completion of the aid operation downstream of the place and after the time of taking-over. The guarantees expire at the port of unloading for FOB and CIF deliveries, and the 'delivered place of destination' stage must be selected if the operation is to be covered by a series of guarantees up to its arrival at destination. In particular, it is only in the case of delivery at the 'delivered place of destination' stage that the Commission and intervention agency retain a financial guarantee against the contractor up to the moment the goods arrive at their destination. The tendering security is itself retained up to the same stage (except in the case referred to under paragraph 4.12 above).

4.26. In all the other cases (FOB, CIF), which are by far the most frequent, the sum owing to the contractor is paid after shipment and he is not required to wait until it has been established whether the goods have been unloaded, much less whether they have arrived at their destination in good condition. The fact is that the contractor is in possession of all the documents required for payment just after shipment and the securities are released on presentation of these same documents. It is very unsatisfactory that the goods should thus leave Europe without any substantial sum being withheld or guarantee being lodged up to the moment of receipt in the beneficiary country. For such a guarantee to be meaningful, it would have to be combined with a serious procedure for the reception of goods on arrival at destination.

Guarantees which may be mobilized directly or via a third party

4.27. In general, guarantees whose implementation depends upon the cooperation of a third party are of much less value than those which may be mobilized directly by the holder. Thus, guaranteeing intervention cereals by insurance (paragraph 4.9 above) is less certain than guaranteeing milk products by the compulsory lodging of a security (paragraph 4.13) which cannot be released until after satisfactory completion of the services and which covers the value plus 10 %. Either the intervention agency or the Community assesses whether the conditions for the release of the securities have been met, while in the case of insurance pay-outs, both parties rely upon the insurance companies, who usually are not short of reasons for refusing payment, by citing one of the many restrictive clauses in the policy.

4.28. This is the great weakness of marine transport insurance in cases of CIF delivery. When insurance compensation is sought by the recipient, in most cases the companies back out of their responsibilities. In the case of 15 000 t of maize delivered to Mozambique, a flagrant case of poor quality on arrival combined with short weight, the insurance company refused to pay up. In the case of 974 t of wheat flour refused by Djibouti in 1982, the insurance company questioned the damage incurred, since the recipient had unwisely refused to unload the goods in question.

4.29. Similar difficulties arise when certain aspects of food-aid management are delegated *in toto* to the national intervention agencies. On the one hand, the intervention agencies, which are intermediaries between the Community, the recipient and the successful tenderer, are far from taking the view that they are always required to defend above all the formers' interests *vis-à-vis* the latter. Some of them sometimes fail to make use of guarantees which may be used against defaulting contractors.

4.30. With regard to an allocation of 2 000 t of milk powder to China in 1980, only 500 t of which was delivered and which, moreover, was not up to standard, the intervention agency reacted very slowly to the news of these infractions, which were established in November 1981. It was not until October 1983 that it informed the Commission that it intended to institute legal proceedings against the contractor.

4.31. On the other hand, the Commission was subjected to repeated pressures from an intervention agency which wanted the penalty imposed on the contractor to be quashed. This contractor had loaded food aid onto a boat which was older than the authorized age. He falsely claimed to have used this boat at the request of the Pakistan authorities, whereas in fact he had done so at the request of the Pakistani owner of the boat. In addition, some of the food aid was missing, so that withholding the tendering security was a good means of ensuring that the contractor fulfilled the contract. The Commission did not give way to these pressures.

4.32. In a ruling dated 27 November 1986, the Court of Justice considered that the contractor was not necessarily at fault in making a delivery on a vessel which was over 15 years old, in contravention of the statutory provisions. It also took the view that a certain sense of proportion should be kept between the penalty and the offence, and that, consequently, in cases of infringements of this type, only a part of the security lodged by the contractor deserved to be forfeited to the Community. The practical implications of this approach corroborate the Court of Auditor's findings on the ineffectiveness of the current system of securities.

4.33. Where a contractor has defaulted, or even in cases where there is merely doubt as to whether he has correctly fulfilled his contract, responsibility for not paying over or releasing the securities and for referring the matter to the Commission lies in the first instance with the intervention agency. If an intervention agency has acted unwisely and paid a defaulting contractor and released his securities, the Community may, of course, as a second resort, refuse to reimburse the intervention agency. The immediate (that is, monthly) screening of expenditure by the intervention agencies is, however, of limited use. The intervention agencies' monthly statements are most often accepted as they are. It is not until several years afterwards, when the accounts are cleared, that the Commission makes a more thorough check of the agencies' expenditure. Clearance is effected purely by means of sampling and takes place long after the event. Only the 'additional expenditure' is given an immediate and detailed examination which takes place at the same time as clearance. This being so, the threat of a penalty in connection with the clearance procedure seems both slight and remote to the intervention agencies and, *a fortiori*, to the contractors: indeed, should expenditure be rejected because the contractor was at fault, the intervention agency would be obliged to follow a long and uncertain procedure in order to recover the sums that had been wrongly paid to the contractor. The back-log in clearance operations is currently being reduced.

Guarantees to maintain the value of the aid or dissuasive penalties

4.34. Obligations and guarantees may serve a dual purpose. On the one hand, they may represent the threat of a penalty for the contractor — or, where appropriate, for the intervention agency — and in this respect they constitute a more or less powerful incentive to correct performance of the contract. On the other hand, their objective may be to maintain or make good the financial value of the aid in the event of loss of or damage to the product or failure to implement the aid. The obligations and guarantees at present adopted do not fulfil both these functions.

4.35. The obligation to implement the aid correctly, and the obligation to 'reimplement' where implementation has been unsatisfactory, under penalty of non-payment, may

well have, taken together, a powerful hortatory effect, thus encouraging the successful tenderer to perform his contract correctly and protecting Community finances against the risk of expenditure that fails to produce a definite result. Similarly, the delivery security and advance security may well represent an almost absolute protection for the intervention agency's finances or for those of the Community and at the same time a very real financial threat for the contractor. The same is not, however, true of insurance cover and the tendering security.

4.36. Insurance covers offers protection — but not very good protection — of the interests of the insured party but does not constitute an incentive for the contractor. This is one of the weaknesses of insurance, as compared with securities. Conversely, tendering securities are designed solely as an incentive for the tenderers, and subsequently the successful tenderer, to observe their obligations, but since they only represent a small percentage of the total value of the supply, unlike the other securities, they do not have the effect of protecting the financial interest involved in the aid.

Extent of financial responsibility and definition of obligations

4.37. In theory, financial responsibility is an absolute weapon: if the service rendered by the economic operator is not up to standard, the Community is in a position to penalize him by withholding some or all of the payment. This guarantee works in two stages. Firstly, services which have been unsatisfactorily performed must be carried out again (see paragraph 4.6 above). Goods of sub-standard quality must be rejected and under-weight deliveries must be made good. Then, secondly, if the contractor fails to fulfil his obligations, financial penalties (refusal to pay or withholding of securities) may be imposed.

4.38. In practice, this system works very badly. On the one hand, the obligation to reimplement the aid is not systematically enforced. Of all the unsatisfactory deliveries recorded, the contractor himself only rectified deficiencies in kind in two cases, one of which followed a fraudulent supply of butter to Bangladesh. On the other hand, the financial penalties are rare and do not by any means reflect the number of cases of deficient quality found. There are two main reasons why this system does not work properly. The first may be ascribed to negligence on the part of the beneficiaries of the guarantees. The other, however, is due to an inadequate definition of the economic operator's obligations.

Very often the guarantee holder does not put the guarantee into effect

4.39. Deliveries are accepted by the intervention agencies despite their non-compliance to standard. Either the intervention agency declares that they do comply when

they do not, as was the case for 15 000 t of maize delivered to Mozambique in 1983, or the goods are unloaded despite the fact that they have been found not to comply to standard. This was the case for 5 000 t of common wheat dispatched to Benin under the 1980 programme, in spite of the fact that the certificates stated that it was not up to standard. This was also the case for 1 000 t of skimmed-milk powder delivered in 1983 to Tunisia: in this last example the statement of non-compliance had been received after shipment (see paragraph 3.37 above).

4.40. Recipients often fail to make use of the option given them by the legislation to take part in the controls at the time of shipment or to request that such checks be made and to refuse to take the goods over at this stage. Just as frequently, they refrain from submitting any official complaint even though it has been established, after the arrival of the goods at their destination, that they are of poor quality, and they do not even approach the insurers. They are hesitant to criticize the quality of a gift and they do not always carry out a systematic check when the goods arrive. At the time of the Court's audit visit to Ghana in January 1985, the Ghanaian authorities had not yet submitted, several months after the goods' arrival, any claims to the insurers for losses of rice totalling 300 t in respect of two batches under the 1983 programme. The Commission delegation in Ghana did not react. The Tanzanian authorities, who experienced losses of wheat, milk powder and butteroil in 1980 and 1981, submitted their claim to the Commission, instead of applying to the insurers.

4.41. When, if all goes well, an insurance claim is paid, the money must then be used to replace the damaged or lost goods. The delivery agreements should make reference to this obligation. In Indonesia one NGO which had received compensation was authorized by the Commission in 1984 to use the money to organize a seminar to discuss ways of improving the utilization of food aid.

4.42. It must be admitted that even the threat of the heaviest financial penalties is not always sufficient to sway some particularly unyielding contractors. The amount at stake in the case of 1 500 t of skimmed-milk powder delivered to China in December 1981 was almost 1 300 000 ECU. The contractor nevertheless refused to complete his contract. In extreme cases of this kind there remains, however, the ultimate weapon of withdrawal of approval but it was not used in this case. In general, and as far as the Court is aware, it is never used.

The contractor's obligations are not strict enough

Permitted discrepancies in respect of weight

4.43. The permitted discrepancy in respect of cereal tonnage is, depending upon the case, 2 % of the weight for

goods to be delivered in bulk on shipment and 5 % in the case of delivered, place of destination supply agreements. In the case of a batch of 5 000 t in bags (usual quantity), a shortage at destination of 250 t, i.e. 5 000 bags of 50 kg, is tolerated. These tolerances wrongly give preference to the contractor's interests. Of course, it is true that contractors are only paid for the quantities actually delivered, but, so long as the shortages stay within the limits authorized by the Community, the contractor is considered to have fulfilled his contract correctly. The quantity of aid decided upon and promised is deemed to have been given and the aid programme is deemed to have been carried out. The permitted weight discrepancy should be as low as possible at the moment of shipment and the contractor could, at a pinch, be requested to make up any deficiency. Once the goods arrive at destination, the permitted discrepancy should be far lower than is allowed at present since the transport conditions tend to increase the moisture content and thus the weight.

Cases where the contractor is released from his obligations

4.44. There are two exceptions — not equally justified — to the obligation to carry out the aid operation:

- (i) the first does have some foundation. The successful tenderer is released from his obligations where the recipient has made it impossible to complete the delivery on the terms stipulated. Even so, this exception must doubtless be qualified. In many cases, delivery is still possible, on somewhat amended terms, even if it is at the recipient's expense;
- (ii) the second exception — the case of *force majeure* — needs to be looked at critically. The concept of *force majeure*, if interpreted loosely, could be considered to include situations normally covered by insurance. Admittedly, whenever it is possible to get insurance cover against a risk on reasonable terms, the Commission does endeavour to reject pleas of *force majeure*. But this eventuality ought to be ruled out by the regulations themselves.

Shortcomings in the regulations as regards the obligation to repeat the operation

4.45. For milk products, the obligation to replace goods or to make up a deficiency is specifically stipulated only in cases where checks are carried out at the request of the recipient, not where they are at the initiative of the intervention agency. For aid which is to be delivered CIF, where the sea-transport costs are borne by the contractor, the legislation stipulates, solely in respect of milk products, that 'in the event of default or of unsatisfactory transportation the successful tenderer shall, at the recipient's request, make all the necessary transport arrangements, including charter reservations'.

Obligation to carry out precise operations or obligation to achieve a result

4.46. The obligation to carry out strictly-defined services involves one major drawback: in most cases, it makes it impossible for the aggrieved party to obtain redress for a failure to complete a contract because he is unable to produce evidence to show that the failure did indeed relate to one of the stipulated services.

4.47. The example that best illustrates this weakness is that of the insurance of the goods during sea transport in the case of a CIF supply. The regulations stipulate that the insurance must cover all the risks of carriage. In order to receive compensation, the recipient therefore has to prove that the damage sustained has been caused by an occurrence during carriage, which will often be difficult, since the carrier is distinctly uninclined to mention hitches or accidents which occurred whilst the goods were in his hands.

4.48. Moreover, it is not true that the insurance policies cover all the risks of carriage. For example, as a result of 23 t being missing from a consignment of wheat upon arrival at its destination, the Commission found out that in France contractors never insure against shortages. The 'INCOTERMS' document on delivery stages, published by the International Chamber of Commerce in Paris, excludes, unless otherwise specified, insurance cover against risks of 'theft, pilferage, leakage, breakage, chipping, sweat' and 'contact with other cargoes', which are regarded as 'special risks'. The successful tenderers, given the price of comprehensive policies, prefer to sign these standard, restrictive policies. Indeed, it would be very expensive to demand cover for all these special risks. The regulations themselves, whilst on the one hand containing the stipulation that all the risks of carriage must be covered, seem on the other hand to allow for the possibility of a more lenient interpretation by referring in their recitals to the Community's wish to align its rules more closely on the trading practice described in the 'Incoterms' document.

4.49. In the case of an FOB, and especially a CIF, delivery, the fact that the obligations are divided up between the intervention agency, the contractor and the shipowner very often makes it impossible for the recipient to obtain redress for damage — even where it is undeniable — discovered at the time of unloading unless he can with certainty attribute the fault or the fraud to one of these three parties involved. The case of the 15 000 t of maize delivered to Mozambique in 1983 which was incomplete and unfit for human consumption is typical in this respect. The insurance company and the intervention agency managed to show that they had no liability, and the contractor was given the benefit of the doubt, pending the outcome of an enquiry which has been under way in the Member State since November 1984. A series of faulty deliveries of the same product to various countries, carried out in 1985, highlights the same set of problems. Even in

the case of a faulty delivery at the 'delivered place of destination' stage and in the absence of any *ad hoc* procedure (see paragraph 3.40), it is highly unlikely that any reaction on the part of the recipient will result in the goods being replaced for him. Here again, the recipient comes up against the difficulty of producing proof and of pinpointing who is responsible.

4.50. The Community will not escape from these legal dead-ends without a reversal of the burden of proof. And this can be obtained only by introducing a genuine obligation to achieve a result, entrusted to a single supplier of services, who has previously been deprived of the various existing legal loopholes, with the exception of the case of *force majeure*, itself very strictly delimited.

The Community's guarantee: the final guarantee or the first?

4.51. Under the agreement made with the recipient, is the Community obliged to guarantee that the delivery will be made as stipulated, and in the event of a faulty delivery, to agree to replace or supplement the goods as necessary, and to bear the financial consequences if none of the other guarantees can be brought into play?

4.52. Until recently, the Commission required proof that the fault lay with an operator involved in the execution of the aid operation before agreeing to make good the damage suffered by the recipient and it used this putative liability on the part of one of the operators as an excuse for not acting sooner. In the case of the 15 000 t of maize for Mozambique, the Commission decided that the damage suffered would not be made good unless the responsibility of the supplier or the insurer was brought into play. In a letter to the Mozambican authorities, it says: 'Insofar as the latter (the supplier's liability) is involved, the Commission will do all it can to obtain redress for the damage suffered by your country, but this action cannot be taken before the Commission knows how the insurers will deal with the claim, and the claim can only be lodged by the aid recipient'. Thus, the Commission does not contemplate making any direct redress itself. This would have been the most advisable course of action, however, especially since the delivery stage specified in the supply agreement made with the recipient was the port of unloading, the transfer of the risks to the recipient taking place only at this port, and not at the port of shipment, as implied by the rest of the letter, which is doubtless based on the mobilization regulation, which contradicts the agreement on this point. At one point, the Directorate-General for Development, after consulting the Commission's legal service, considered replacing 5 000 t, which was regarded as a fair assessment of the damage suffered, but then it followed the opinion of the Directorate-General for Agriculture, which suggested deferring any action until the outcome of an infringement enquiry against France was known. Since this enquiry has not so far come to a conclusion, it is becoming more and more improbable, as time goes by, that the goods will ever be replaced.

4.53. Take the case of sub-standard milk products that were delivered to Tunisia in November 1983: that country

will receive compensation from the Community only if an enquiry which the Member State has been asked to make establishes that the contractor or the intervention agency is liable. The Commission considers 'that the goods can be replaced only if it is clearly established, on the one hand, that the products were not of the required quality at the time of shipment and, on the other, that the responsibility for this lies with either the contractor or the agencies concerned'. In this case, however, the poor quality of the goods prior to shipment has already been established. As for the second condition, it is tantamount to ruling out the Commission's responsibility. The Commission has nevertheless authorized the recipient not to pay any counterpart funds for the unusable part of a consignment of milk powder. But this exemption obviously does not constitute redress of the damage suffered.

4.54. The Commission's attitude may perhaps be changing. In the case of the maize granted to Mozambique, the opinion of the Commission's legal service, dated 6 February 1985, for the first time clearly adopted the principle of the Community's direct responsibility in the event of a sub-standard delivery. Here are the main passages of this opinion:

'It would seem to have been established that the Community has not fulfilled the obligations arising from its exchange of letters with Mozambique, according to which it undertook to deliver CIF 15 000 tonnes of maize, insofar as a large part of this delivery proved to be unfit for human consumption. In view of the fact that no fault of a kind likely to diminish or eliminate the Community's responsibility can apparently be attributed to the recipient, the Community is obliged to supply quantities equivalent to those which could not be used for human consumption...'

Thus, according to the legal service, only a fault on the part of the recipient, the co-signatory to the agreement, could, if the occasion were to arise, weaken the Community's responsibility. On the other hand, no condition is stipulated concerning possible responsibility on the part of an operator, whether contractor or intervention agency. The Commission, apparently in application of this doctrine, recently decided to replace 240 t of butteroil and a consignment of sub-standard durum wheat which had been delivered to Morocco via the WFP. This decision was taken without waiting for the findings of an enquiry intended to pinpoint responsibilities.

5. POINTS FOR DISCUSSION WITH A VIEW TO REFORMING THE SYSTEM

Simplifying and speeding up the procedures

Overcoming the political complexity of food aid

5.1. Food aid concerns both development policy and the common agricultural policy and, because of its political implications, requires careful monitoring by the Member

States and the Council. The Member States, either directly, or through the Council, have arranged matters in such a way that they are involved in the procedure for managing food aid at four stages (as the budgetary authority, then by means of the annual regulation laying down the quantities, then via the food-aid committee for each allocation and, lastly, for each mobilization, via a management committee). It should, however, be possible to cut down considerably the number of stages in the procedure and the number of parties involved in each stage.

Taking the simplest existing procedures as a basis

Triangular operations

5.2. A triangular operation is one involving food aid that is not mobilized in Europe but in a country located, if possible, in the same geographical region as the recipient country. The sole management body and paying agency is the Directorate-General for Development, which awards the contracts or selects the bodies responsible for awarding them (e.g. NGOs or Commission delegations on the spot). The Council retains its monitoring powers through the food-aid committee. The Directorate-General for Agriculture and the intervention agencies play no part, since the products sent as aid are not of EEC origin.

Aid in the form of oleaginous products

5.3. The intervention agencies are not involved. The Directorate-General for Agriculture awards the contracts itself, after publishing invitations to tender in the *Official Journal of the Communities*. The Directorate-General for Development pays the successful tenderers. The link with the common agricultural policy nevertheless remains in cases where it is stipulated, as for the 'traditional products' (cereals and milk products), that the goods must be procured on the European market, as is the rule, with very few exceptions. Again, the Council retains its monitoring powers through the food-aid committee.

Emergency aid (Articles 950 of the budget and 137 of the Second Lomé Convention)

5.4. This aid is managed exclusively by the Directorate-General for Development, which designates the operators and pays for the services rendered. The link with the common agricultural policy is not broken because of the obligation, which is usually still stipulated, to procure the product on the European market, the successful tenderers thus receiving the refund by the normal channels and making their bids 'less the refund'. This aid is not subject to the approval of any committee. This procedure

has frequently been used in the context of emergency plans to combat famine in Africa and has produced good results (see the annual report of the Court of Auditors for the financial year 1985, paragraph 10.3).

Suggestions for reform

5.5. The preceding examples suggest that it must be possible to envisage speedier procedures, which, whilst ensuring good coordination with the mechanisms of the common agricultural policy and respecting the Council's powers, will take account of the specific aims of food aid, by means of suitable monitoring.

5.6. Consultation of the Member States could be done on one single occasion. This solution, which is far more practical than the present string of consultations, would in no way alter the inter-institutional balance, and would require only that the principle of granting the aid and the detailed arrangements for mobilizing it be decided at one and the same time. Since 1982, the Commission has been tending to move towards the proposed solution, in that it has been staggering its aid allocation decisions according to the desired delivery periods so that these decisions come only a short time before the start of mobilization.

5.7. At the same time, of course, the annual questioning of the recipient countries about their aid requirements should not be allowed to take too long. The 1982 reform should also make it possible for one single consultation to be held for each country in order to discuss the quantities to be delivered and to negotiate the delivery arrangements (exact nature and characteristics of the product, delivery stage, free distribution or sale, people to benefit from the aid, exact time of the delivery, use of counterpart funds, etc.).

5.8. As regards coordination with the common agricultural policy, the essential point is the product's origin, which must as a rule be European. This origin could be adequately safeguarded by means of restrictive regulations.

5.9. Food aid must be exempted from the system which is a characteristic feature of the EAGGF, Guarantee Section, whereby the Member States are granted periodic advances which are not settled until long after expenditure has been incurred. Specific needs must be satisfied by means of a specific management system. The product's supplier and the contractor responsible for transporting and delivering it to the recipient, who may be separate persons of one and the same, ought not to be paid until the services have been rendered, as is the rule for public contracts, even though this may mean granting suitable advance payments, which are settled after delivery.

5.10. It might even be useful to consider an arrangement whereby the contractor, and only the contractor, would be paid directly by the Commission, minus the refund, after

sending in supporting documents to prove the export and arrival at destination of the goods, which he himself would have purchased on the Community market or from intervention agencies. An arrangement of this kind would encourage the contractor to make his own checks on the quality of the products, as a quality control upon delivery would be introduced.

5.11. A system such as this could be managed directly by the Commission or delegated by the latter to agents whose obligations would have to be clearly defined. These agents could be, but would not need to be, the intervention agencies, which would still act as suppliers, moreover, each time it was decided to have recourse to intervention stocks.

Ensuring the consistency of management documents

5.12. The recipient knows only what is stated in the supply agreement, and is not supposed to be acquainted with the permanent regulations regarding mobilization nor with the specific supply regulation. Conversely, the intervention agency and the contractor are for their part subject to the Community regulations which they are supposed to apply, but they have no knowledge of the supply agreement made with the recipient. Contradictions sometimes arise between these two categories of documents, which are drawn up by separate departments.

5.13. The obvious solution is to move towards a single document consisting of a very broad common segment of the supply agreement and the mobilization regulation. The mobilization request could simply involve sending this joint text.

5.14. This joint document would be all the easier to envisage if the procedures were speeded up. One of the chief obstacles at present standing in the way of a proposal of this kind is that some of the provisions that are laid down in the mobilization regulation have not yet been determined at the time when the supply agreement is made. But this obstacle would be eliminated if these operations were closer to each other or were even concomitant.

Better definition of controls and responsibilities

Monitoring the execution of the operation is indispensable, regardless of whether there is any legal responsibility to do so

5.15. The fact that the Community has no legal responsibility for the stages subsequent to the stage up to which it finances an operation does not mean that it can

dissociate itself from what happens after this stage. Just as, in the case of a development project, the Community makes a point of monitoring its operation well after the completion of its own financial involvement or technical assistance, it ought likewise to follow up the implementation of all food-aid operations as far as the final stage of distribution, whatever the point at which its own financial involvement ceases. The Community ought not to finance aid operations without ascertaining that they achieve their objective.

Need for separate checks at the various stages of carrying out the aid operations

5.16. Depending on the nature of the legal provisions governing the relations between the Community, the recipient and the various operators involved in the aid operation, the respective responsibilities may be differently defined, but the need for checks remains the same, because it is connected with the physical risks which the goods run during this or that phase (transport, storage, handling) and with the risks of fraud associated with the carrying out of each service, whoever the person providing the services is. Whatever the system for defining the responsibilities, the stages are always the same: manufacture of the product, shipment, unloading, arrival at destination. In all cases, checks have to be made at these different stages. As regards the checks carried out at the moment of unloading, which are absolutely indispensable, they should relate to all the supply's physical features (quantity, quality, packaging). The Community should not only stipulate these checks, but should also finance them and ensure that they are carried out and that they are effective. It should be noted that some national aid is checked twice, at shipment and at unloading, and also goes through an official taking-delivery procedure, involving all the parties, upon arrival at its destination, the various parties being notified at the place of unloading and at destination by the diplomatic missions on the spot.

Without precise definition of responsibilities, the best checks are useless

5.17. Checks are pointless unless they make it possible to bring into play clearly defined responsibilities. For example, proof that a delivery is sub-standard or otherwise unacceptable does not have any effect if the aggrieved party does not have the legal means to press his claim against the insurance company, the contractor, the intervention agency or even the Community. The examples given earlier in this report prove that the present system does not always offer this legal sort of protection.

Awarding more contracts with an obligation to achieve a result

5.18. Whenever it seems possible, tenderers to whom food aid contracts are awarded should be required to accept a firm obligation to achieve a result, without any loopholes, such as undue recourse to *force majeure*, and any price increases such as additional expenditure not provided for in the contract. To this end, the successful tenderer should take out and implement insurance policies that enable him to honour this obligation to achieve a result.

5.19. In as many cases as possible, the aim should be to deal with one single contractor who would be responsible for carrying out the aid operation from the supply of the product up to its delivery to the place of destination. Dealing with a single contractor does not rule out subcontracting — quite the contrary in fact — provided that the legal relationship in subcontracting contracts is only between the main contractor and his subcontractors. This solution would entail a slight increase in the direct costs borne by the Community, but would enable it to save on intermediate checks and, above all, it would increase the likelihood of the operation being carried out well in the end, which is in itself a saving. In any case, when a country receives aid financed only up to the FOB stage, it runs some risks. This therefore supposes that it is in a position to bear all the responsibilities from the European port onwards. In short, the proposed solution would have two advantages: it would require only one contract per aid operation; it would keep the successful tenderer in the position of being wholly responsible until the moment the services financed under his contract were all completed.

5.20. It is nevertheless clear that some safety-nets have to be set up:

- (a) firstly, even in the case of a single contractor, the freedom he is allowed in choosing the methods to use should not be allowed to impede the proper functioning of any system for providing information to the Commission which will enable it to intervene whenever it feels that Community aid is in grave danger of not arriving at its destination undamaged. In order to avoid excessive costs, it should also be possible to request the contractors, at the time when tenders are submitted and then again when the supporting documents are submitted with a view to payment, to supply a detailed breakdown of the various items of the contract (handling costs, transport costs, insurance costs, etc.);
- (b) secondly, if the conditions under which the operation was to be carried out, in particular the difficulty of finding operators and the lack of competition, were to make it impossible to use one single contractor, it

should be permissible to split the operation into as many contracts as necessary. The Commission ought then to cater efficiently for the monitoring of those operations where the need for coordination and direct involvement is, in the nature of things, greatest.

Setting up a taking-delivery procedure involving all parties to the agreement as a condition for paying the contractor

5.21. There is no valid reason why food aid, which is a supply like any other, should be exempt from a procedure which the Community has laid down for other areas of its financial involvement. Thus, for example, the 'General clauses for invitations to tender concerning supply contracts' provide for a taking-delivery procedure, which is generally carried out at the place of destination. The Commission can be represented at this procedure, which is backed up by financial penalties for cases where the services are not carried out properly. Similarly, food aid ought systematically to undergo a taking-delivery procedure involving all parties to the agreement and implemented at the stage as of which the successful tenderer no longer bears any responsibility. Payment and the release of securities should, of course, be made strictly subject to the discharge granted under this procedure.

Revising the coverage of the insurance policies

5.22. It would be advisable to make the insurance as far as possible independent of the conditions and incidents of transport, and instead, preferably, to make it relate only to the product itself; to put it at its most extreme, it is the goods that should be insured, not the transporting of them.

5.23. The question of who is named as the beneficiary of the policy should be reviewed. It is probably better if the beneficiary is not the recipient of the aid. It would be preferable for the beneficiary to be the contractor, provided that his responsibilities had previously been extended, or, better still, the Community itself, which is the party with the strongest interest in the proper implementation of the aid, under the terms of the supply agreement. Any compensation paid by the insurance would then make it possible to replace the unacceptable goods despite the lack of budgetary appropriations available for financing the same aid allocation a second time.

5.24. Whenever possible, a guarantee based on the payment arrangements (e.g. a performance guarantee or the lodging of a bank guarantee) should be preferred to the guarantee obtained by an insurance policy, since insurance companies sometimes tend to increase the number of legal

reasons of a kind likely to relieve them of their obligation to pay compensation. Securities and guarantees should not be released until consent has been given by a Community authority, in most cases the Commission Delegate in the country receiving the aid. This solution would be consistent with the setting-up of the taking-delivery procedure suggested in paragraph 5.21.

6. CONCLUSION

6.1. The Court's analysis shows that by far the greater part of the problems referred to above stem from the over-complexity of the regulations and practices relating to standards, responsibilities and guarantees in the sphere of food aid. In this report, the Court has made various recommendations bearing in mind the present scattered distribution of responsibilities. The Court nevertheless wonders whether an even more effective way of tackling this problem might not be to set up, as a matter of priority, procedures that were simple and unequivocal.

6.2. Whether the contracts are entered into with one single contractor — which should gradually become the rule, especially if experience shows that an adequate number of economic operators are coming to the fore who are capable of carrying through such operations —, or whether the contracts are split up — which could be an option whenever a food-aid operation requires extra supervision —, the procedures should have as their common denominator the introduction of obligations to

achieve a result that are covered by performance guarantees released on the basis of final checks made at the place of destination (or at the place of transition to the subsequent phase, in the case of a split contract) with the participation of a Community representative.

6.3. Whatever solution is chosen, there will be a price to pay:

- (a) more frequent recourse to delivered, place of destination arrangements, on the one hand, and to contracts with a sole contractor, on the other hand, will in many cases be more expensive than the options most frequently used at present of FOB or CIF deliveries. But experience has shown that the Commission's attempt to align the stages of supplying food aid with the commercial notions of FOB, and above all of CIF, has resulted in failure. These practices are effective in the context of purely commercial transactions where the seller and the purchaser are as a rule dealing on the same footing, and where the latter has the means of imposing economic sanctions on the former for any failings. The same practices cannot be applied in the case of a gift, as the recipient of the aid does not then have at his disposal the same means of imposing penalties;
- (b) as regards the exceptional implementation of split operations under the close supervision of Community staff, this is pointless unless the latter are suitably equipped to ensure effective management and monitoring. Here too, the solution chosen will mean that the budgetary resources at present available will have to be reallocated.

This report was adopted by the Court of Auditors in Luxembourg at its meeting of 27 May 1987.

For the Court of Auditors

Marcel MART

President

(¹) See the term 'lot' in Annex 3.

(²) OJ L 352, 14. 12. 1982.

(³) Annex 2 is devoted to a comparative analysis of these two Regulations, from the viewpoint of paragraph 2.11 below.

(⁴) OJ L 192, 26. 7. 1980.

(⁵) OJ L 142, 1. 6. 1983.

(⁶) See the definition of these terms in the glossary at Annex 3.

(⁷) See the term 'free on board' in Annex 3.

(⁸) See the term CIF in Annex 3.

(⁹) Acronym of the United Nations Relief and Works Agency for Palestine Refugees in the Near East.

(¹⁰) OJ L 84, 31. 3. 1978.

(¹¹) See the Court of Auditors' special report No 2/85 on the system for the payment of refunds on agricultural exports, paragraph 3.11, OJ C 215, 26. 8. 1985.

(¹²) See the terms 'taking-over certificates' and 'attestation of conformity' in Annex 3.

(¹³) OJ L 43, 15. 2. 1977.

(¹⁴) See the expression 'free alongside ship' in Annex 3.

(¹⁵) See the terms CIF and CIF-landed in Annex 3.

ANNEX 1

List and description of deliveries of sub-standard goods noted by the Court

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1. Some of the inadequacies noted relate to the quantity delivered, others to the type and quality of the product, others to the packaging of the product and others, finally, to the time and place of delivery. The cases of sub-standard delivery set out in this annex sometimes date back a long time. Nevertheless, they are all still significant, either because the original regulations have not been amended or because the new regulations have not substantially improved the system of aid management and control.

A. Inadequacies relating to the amount delivered (or the value transferred)

1. *Quantities missing from specific consignments*

2. Of a 50 t consignment of butteroil, for delivery to Burundi during the course of 1982, 12 t were missing on arrival at Bujumbura.

3. Quite considerable losses were recorded in 1982 in relation to a triangular operation involving the purchase of millet in Senegal for dispatch to Chad and the Niger. According to the annual report of the Commission's Delegate in Senegal, the cause of these losses was 'the poor quality of the sacks and the fact that they were not properly fastened'.

4. Under the terms of the 1983 programme, Ghana was supposed to receive 7 935 t of long-grained rice, plus a further 2 760 t of the same product by way of emergency aid, all packaged in 50 kg sacks. It was noted on arrival that, from the two shipments, 3 540 sacks were missing and 3 345 sacks were either empty or did not contain the total stipulated weight. In total, about 300 t were missing, i.e. 2,8 % of the total agreed quantity, involving an estimated loss of 0,2 Mio ECU.

5. Following a storm at sea, the maritime transport undertaking which had loaded 5 965 t of colza oil on 19 May 1982 for shipping to Bangladesh was obliged to sell off 1 939 t in Singapore and deliver only what was left to Bangladesh. The company which had received the food aid contract did, however, subsequently agree to deliver the missing quantity.

2. *Quantities regularly missing*

6. Losses are regularly recorded in the case of aid granted to the Comoro Islands. Average losses for cereals amount to 10 % of the delivery, but in some extreme cases they have amounted to as much as 25 %. These losses are caused by transport on poor quality vessels or by transshipments due to the lack of regular services and to the fact that the Comoro Island ports are inaccessible to deep-sea vessels.

7. Losses of more than 10 % are recorded each year for milk powder received by Burundi, apparently because the packaging is not strong enough to resist the stresses caused by the numerous transshipments that occur during transport.

8. From the 1977 to 1982 programmes, 496 t of milk powder out of total allocations to Ghana of 11 100 t, i.e. 4,5 %, were lost, and, out of a total allocation of 1 860 t of butteroil, 41 t, i.e. 2,2 % were also lost. Each of the years in question was affected by losses. The losses were noted whilst the goods were being unloaded, though the official delivery had already taken place at the port of loading (FOB).

9. In Ghana, the storage of milk powder without the use of pallets or tarpaulins encourages deterioration and theft.

10. In Tanzania, the following losses were recorded during the unloading of the goods: 783 t of wheat, 95,8 t of skimmed-milk powder and 11,1 t of butteroil in 1980; 126,6 t of skimmed-milk powder in 1981. At European prices, these losses exceeded 0,4 Mio ECU in value.

3. *Missing quantities which were not replaced, or were replaced late*

11. In most cases, the missing quantities were not replaced. The Court has made special note of the failure to replace certain consignments.

12. In 1981, 15 000 t of wheat were granted to Pakistan via the UNHCR (United Nations High Commission for Refugees) for Afghan refugees in Pakistan. During unloading in Karachi, 33,4 t were found to be missing from the two vessels which had transported the wheat. An amount of 10,1 t was subsequently 'found', bringing the final loss to 23,3 t, i.e. an insured value of some 41 400 FF (about 6 900 ECU). Admittedly, the loss rate was very low (1,6 %), but as the wheat was in sacks, the loss was clearly identifiable and unacceptable. Furthermore, other sacks, representing a considerably greater tonnage, were found to be damaged. Amongst the possible causes of loss it should be noted that, of the 15 000 t in question, 7 500 had been loaded on a vessel which was eight years older than the maximum 15 years laid down by the regulation on the mobilization of cereals. The recipient was not indemnified because the insurance did not cover the risk of loss, despite the requirement in the regulation which stipulates that the recipient must take out an insurance policy 'covering all transport risks'.

13. Out of the 1 500 t of milk powder to be delivered to Zambia at the beginning of 1982, 230 t, i.e. 15 %, were missing on arrival at Lusaka and 35 t were damaged. The missing quantities, which were probably lost during overland transport in Africa, were not replaced. The loss and damage could have been avoided if the goods had been placed in containers.

14. Two consignments of long-grained milled rice delivered to Ghana under the 1983 programme were found to be short of a total of 300 t. The loss was partly caused by damage to the sacks. At the time of the Court's on-the-spot visit of inspection in January 1985, no claim had yet been submitted by the Ghanaian authorities to the insurers, more than seven months after the arrival of the first consignment and more than three months after the arrival of the second. The Commission Delegation in Ghana had not taken any action either to see that the damage suffered by the recipient was made good.

15. Under the 1982 programme, 15 000 t of maize were granted to Mozambique. When the maize arrived at its destination, the recipient noted that some of it was missing. It is true that the estimates of the missing amounts are vague, varying from 280 to 1 807 t according to the source. However, it has not been possible to identify the cause of the losses, despite an on-the-spot inquiry by the Commission's legal department. Although the loss suffered by Mozambique by way of missing amounts and very poor quality maize (see paragraph 25 below) has been estimated by the Commission to total 5 000 t, the latter has not taken steps to replace the 5 000 t in question. The reasons for this are threefold:

no appropriations are available for this purpose, replacement is dependent on the identification of the parties responsible and, finally, the inquiries launched by the Commission to establish responsibility have ground to a halt, even though some of the parties responsible have been identified (a mistake, which was not denied, on the part of the intervention agency). Furthermore, when a claim was submitted to the insurance company, it denied that it was under any obligation to pay an indemnity.

4. *Financing costs wrongly borne by the recipient*

16. Food aid consists in the financing of a product, but also in transporting it to an agreed point. If, therefore, the recipient has to bear certain transport or handling costs in order to ensure the goods reach the agreed stage, then the supply has not been made in accordance with the agreed terms. Thus, the chartering conditions of the two vessels which transported the 15 000 t of wheat to Pakistan via the UNHCR in November 1981 (see paragraph 12 above) did not include the unloading costs, so that the recipient was forced to bear them itself. This contravenes the Community Regulation on deliveries financed to the port of unloading, which lays down that the contractor who has been awarded the supply contract shall be responsible for all costs incurred by the goods up to and including wharfage costs (Article 13 (5) of Regulation (EEC) No 1974/80) (1).

17. Thus, since the policy of the port of Beirut is not to include the unloading costs in the freight rate, the contractor responsible for supplying the emergency delivery, to CIF stage, of 250 t of soya oil to the Lebanon via the UNRWA (2) (1983), citing the port of Beirut's policy in this matter in his own defence, refused to bear the unloading costs. The Commission therefore decided to reimburse them to the UNRWA (Internal note No 26.471 of 23. 11. 1983). The cause of this incident may be traced back to the mobilization request, which defined the delivery stage by reference to the ambiguous concept of CIF.

18. The loss suffered by Mozambique at the time of the delivery referred to in paragraphs 15 above and 25 below, was estimated by the Commission at 5 000 t because it considered that 10 000 t could be recovered by sifting. In so doing, the Commission underestimated the financial cost of a sifting operation involving several thousand tonnes.

B. *Inadequacies relating to the type and quality of the product*

19. Inadequacies relating to the type and quality of the product may be divided into three categories:

- a) the first category includes deliveries in which the quality and state of preservation of the product are not necessarily open to criticism, but in which the products themselves are of a different type from what was ordered or desirable: in such cases, the Community has not delivered the product required;
- b) in the second category, the quality chosen at the outset is inadequate;

- c) the third category includes cases of products which have deteriorated to a level below the permitted standard.

Although the first category covers easily identifiable cases, the second two categories are hard to differentiate: on the one hand, many cases are a combination of the two categories since the initial quality of the product is inadequate and the product then goes on to deteriorate further and then, on the other hand, it is not always possible to tell whether a given defect is caused by the choice of second or third-rate products or by a gradual deterioration throughout the various stages of the supply procedure. For this reason, in the following pages classification of some deliveries into either one of the last two categories will only be given as a general guide. Despite this uncertainty, it is clear that cases where the initial quality is called into question occur much more frequently than cases of deterioration as a result of damage to the product.

1. *Product of a different type from what was specified or desirable*

20. In October 1982, Botswana received a delivery of 500 t of non-vitaminized skimmed milk powder, which was contrary to the most basic dictates of common sense. Since the milk was intended for direct consumption by children in schools and small clinics, it should have been vitaminized to prevent the risk of serious gastric disorders. This mistake resulted from the absence of instructions in this respect in the texts relating to the mobilization of this aid.

21. A consignment of 500 t of skimmed-milk powder delivered to Mauritius in 1982 also lacked vitamins. In this case, too, the addition of vitamins was essential, since the powder was for immediate distribution to more than 100 000 people from vulnerable categories (children, pregnant women, invalids etc.). The supply agreement reached with the government definitely stipulated that the vitamins should be added, but the Directorate-General for Development at the Commission omitted to mention this requirement in the mobilization request which it sent to the Commission's Directorate-General for Agriculture.

22. Butteroil makes up an important part of the aid delivered to Sri Lanka, even though butter is not part of the local diet. Supplies of whole-milk powder, which an NGO recipient agency has in fact requested, would be far preferable. Similarly, Mali would prefer to receive milk powder with a fat content of 26 %, which would be very similar to the type of milk consumed locally. The reason given by the Commission for only delivering skimmed milk is that full-fat milk powder does not keep well. But is this problem not connected with the type of packaging normally used for the shipment of Community milk powder? Furthermore, the Commission has recently decided to deliver full-fat milk powder to Tunisia (Decision of 22 November 1985 concerning 3 000 t).

23. Until recently, (i.e. at least until 1984) the skimmed-milk powder delivered to Ghana, despite repeated protests, rarely had the qualities necessary for milk production by the evaporation method, which is the process used in that country. The powder delivered had a low level of heat stability, whereas the manufacturing process requires at least average stability. In actual

(1) The footnotes are set out together at the end of Annex 1.

fact, the mobilization regulations for example Commission Regulation (EEC) No 1572/85 of 10 June 1985⁽³⁾ (1 200 t), or Commission Regulation (EEC) No 1176/84 of 27 April 1984⁽⁴⁾ (2 200 t), did not specify the quality required.

2. *Inadequate quality definitely or probably connected with the choice of product*

24. The most obvious cases are those of products containing excessive amounts of impurities, dust and broken grains. In Cape Verde, EEC maize is considered to contain excessive amounts of broken grains and dust and to be clearly inferior to American maize.

25. The 15 000 t of maize which were loaded in the port of Le Havre in 1983, bound for Mozambique, were found to be old, full of broken grains, foreign grains, impurities and mould and were totally unfit for human consumption, according to the report made during unloading. No definite conclusion has been drawn regarding responsibility, but it is highly probable that the product's main defects already existed at the time of loading. Furthermore, the results of the analyses carried out before loading, which were, of course, much less thorough than the report made during unloading, showed in any case that the goods were not up to the regulation standard. The intervention agency was therefore at fault in issuing a certificate of conformity, and there was also negligence on the part of the supplier.

26. An identical case to the previous one, concerning 8 000 t of the same product, occurred more recently in connection with the 1985 programme for Burkina Faso. As well as the product, the intervention body, the contractor and the port of shipment were also all identical to those in the previous case. The same certificate of conformity was issued at loading and subsequent analyses gave the same results, namely that the maize was of unacceptable quality and was probably maize fodder.

27. Other supplies of maize from France have also caused problems. Complaints have been made by Tanzania concerning 4 000 t, by Zambia concerning 500 t, by Ethiopia concerning 5 000 t, by Kenya concerning 150 t, by Uganda concerning 150 t and by the Niger concerning 26 000 t⁽⁵⁾. It is out of the question that there could be collusion on the part of the recipients in order to deceive the Commission. Furthermore, as regards the maize delivered to the Niger, the Commission's delegation brought back a sample to Brussels: it was not even acceptable as animal fodder. Of the eight cases of disputed maize mentioned under paragraphs 26 to 28, all were mobilized in France by the Office national interprofessionnel des céréales (a French cereals agency) and six of them were assigned to the same contractor and were loaded in the port of Le Havre. Though such coincidences do not prove anything, they do at least tend to justify the precautions taken by the Commission, which has decided not to allocate any further consignments of this product.

28. It has sometimes happened that the product delivered was too old, which meant that the wrong choice had definitely been made in Europe. In 1982, India received 5 000 t of skimmed-milk powder which was older than had been stipulated in the supply agreement (seven to eight months old instead of six months). This situation arose following a series of problems and mistakes. Initially, because the Council was too late drawing up the 1982 programme, the Community was forced to grant emergency aid in order to prevent an exhaustion of stocks in India, which relies on

considerable EEC allocations each year as part of the FLOOD operation. Because of the urgency, the Directorate-General for Agriculture (DG VI) preferred to use intervention stocks for the mobilization rather than the Community market. At that time, however, stocks of fresh milk powder in intervention were very low.

29. In Mali, both the OPAM⁽⁶⁾, the agency that receives cereals, and the ULB, the dairy industry body which receives milk products, complain that they are frequently sent products which are too old, and which, in the case of milk products, come from out-of-date intervention stocks. Eleven tonnes of milk powder from the 1982 programme had to be destroyed because it had gone bad. This would seem to put the blame on the suppliers, the interventions bodies and the inspection companies, though it is not possible to work out the financial responsibility of each body.

30. Organoleptic⁽⁷⁾ deficiencies in the products are usually the result of either excessive age or abnormal physical and chemical composition. In 1980, Bangladesh received 100 t of skimmed milk powder which had a disagreeable, musty taste and an unusual appearance.

31. The Ghanaian company which receives milk products complained during the Court's audit visit in January 1985 that it had received two deliveries of butteroil which were slightly rancid and resembled cheese.

32. The 240 t of butteroil delivered to Morocco in August 1983 via the WFP were unfit for human consumption, notably because they contained three to four times the maximum level of aerobic germs permitted by the French regulations. The product had come from French intervention stocks and the Moroccan authorities were contemplating using the consignment to manufacture soap. At the request of the WFP, the Commission agreed to replace the consignment and steps have been taken by the Commission with a view to instituting proceedings against the contractor. In this case the quality controls are suspect, unless the deterioration of the product occurred during manufacture: the French veterinary laboratory which analysed the butter did not make any criticism, whereas subsequent tests carried out in London, Casablanca, Paris and Belgium as well as an expert evaluation by the FAO, all concluded that the butteroil should be rejected.

33. In the same year, Tunisia received 345 t of butteroil of comparable quality. The tests carried out, at the recipient's request, by the Laboratoire Central d'Hygiène Alimentaire in France on samples taken before loading showed that the butteroil had been manufactured from old stocks of intervention butter, contained a high level of peroxide and was contaminated with faeces. In this case too, certain quality controls should be questioned: other analyses carried out on the same consignment of butteroil by the Société Générale de Surveillance, whilst confirming the abnormally high peroxide content, concluded that there was no contamination from faeces. In contrast, the inspections carried out by the intervention body before the product was loaded had concluded that the consignment was up to standard.

34. Also in the same year, Tunisia received 1 000 t of powdered milk which had numerous defects: a humidity content in excess of the permitted maximum, aerobic germs, a musty taste, an abnormal colour and impurities. This consignment had also been taken from intervention stocks. Inspections carried out at the

recipient's request, both before loading and after unloading, all concluded that the consignment was sub-standard. However, due to the lateness of the recipient's claim, it was difficult to distinguish between damage which had already occurred at the time of unloading and deterioration caused subsequently by the handling and storage conditions in the country itself after unloading. No quality control had been carried out at the initiative of the intervention body before loading, which however, is fully in line with the current regulations, which only provide for such controls in the case of milk products which are taken from intervention stocks and delivered without further processing.

35. On the other hand, this consignment of milk powder was covered successively by five certificates of export quality, issued on 23 September 1983 by the veterinary departments of the Ministry of Agriculture in France, that is, 52 days before loading actually took place, and was provided with a quality certificate signed by the contractors themselves.

These certificates were then withdrawn, for some unknown reason, and replaced by others issued in October 1983. All of these certificates, which were issued under the regulations of the Member State concerned, concluded that the consignment was of regulation quality.

36. Each year, the Bangladeshi government reports on the poor quality of wheat received from the EEC, which is unsuitable for long-term storage. During an inspection visit to this country, the Court noted, in particular, the poor quality of 20 000 t of wheat delivered as indirect aid in 1978, and the totally unacceptable quality of 5 000 t of wheat delivered in 1979.

37. The Djibouti authorities declared that 2 920 t of wheat flour were not of bread-making quality (the Court's findings on deliveries in 1982 and 1983).

38. If an excessively high humidity level is recorded once a consignment arrives at its destination, there may be some doubts regarding the source of the problem, i.e. whether it already existed before loading in Europe or occurred during shipment. This was the case for wheat received in December 1982 by Sri Lanka, the humidity level of which exceeded the rate of 14,5 % authorized by the mobilization regulation. Moreover, according to local experts, 14,5 % humidity is too high for prolonged storage in a tropical climate and makes the wheat unsuitable for milling. At any rate, EEC food aid was definitely implicated: local millers had in fact noticed that European wheat received by way of commercial imports had a lower humidity rate (12 to 13 %).

39. However, there is no possible doubt about the source of the problem if the inadequacy has actually been noted in Europe. 5 000 t of common wheat were shipped to Benin under the 1980 programme, even though the certificates drawn up by the Société Générale de Surveillance clearly stated that they did not comply with the regulations, due to their excessive humidity and unacceptable level of impurities. Here is yet another example to show that the current system of quality controls cannot adequately ensure that defective supplies are intercepted in time.

40. Court officials on an audit visit to Bangladesh in 1981 noted the unacceptable quality of 125 t of butter. Although the

exact nature of the defect was not specified, it was established that it had arisen in Europe. The contractor, who had tried to improve the product by mixing it with others, was forced to replace the whole consignment at his own expense.

41. In its Annual Report concerning the financial year 1979, the Court noted (paragraph 9.13, first indent) that various emergency deliveries of rice, totalling more than 5 000 t, were unfit for human consumption.

42. Each year, from 1979 to 1982, Indonesia received skimmed-milk powder of unacceptable quality; 631 t in 1979, 44 t in 1980, 230 t in 1981 and 214 t in 1982, i.e. 17 % of the total quantities of skimmed-milk powder received in direct aid during that period (1 119 t out of 6 475 t). For 1980, the reasons have partly been identified. It seems that the defects were partly due to the poor quality of the supplies and partly due to incidents during shipment. When reconstituted, the milk obtained from the powder had a strong taste of groundnut oil. However, the dairy which received the product had also noted that some of the bags were torn. Whatever the reason, the Indonesians had to sell the 44 t of powder as cattle fodder since it was unfit for human consumption.

3. *Inadequate quality attributable to the deterioration of the product during shipment*

43. In the case of the 1 000 t of skimmed milk powder for Tunisia mentioned previously (paragraph 34 above), a large proportion of the bags were torn, sometimes even through to the inside polyethylene layer. In the latter case, the product was spoiled by excessive humidity. The damage suffered by the bags raises unavoidable questions regarding the transport, handling and storage conditions, but also emphasizes the flimsiness of the packaging used for milk products, which has been severely criticized by the Court on many occasions (see paragraphs 54 to 65 below).

44. Specifically in relation to damage caused by maritime transport, mention should be made of the case of 1 500 t of wheat received by Zambia in October 1976. This consignment was spoiled by the presence in the ship's hold of ammonium nitrate, left over from a previous cargo. The consignment was not replaced by the Community until two and a half years later.

45. In Senegal, out of three deliveries of skimmed-milk powder made via an NGO shortly before the Court's audit visit of inspection in June and July 1981, amounts were lost (5 880 kg) and damaged during shipment (6 720 kg) in all three cases.

46. The conditions under which it was conveyed by sea are also to blame for the deterioration of a consignment of 974 t of wheat flour, delivered CIF to Djibouti and declared unfit for human consumption on 10 November 1982 by the local hygiene department, even though a few days previously two Belgian laboratories had declared that it complied with the requirements. Having been refused by the recipient, the flour was sold by the transport undertaking to Zaire in 1984! This cargo had been loaded in March 1982, trans-shipped onto a second vessel in August 1982, immobilized on several occasions in Mediterranean ports and had finally arrived in the roadstead at Djibouti on

26 October 1982. In view of the fact that it had been in a ship's hold for more than seven months, it is hardly surprising that the product was spoilt. These incidents were caused by the insolvency of the shipowner, against whom the Belgian intervention agency has instituted legal proceedings.

47. In the Comoro islands, the absence of regular sea links and the inconvenience of the ports of Moroni and Mustamudu make serious shipowners reluctant to transport aid to these ports. Consequently the contractors resort to the services of 'cowboy' shipping companies, whose vessels usually sail under a flag of convenience or the flag of an East European country. The quality of the delivery suffers as a consequence. One vessel was shipwrecked in 1977 and another suffered a serious accident at sea.

48. It was rather the conditions of overland transport on the African continent that were to blame in the case of a delivery of 100 t of milk powder to Burundi under the 1983 programme. Some of the packages, which again were too fragile, were not able to withstand the numerous trans-shipment operations during transport.

49. In other cases, the length of the period of storage is responsible for the loss in quality. In Morocco, 1 500 t of vitaminized milk powder and 200 t of butteroil were still at the port of Casablanca in April 1983, having been there since 21 September 1982. Since the vitamins cannot be preserved for longer than six months, they were in effect wasted.

50. In Cape Verde, a similar wastage of vitamins occurred in the case of milk powder dating from June 1984 which was still in storage in warehouses in Praia in March 1985.

C. Inadequacies relating to the packaging of the product

51. At first sight, inadequate packaging would seem to be a cause of defective deliveries, rather than a separate defect affecting the quality of the products delivered. However, in actual fact, this is a borderline area and inadequate packaging should be criticized as a defect in itself. Firstly, in modern design, the packaging is an integral part of the product. A good product, delivered in packaging with a capacity unsuitable for the requirements of its users, is in fact a bad product. Even if the product itself has not been spoilt, if it reaches its addressee in a burst package, it is a bad product. Flimsy packaging should be criticised even if by some good fortune it remains intact after transport. Finally, the packages provide an opportunity to send information to the user, and the relevance of such markings needs to be examined.

1. Capacity of packaging unsuited to requirements

52. Until 1982, the butteroil delivered to Zambia was packaged in 5 kg canisters, whereas the dairy receiving the product had always asked for 90 kg drums. Despite a request by Zambia to this effect concerning the 1983 delivery, the Commission gave instructions to deliver the product in canisters of only 20 kg.

2. Fragile and/or damaged packaging

53. In Pakistan, more than 20 % of the butteroil canisters do not withstand the various handling processes they have to go through (transfer from ship to train, from train to lorry and from lorry to ox cart).

54. In Burundi, the Court's audit visit in June 1984 found that approximately 5 % of the butteroil canisters in storage which it had been able to examine were damaged and leaking.

55. Court officials on an audit visit in Morocco in 1983 also noted butteroil canisters which were badly damaged.

56. Virtually every time the Court has been asked to examine stocks of butteroil, it has recorded similar damage (badly dented canisters, cracked canisters etc.). This is because the type of metal canister most commonly used is too fragile. It is a cylinder with a 5 kg capacity which is much too tall and therefore not sufficiently resistant to knocks. A cylinder which is more compact and almost disc-shaped, would be much more suitable. This is a loophole in the mobilization regulations.

57. Out of 5 965 t of colza oil shipped to Bangladesh on 19 May 1982, many drums were found to be badly damaged on arrival. It is true that the reason for this was very different from the previous cases — the vessel had been through a storm (see also the quantities missing from this delivery, mentioned in paragraph 5 above).

58. On many occasions, Court officials on audit visits have also noted that the bags used for packaging milk powder are extremely flimsy, easily damaged and are not watertight. In this respect, mention should be made of the case of 1 000 t of milk powder received by Tunisia in November 1983, already referred to in paragraph 43 above. In this case, the extreme flimsiness of the bags was corroborated by the findings of the Delegation's adviser, who remarked at the same time that commercially imported stocks of milk, which were packaged with an extra outer bag, were in perfect condition.

59. The Indonesian dairy industry body which receives Community milk powder found torn bags amongst the deliveries for 1980 (already mentioned in paragraph 42 above).

60. The Mali authorities periodically record similar findings for some consignments of milk powder.

61. A report on the delivery of 2 000 bags of vitaminized milk powder unloaded at Benin in December 1980 noted 192 bags which were either wet, torn or soiled. In this case, the result was probably due to a combination of the flimsiness of the bags and incidents during transport.

62. In the case of a consignment of 1 500 t of vitaminized milk powder received by Morocco in September 1982, many of the paper bags were torn.

63. Apart from the case mentioned in paragraph 64 below, generally speaking, the Court has not found that deterioration is the fault of the contractor. In actual fact, it is the requirements of the regulations as regards packaging which do not offer sufficient guarantee.

64. During an audit visit by the Court in Ghana, a case was noted where the lack of watertightness was due to faulty fastening: all the layers making up the bag, including the polyethylene inner layer, had been welded at the same time, thus allowing moisture to enter. It is essential that the polyethylene layer should be welded separately first, before the other paper layers are closed.

65. The fastening process is also implicated in the following case. The 1 kg bags of milk powder sent to China by way of emergency aid in November 1981 (500 t) had not been sealed in accordance with the requirements of the mobilization regulation⁽⁸⁾. Instead of being sealed by two parallel welds of 1,5 mm each, the fastening comprised a single weld 4 mm wide. This was unquestionably the fault of the contractor. However, in the end the bags arrived in good condition.

3. Defects in bulk packaging and handling methods

66. The damage suffered by the packaging is sometimes attributable to the outer containers (cartons, crates) and to the handling methods. Usually, canisters of butteroil are placed in cartons which, as they are often badly fastened, are open and damaged on arrival and as a result the metal canisters are directly exposed to knocks.

67. The canisters of butteroil observed during an audit visit by the Court to Morocco (see paragraph 55 above), were damaged because the fastening device on the cartons was inadequate.

68. In Sri Lanka, the Court's audit visit in October 1983 found that rusty canisters of butteroil were placed in cartons which were torn and partly open, due to the absence of metal hoops.

69. In Burundi, an audit visit by the Court in June 1984 found that cartons containing 38 t of butteroil delivered under the 1982 programme had had to be replaced by wooden crates, at the expense of the recipient country.

70. In Mali, up to 1982, canisters of butteroil were not delivered in containers, with the result that the 1982 consignment included many canisters which were misshapen and punctured. Since then, these defects have disappeared because the canisters are now delivered in containers.

71. It should also be noted that, in the case of the 100 t of milk powder delivered to Burundi under the 1983 programme, already mentioned in paragraph 48 above, part of the consignment, which had been transported in containers, arrived in good condition. It was only the remainder of the consignment, which had not been transported in containers, and not stored on pallets in Burundi, which was badly damaged.

72. The reason why it was found, during the Court's audit visit in April 1983, that many of the bags of milk powder delivered to Morocco in 1982 and mentioned in paragraph 62 above were damaged was that they had been handled individually and not on their pallets.

73. Although in the short term the Commission has almost no means of improving storage and handling conditions after unloading, since these procedures are too dependent on local factors, it is, on the other hand, unfortunate that the mobilization regulations, especially those relating to milk products, are not more strict in the matter of bulk packaging.

4. Defects relating to the markings on the packages

74. An adviser in the Commission's Delegation to Tunisia noted that most of the bags of milk powder delivered in November 1983 were incorrectly marked in French 'Skimmed-milk powder. Gift of the EEC' and that some bags bore no markings at all. The mobilization regulation required the more detailed marking: 'Gift from the European Economic Community to the Republic of Tunisia'. The contractor had thus not fulfilled his contract obligations.

75. The markings on packaging for milk products are not such as to ensure that these products are used correctly and safely from a health and dietary point of view. Packages of butteroil and milk powder do not indicate how the products should be used. Although the Court made this remark in relation to milk powder as far back as 1980, in its Annual Report concerning the financial year 1979 (paragraph 9.13), the situation has still not changed.

76. Bags of vitaminized milk powder usually do not give an uncoded indication of the date of manufacture, or the expiry date; such omissions are all the more serious as after six months' shelf-life vitamins start to break down and eventually disappear and non-vitaminized milk can cause serious gastric disorders.

77. Although similar deficiencies have been noted on many occasions, here are some typical examples:

- (a) In Sri Lanka, butteroil was delivered without any indications as to how it was to be used. Yet, in that country, such instructions are particularly necessary, since the various ethnic groups are not familiar with the product (findings of an on-the-spot visit of inspection by the Court);
- (b) In Benin, neither the date of manufacture nor the expiry date were indicated for vitaminized milk powder. In that country, the head of one NGO even wanted the words 'Not to be used for babies less than three months old' to be marked on the bags because milk powder causes serious intestinal disorders in such cases (findings of an on-the-spot visit of inspection by the Court);
- (c) 2 000 t of vitaminized milk powder delivered to China in November 1981 did not indicate the expiry date. Bearing in mind the time taken for the milk to reach Chinese ports and the time taken to distribute it inside the country, an expiry date would have been extremely useful.

78. The cause of this failure to indicate the correct method for using the products is the lack of provisions in this respect in the mobilization regulations. Yet other donors indicate the date of manufacture, the expiry date and even the directions for use on the packaging of milk products in uncoded form and in several languages, as was noted during an audit visit by the Court to Sri Lanka in October 1983.

79. Also with reference to the use of the product, although not in relation to the markings on the packaging, but to the official letter validating the supply agreement, mention should also be made, by analogy, of the case of a delivery of vitaminized milk powder to Morocco. The Commission included the following instructions in the special conditions which were sent to Morocco on 17 July 1982: 'Milk powder can be distributed either mixed with other foods or in the form of liquid milk, cheese, yoghurts, etc. . . .'. Not only was no warning given regarding the expiry date, therefore, but, instead, inappropriate instructions were given to the users, since the process of manufacture of certain cheeses destroys the vitamins contained in milk powder.

80. The markings on the packaging which indicate that the product is a gift of the Community are sometimes not sufficiently obvious, and, indeed, are sometimes inappropriate. On 25 March 1983, the Commission Delegation in Morocco noted, apropos of milk powder delivered to that country: 'The packaging gives more publicity to the contractor than to the fact that the product is a gift from the Community . . .'.

81. Conversely, in the case of aid which is intended for retail sale, the marking 'Gift of the EEC', although correct, might well come as a surprise to the final beneficiaries, who are asked to pay for the product. In Zaïre, the sale on the market of bags marked in this way led to a stormy campaign in the press (the Court's audit visit of inspection in November 1980).

82. A similar finding was made more recently (in March 1985) during the Court's audit visit to Cape Verde. In this case, butteroil was being sold retail in 5 kg canister samples. In these two cases, the contractor had correctly applied the provisions of the mobilization regulation.

D. Inadequacies relating to the time and place of delivery of distribution

1. Delivery or distribution after the date requested by the recipient

83. Bangladesh prefers aid in the form of cereals to be delivered as soon as possible after the adoption of the annual Council Regulation concerning the food aid programme. In actual fact, however, the aid reaches the country between July and September. The reasons for this are not known, and should be analysed case by case. However, it should be mentioned that in the past the Council has often been late drawing up the annual programme, even, in some cases, as late as July (in the case of the 1983 programme).

84. A delivery of butteroil allocated to this same country under the 1979 programme was considerably delayed for a whole series of reasons. Firstly, the first invitation to tender had to be cancelled and repeated because the bids were too high. Secondly, the delivery of 500 t was further delayed following a fire in a factory in Europe. Finally, in the case of 1 500 t, further delays occurred because the vessels were late arriving at the port of shipment.

85. A consignment of 109 t of common wheat allocated to Mali via the WFP under the 1982 programme, was not loaded until November 1983, following two unsuccessful invitations to tender.

86. The late arrival of 50 t of butteroil delivered to Burundi in 1980 was due to the goods being held up in the port of Dar es Salaam for about six months.

87. This is also an appropriate moment to refer back to the case mentioned in paragraph 46 above, in which aid granted to Djibouti and loaded in Europe in March 1982 did not arrive at Djibouti until the end of October, following various incidents at sea.

88. In the following case, it was the distribution and not the delivery which was delayed. A consignment of 2 000 t of milk powder arrived in Senegal at the end of September 1981. The distribution was not completed until the end of August 1982, because of a dispute between the contractor and the shipowner and because the product was held up in the warehouses of a forwarding agent.

89. A comparable case occurred some time later in the same country. A consignment of 10 000 t of wheat, which was unloaded in mid-January 1983, was still in a warehouse at the end of April 1983, pending the distribution of 12 500 t of Canadian wheat which had reached Senegal two weeks before the EEC consignment. In this case, the reason was bad coordination of the aid.

90. The following case is entirely different, since it concerns an allocation in cash, rather than in kind, which was made to the UNHCR for the purchase of rice for refugees in Thailand. The payment of an advance of 2,3 Mio ECU was made in March 1983 instead of July 1982. Taking into account the fall in the exchange rate, this delay represented a loss to the UNHCR equivalent to 200 t of rice (40 000 USD at a rate of 200 USD/t). In this case, the payment procedures in use at the Commission were at fault.

2. Deliveries made after the period of shortage

91. A consignment of 400 t of butteroil, promised as emergency aid to Tanzania on 24 July 1979 and mobilized as such by means of a private treaty contract, was not delivered until December 1979.

92. In 1980 and 1981, deliveries to Mauritania, which had been requested for the period from May to June, arrived in November and even in January, i.e. after the period of shortage between harvests was over. These two cases highlight the slowness of the mobilization procedures.

93. Following a request for emergency aid on 17 March 1981, an allocation of 2 000 t of milk powder was granted to China that same year in order to alleviate the consequences of a serious drought in Hebei province and floods in Hubei province. The first 500 tonnes were shipped on 26 November 1981 and the first certificates of receipt were issued in China on 19 July 1982, i.e. 8 months and 16 months, respectively, after the emergency had been declared, and probably long after it had ended. The shipment of the first 500 tonnes was made in November 1981, not in October as originally planned. Finally, since the first shipment was not

accepted by the Commission because of a breach, albeit minor, of the provisions relating to packaging (see paragraph 65 above), the contractor refused to deliver the remaining 1 500 t, which also had the same packaging defect. This refusal forced the Commission to enact a new mobilization regulation, on 15 December 1981, stipulating a shipment date for February 1982, i.e. two months later than the period provided for initially.

94. These various shortcomings do not explain everything, however. For example, they do not explain why the allocation decision by Council Regulation was not taken until 28 April, even though the request for emergency aid had been made on 17 March 1981, nor why the mobilization request was only made on 31 July, (ie. three months after the decision) or why the first mobilization regulation was not adopted until 8 October, (ie. more than two months after the mobilization request). They also do not explain why eight months elapsed between the first shipment and the first certificate of receipt. The legal file relating to this matter, which was examined by the Court, did not shed any light on this last point. The slowness of the Community's decision-making and mobilization procedures, and also probably the slowness of the administration in the recipient country, must therefore also be criticized.

95. A promise by the Commission, on 25 March 1981, to grant 2 000 t of cereals as immediate food aid to Mauritius, following hurricanes, actually materialized fifteen months later, on 20 June 1982, when the aid finally arrived at Port Louis. Such sluggishness in the implementing of decisions is totally unacceptable.

96. Despite urgent requests by the WFP, most of the aid granted to Tunisia via this organization from 1980 to 1982 (11 740 t of cereals, 3 264 t of milk powder, 170 t of butteroil) was delivered within a period of four to six months. One of the causes of the delays in 1982 was the cancellation and re-run of an invitation to tender relating to 530 t of milk powder.

97. Although the Commission knew that stocks of Zambian maize would run out in April 1983, the delivery of 15 000 t, promised for May 1983, resulted in a contract for a triangular operation from Zimbabwe. The contract was not signed until 29 June and the delivery only began in July. The delivery agreement was not formally signed until the end of August 1983.

98. An allocation of 3 000 t of cereals and 600 t of milk powder to Botswana, which was decided on 14 July 1983 by way of aid to counter the effects of drought, had still not been mobilized in November 1983.

99. Following a request made on 3 June 1983, 15 000 t of wheat were allocated to Indonesia. Although the need arose following a poor harvest in 1983, the goods were shipped in the middle of August 1984, ie. 14,5 months after the request and 4,5 months after the end of the period of shortage, even though the next harvest had already taken place.

100. All these cases are disturbing insofar as they point to the conclusion that the procedures for implementing Community food aid are incapable of satisfying, in good time, the sometimes

pressing requirements arising from emergency situations and unforeseeable disasters.

3. *Doubts about the delivery date and the consequences of such doubts*

101. Unforeseeable delays in implementation and erratic delivery periods leave the recipients in a state of uncertainty about their supplies. In Indonesia, an NGO, the Catholic Relief Services, keeps about six months of emergency stocks to ensure that its programmes are maintained despite uncertainties concerning Community delivery dates.

102. In Sri Lanka, for the same reasons, another NGO declared that it was unable to introduce regular and continuous food programmes even for sectors of the population which were especially malnourished. For example, one part of the 1982 allocation was shipped six months after the request and another part nine months after it.

103. In Ruanda, two consignments of wheat, each amounting to 2 250 t, should have arrived at an interval of two months according to the provisions of the mobilization regulation⁽⁹⁾. In fact, the two consignments arrived at the same time, creating serious storage problems.

4. *Unfortunate consequences of delays in delivery to certain locations*

104. Seen from Europe, the effects of combination of the aid time-tables, on the one hand, and the location of requirements or possible transport itineraries on the other, are not obvious. However, they do exist. In Mali, each year the ULB dairy sends the Community a programme for restocking supplies, drawn up according to each region and period, and with an indication of the preferred ports of unloading. During the Court's visit of inspection in 1983, the management of the dairy drew attention to the fact that delays in shipment can make it necessary to change the port of unloading, the itinerary and the method of land transport. Thus aid for Gao and Timbuktu is sometimes transported via Abidjan, and sometimes via Lomé.

105. Similarly, delays in the programme of cereal deliveries force the Office for Agricultural Products in Mali to transfer stocks from one region to another, thus creating additional transport costs.

106. Cases where food aid products fail to conform to the rules in force or to desirable standards occur too frequently to be considered purely accidental or attributable to bad luck.

107. Of course, it could be argued that the cases quoted represent only a fraction of the total tonnages delivered. However, this is probably not the most appropriate way of looking at the matter. In fact, the defective consignments should not be compared with the total deliveries, but with the total aid which was inspected by the Court. Thus, out of 22 countries visited by the Court between

1981 and March 1985 and subject to inspection relating to food aid, 14 countries had received poor quality deliveries. Cases of poor quality arose for nearly all products and occurred each year. Certain countries had a series of defective deliveries, such as Bangladesh, which had cause for complaint nearly every year (see

paragraphs 5, 30, 36, 40 and 83 above), Indonesia, which had cause for complaint each year from 1979 to 1983 (paragraphs 42 and 99 above), and Ghana, which had cause for complaint each year from 1977 to 1984 (paragraphs 8, 14, 23, and 64 above).

(¹) OJ L 192, 26. 7. 1980.

(²) United Nations Relief and works Agency for Palestine Refugees in the Near East.

(³) OJ L 153, 12. 6. 1985, p. 7.

(⁴) OJ L 116, 1. 5. 1984, p. 11.

(⁵) Mobilization Regulations (EEC) No 1373/84, 3503/84, 3576/84, 3578/84 (for Kenya und Uganda) and 663/85 (OJ L 132, 18. 5. 1984, 327, 14. 12. 1984, 332, 20. 12. 1984 and 74, 15. 3. 1985) respectively.

(⁶) Office for Agricultural Products, Mali.

(⁷) Organoleptic properties: properties by which products affect the senses of taste, smell and sight.

(⁸) Commission Regulation (EEC) No 2936/81 of 8. 10. 1981. OJ L 294, 14. 10. 1981, p. 21.

(⁹) Commission Regulation (EEC) No 397/84 of 16. 2. 1984. OJ L 47, 17. 2. 1984, p. 45.

ANNEX 2

Differences between the system for mobilizing cereals and that for milk products which may affect the quality of aid

CEREALS
(Regulation (EEC) No 1974/80)

MILK PRODUCTS
(Regulation (EEG) No 1354/83)

A. Provisions that do not provide as good a quality guarantee for milk products as for cereals

1.

It is stipulated that the security is 'to serve as a guarantee that the successful tenderer will fulfil his obligations'
(Article 5 (1))

No equivalent stipulation.

2.

The Quality control carried out at the initiative of the intervention agency

is required for all deliveries, whether the product is mobilized on the market or drawn from intervention stocks
(Article 15 (1))

is specified only for products mobilized on the market and for products obtained by industrial processing
(Article 8 (1) and (2))

3.

Cereals are checked at the port, at the time of shipment
(Article 15 (1))

No time and place for checking milk products is specified, except in the case of industrial processing (vitaminized milk powder, butteroil), when it takes place during the manufacturing process
(Article 8 (1), (2) and (4))

4.

The intervention agency

'arranges for a check' on the nature, quality and packaging of the goods
(Article 15 (1))

'checks' that the composition, quality and packaging comply with the regulation requirements
(Article 8 (1) and (2))

5.

The recipient's representative is invited to take part in the inspection operation
(Article 15 (1), 2nd subparagraph)

There is not stipulation that the recipient should take part in the inspection operation
(Article 8 (1) to (4))

6.

The intervention agency arranges for a second final inspection

if the first inspection which it arranged has given rise to a dispute
(Article 15 (3))

if the quality has been disputed by the recipient following a check which he has requested and paid for
(Article 20 (2))

7.

The successful tenderer is under an obligation to replace the goods

where the quality control arranged by the intervention agency shows that the goods do not satisfy requirements
(Article 15 (4))

where the goods have been declared definitively sub-standard after the second final check has been carried out following the initial check requested by the recipient
(Article 20 (3))

8.

Insurance for the shipping of a delivery to be effected at the CIF stage must cover

'all risks of carriage'
(Article 13 (2))

'all risks associated with carriage'
(Article 18 (2), 1st subparagraph)

9.

The shipping of a CIF delivery must be effected in vessels

— not more than 15 years old

— not more than: 15 years old in the case of charter services;
25 years old in the case of regular cargo services

— 'listed in the larger classes in recognized classification registers'

— 'meeting all the technical and health requirements for the transport of milk products'. No certificate is required
(Article 18 (1))

— 'attested by a competent body as meeting hygiene requirements'
(Article 4 (4 d))

B. Provisions that do not provide as good a quality guarantee for cereals as for milk products

1.

No quality is mentioned in the Regulation

Detailed quality and packaging standards are set out in the Regulation

2.

The Regulation is only concerned with deliveries at the FOB and CIF stages

The Regulation is concerned with all delivery stages — FOB, CIF and 'delivered place of destination'

3.

No equivalent provision

'Member States shall take the measures necessary to ensure that the health standards in force on their territory are met'
(Article 7)

4.

The Regulation does not mention any option for the successful tenderer of carrying out an inspection of the goods delivered to him by the intervention agency

The successful tenderer is required to check to his own satisfaction that the quantity of skimmed-milk powder or butter made available by the intervention agency corresponds to the quantity to be supplied, and that the packaging of the product is dry, clean and undamaged
(Articles 4 (2) and 6 (2))

With a view to aid in the form of butteroil, the intervention agency must enable interested parties to examine, at their own expense, samples of the butter proposed by the intervention agency
(Article 6 (1a))

5.

The amount of the tendering security

is not laid down in the Regulation which refers to the particular mobilization regulation setting out this information
(Article 5 (1))

is laid down in the Regulation, as a percentage of the intervention value of the product
(Article 4 (1))

6.

The contractor ('successful tenderer') must guarantee the goods drawn from intervention stocks

through insurance covering the value of the product at the intervention price or reference price, according to the circumstances
(Article 12 (5) and 13 (3))

through a 'security for delivery', the amount of which must be equal to the intervention price of the goods, plus 10 %
(Article 4 (1) and 6 (1b))

7.

No equivalent provision

The recipient can arrange for checks to be carried out prior to shipment, at his own expense
(Article 20 (1))

8.

No equivalent provision

'In the event of default or of unsatisfactory transport' by sea, the tenderer who has been awarded the contract for a delivery to be effected at the CIF stage 'shall, at the recipient's request, make all the necessary transport arrangements, including charter reservations'
(Article 18 (1), last subparagraph)

9.

No equivalent provision

Provision for deductions from the tendering security and the delivery security are made in the event of any shipping delay for reasons attributable to the contractor ('successful tenderer')
(Article 26 (5))

N.B. These differences regarding the mobilization of food aid should be compared with the following difference regarding the procedure for admission as intervention stock:

CEREALS

If there is agreement as to the quality and characteristics of the cereal offered, it is not necessary to carry out a sample laboratory analysis prior to admission as intervention stock
(Commission Regulation (EEC) No 1569/77 of 11. 7. 1977)

MILK PRODUCTS

Provision is made for a systematic check on manufacture prior to the admission of skimmed-milk powder as intervention stock
(Commission Regulation (EEC) No 625/78 of 31. 3. 1978)

ANNEX 3

Glossary

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Glossary

Delivery stages

Commercial law concepts which set out the conditions according to which the responsibilities and risks relating to specific goods pass from the supplier to the buyer, and the place of this transfer.

In commercial matters, the delivery stage may be freely negotiated between the supplier and buyer. However, reference delivery stages exist, for which precise definitions are given in INCOTERMS, a document drawn up by the International Chamber of Commerce in Paris.

For the execution of food aid, the European Community has itself defined various possible delivery stages, which have varied over the years. According to the circumstances, the stages used by the Community have been *sui generis* stages which do not exactly correspond to stages in general use in international trade and codified in INCOTERMS or, on the other hand, stages which refer explicitly to these definitions (replacing the term 'buyer' by the expression 'recipient of aid'). The stages currently used by the Community are 'FOB', 'CIF' and 'delivered place of destination' (see these terms).

(*) FAS (*free alongside ship*)

The supplier is required to deliver the goods within the period stipulated to the named port of shipment, at the loading berth named by the buyer, close to the mooring berth which is to be used by the vessel on which the goods will be loaded, and must notify the buyer of the delivery without delay. All costs and risks incurred in connection with the goods are borne by the supplier until such time as they are effectively set down at the named place. After this time, the costs and risks are the buyer's responsibility, particularly loading costs, stowage costs and expenses connected with any delays in the arrival of the vessel. It is in fact the buyer who must charter the vessel.

The Community used the 'free alongside ship' stage until 1980 for cereals and until 1983 for milk products (calling it 'delivery to port of shipment'). From this time, it replaced this stage by FOB (see the definition of 'free on board').

(*) FOB (*free on board*)

The supplier is relieved of his responsibilities for the goods when they have passed the ship's rail at the time of loading. He bears the loading costs, but the buyer bears the stowage costs.

The buyer must charter the vessel at his own expense and bear the charges connected with any delay in the arrival of the vessel, including those which the supplier might have incurred on that account (e.g. storage costs, cost of immobilizing lorries or wagons and financial costs).

The buyer must accept the goods immediately after shipment. However, case law acknowledges the buyer's right to question the conformity of the goods after landing — for example, when hidden defects could not be observed at the time of shipment, or when deterioration subsequent to delivery is attributable to the poor quality of packaging. FOB is one of the delivery stages used by the Community for supplies of food aid.

(*) CIF (*cost, insurance, freight*)

From the point of view of taking over the goods, CIF is identical to FOB: the delivery is effected and the risks pass from the supplier to the buyer when the goods cross the ship's rail.

The buyer accepts the goods after shipment, exactly as in the case of FOB, and, under case law, has a similar right of challenge, at the time of landing, in the event of a hidden defect.

CIF differs from FOB in the way in which the shipping procedures are defined; i.e. the supplier must:

- contract at his own expense for shipping by the usual route to the agreed port of destination;
- take out at his own expense a policy insuring the goods during shipping against the risks involved in this shipping operation. The policy must be endorsed in the buyer's name.

However, the commercial CIF refers to types of insurance policies which do not include cover for a range of risks regarded as special risks (theft, pilferage, leakage, breakage, chipping, sweat, contact with other cargoes, etc.) Only explicit clauses inserted into the policy provide cover for such risks.

Whether or not the unloading costs are included in the shipping contract (and therefore in the costs borne by the supplier) is a question of local practice, which varies according to the port of unloading. Unloading costs are only automatically included, irrespective of the port, in the case of 'CIF landed' (see this term).

CIF is one of the delivery stages used by the Community for supplies of food aid.

(*) *CIF landed*

It is CIF with the unloading costs borne by the supplier. Normal CIF does not automatically incorporate this specification. In fact, whether or not the unloading costs are included in shipping contracts depends on the practice followed in the ports (of unloading). See the term CIF.

(*) *Ex ship*

The delivery is effected and the risks pass from the supplier to the buyer at the time when the latter takes charge of the goods in the hold of the vessel at the port of unloading. The buyer bears the cost of unstowing and unloading, and, where relevant, lighterage and demurrage.

The 'ex ship' stage was one of the delivery stages used by the Community until 1983. However, Community legislation excluded all references to commercial practice, and the Community stage was therefore not assumed to be the same as the stage recognized by commercial practice.

(*) *Ex quay, port of unloading*

The delivery is effected and the risks pass from the supplier to the buyer at the time when the product is set down on the quay of the named port of unloading.

The supplier bears all the costs and risks which may be incurred by the goods up to this stage, i.e. demurrage costs (see this term), any lighterage costs and unloading costs.

Up to 1983, the Community employed a delivery stage which was similar to this one: Community legislation in fact excluded all references to commercial practices. Thus, in the Community stage, the demurrage costs were borne by the recipient.

The Community singled out a variant of this stage: delivery on the lighters and not on the quay.

(*) *Delivered place of destination*

The supplier delivers the goods to a warehouse or named place in the importing country and bears all the transport costs up to this point; if appropriate, he also bears the unloading costs if it is necessary or usual for the goods to be unloaded on their arrival at the named place. He must carry out all the formalities and bear all the customs duties and other taxes connected with the exportation of the goods outside the country of origin, any transit journey through one or more countries and the importation of the product in the destination country. He must provide the buyer with any document required for him to take delivery of the product at the named place.

If appropriate, the buyer bears the unloading costs in the cases mentioned above and all expenses which he or the supplier incurs as a result of a delay in the goods being taken over.

The Community has always used a 'delivered place of destination' stage, but it is not assumed to be the same as 'delivered place of destination' as used in commercial relations. Thus, in the Community sense, unloading is always the supplier's responsibility; delivery always takes place 'in a warehouse' (i.e. not in the open air); the supplier is required to take out 'appropriate insurance' for the carriage and unloading of the goods.

Supply agreement

Agreement in the form of letters between the European Economic Community and a recipient (country or organization). In these letters, the Commission, acting on behalf of the Community, informs the recipient of the Community's decision to grant him a given tonnage of a given product at a given supply stage, and announces that arrangements will be made to effect the delivery on receipt of agreement by the recipient on the delivery procedure and use of the aid.

The agreement is signed for the Commission by a Member of the Commission, and, for the recipient, generally by the ambassador of the recipient country to the Communities or, in the case of an organization, its qualified representative.

Supply agreements always include several annexes. In the case of direct aid (aid to a country), there are three annexes:

I. General conditions

This annex includes various *commitments* entered into by the contracting parties, which differ considerably according to whether the delivery in question is FOB, CIF or 'delivered place of destination' and whether the product is to be sold or distributed free of charge. For the Community, the party which commits itself is the Community, a legal entity represented by the Commission, and not the Commission itself.

II. Delivery procedure

In this annex, the Community informs the recipient of the rights and obligations which relate to the delivery of the product and which are incumbent on the various *aid operators* — supplier, intervention agency, recipient and the *Commission* itself, insofar as it is involved in this process.

The second annex is drafted in terms which differ according to the delivery stage, but also according to the product. From this annex, it is possible to state from what stage the risks are assumed by the recipient.

III. Special conditions

This annex defines the characteristics and the packaging of the product and various specifications connected with the delivery in question — sometimes, for example, the use of counterpart funds.

These three annexes are also found in indirect aid agreements (concluded with organizations). However, other annexes are added to such agreements, particularly in order to specify the conditions of carriage after the delivery stage and the aid financing conditions.

Certificate of conformity

Document in which the intervention agency certifies, prior to or at the time of shipment, that the product delivered and its packaging comply with the standards applicable. The obligation to issue such a certificate is not dependent on the delivery stage — FOB, CIF or 'delivered place of destination'. It is not stipulated in certain cases of delivery of milk products originating from intervention stock.

Notice of invitation to tender

A document published in the *Official Journal of the European Communities* and aimed at intervention agencies and tenderers. In the case of cereals and milk products, it only consists of an annex to the mobilization regulation and the notice of invitation to tender appears in the C series. Other products do not normally give rise to the publication of a notice of invitation to tender.

Taking-over certificate

Certificate drawn up and signed by the recipient or his representative, which is given to the supplier after he has delivered the product to the agreed place. It certifies that the product is of the prescribed quality.

In the case of an FOB or CIF delivery, the certificate must be issued immediately after the vessel has been loaded. Furthermore, in the case of a CIF delivery, the supplier must have provided evidence that he has carried out his shipping obligations (chartering and insurance of the shipping operation).

In the case of a 'delivered place of destination' delivery, the certificate must be issued immediately after the product has been unloaded at the warehouse at the agreed destination.

If all the conditions for the issuing of the certificate have been met, but the recipient fails to draw it up and give it to the supplier, a certificate equivalent to the taking-over certificate and drawn up according to the same model is issued, for the FOB and CIF stages, by the intervention agency, which thereby guarantees the conformity of the product. In the case of the 'delivered place of destination' stage, the Community Delegate in the destination country or, in his absence, the embassy of one of the Member States of the Community issues a 'certificate' of the same form and bearing the same particulars as a taking-over certificate, thus again acknowledging the conformity of the product.

Mobilization request

Document attached to a single recto verso sheet, issued by the Directorate-General for Development (Commission DG VIII) to the Directorate-General for Agriculture (DG VI). It is designed to initiate the 'mobilization' of supplies, i.e. the preparation by DG VI of a draft mobilization regulation and notice of invitation to tender, the submission of the draft to the nearest competent Management Committee for approval, and, in the event of approval, the publication of the regulation and notice in the *Official Journal of the European Communities*.

Publication gives rise to the initiation of action by the agricultural intervention body, or bodies, responsible for organizing the invitations to tender, the award of contracts for the supply and transport of aid, quality control operations and making payment to the successful tenderers.

Lay days

Number of days stipulated in the charter-party (contract of affreightment) for the loading or unloading of a vessel. See the term 'demurrage'.

Lot

A lot of food aid is a certain tonnage of a given product, mobilized for the benefit of a given recipient for delivery at a given stage and place, shipment taking place during a given period. Lots vary in size, from a few tonnes to over 10 000 tonnes. The lot is the basic unit for the mobilization and tendering procedures and appears as such in the mobilization regulations, which cover from one to several dozen lots to be mobilized. Certain lots, involving high tonnages, may, however, be subdivided in the interest of separate tendering, by sub-lot. Conversely, a number of low-tonnage lots, bound for different places and recipients but involving the same product, to be delivered at the same time and place, are treated as sub-lots and grouped together for mobilization purposes to produce higher-tonnage lots. This is the case for much of the aid delivered at the FOB stage to the NGOs.

Mobilization regulation

Commission Regulation published in the *Official Journal of the European Communities*, L series, relating to a product (skimmed-milk powder, butteroil, common wheat, etc.) or to a category of products (cereals) and with the purpose of mobilizing one or more consignments of food aid in the following weeks. Each consignment of cereals or of milk product gives rise to its inclusion in such a mobilization regulation. There are no mobilization regulations for the other product categories.

Mobilization regulations have their own particular characteristics and must not be confused with the regulations laying down general rules for mobilization and supply, which set out the permanent mobilization rules for one category of products.

Demurrage

Time during which a vessel has been detained for loading or unloading over and beyond the lay days (see this term) agreed in the charter-party. The demurrage payment is made by the charterer to the shipowner.

THE COMMISSION'S REPLIES

General observations

The Commission has noted the comments made in the Court of Auditors' Report. It would stress, in this context, the degree to which the Court's final recommendations for new arrangements are reflected in the new measures outlined by the Commission in July 1986 and given effect in the first instance in Council Regulation (EEC) No 3972/86 of 22 December 1986, which in particular makes the Commission responsible for procurement of supplies and adopts more specific procedures in respect of food aid. The next stage will be the adoption of a single set of mobilization procedures for all sectors, which should come into force on 1 July 1987. Broadly speaking, these measures follow the line indicated by the Court of Auditors, and are therefore referred to at various points in the Commission's replies.

Specific comments

2. THE APPLICABLE RULES

2.2. (e) to 2.5. Triangular operations have not hitherto been the subject of mobilization Regulations or notices of invitation to tender. The same applies to paragraph 2.5. However, this will change after the reform measures referred to in the General Observations.

The supply agreements

The comprehensiveness of the agreements

2.4. (a) The exchange of letters with ambassadors to the Communities (see Glossary — Annex 3 to the Court's Report) deals only with the practicalities; the delivery period is not determined until later, at the express request of the authorities responsible for receipt.

2.4. (b) See paragraph 2.16.

2.4. (c) In any case, local requirements can more appropriately be specified in the mobilization request, since such requirements have a tendency to change.

Moreover, some of the specifications sought by certain recipients would need to correspond to availabilities on the Community market, which again is verifiable only at the time of mobilization.

Applicability of the agreements

2.6. In general, the delivery periods indicated have been respected, but this cannot be done when the schedule requested by the recipient is unrealistic.

2.6. (a) Mozambique

There was a mistake in the official letter. This should have referred to delivery CIF, implying take-over at the port of shipment.

2.6. (c) Annex 1, paragraph 21 (page 83) Mauritius

This comment was made in the Court of Auditors' Report concerning financial year 1982. The Commission pointed out to the Court of Auditors at the time that all appropriate steps had been taken as rapidly as possible to resolve the situation.

2.6. (d) With regard to the Court's second comment, the state of stocks was such that it was not possible to be certain of availability at the time of the mobilization commitment.

The regulations on the mobilization of aid

Sphere of application

2.8. Agricultural products other than cereals and milk products have so far represented only a marginal proportion of the quantities mobilized in the Community. The absence of general or specific standing regulations covering these products does not therefore constitute a serious shortcoming.

The drafting of specific rules for vegetable oils begun two years ago was suspended with a view to the adoption of a single set of Regulations for all sectors.

The cereals Regulation preceded the milk Regulation and was drawn up at a time when products could be supplied only FOB or CIF. A new cereals Regulation, providing for

delivery 'free at destination', was in the process of finalization when preparations began on the reform of food aid as implemented by Regulation (EEC) No 3972/86.

Complexity

2.9. The single mobilization Regulation, referred to in the General Observations, will create a single set of rules to cover all delivery stages and all products. As regards the marking error, the Commission feels that this was merely an isolated case.

2.10. It would be impossible to organize the implementation of Community aid on a tendering basis in the absence of a single reference corpus. The products mobilized in the Community, either from official stocks or on the market, comply strictly with the standards in force, notably concerning quality and packaging, which have been laid down within the framework of a general common policy. The same is true of the majority of the analysis and checking methods used. It is almost inconceivable to disregard such a reference corpus, notwithstanding certain specific requirements inherent in food aid.

2.11. See Annex 2 — A 5

Content

Packaging

2.12., 2.13. and Annex 1, paragraph 56

The packaging assemblies for the transport of butteroil (cartons containing 4 metal canisters with a 5 kg capacity or 1 metal canister with a 20 kg capacity) must undergo destructive testing in accordance with the procedures described in Regulation (EEC) No 303/77, (Annex 1), superseded by Regulation (EEC) No 1354/83 (Annex III). These tests, which simulate an accident rather than normal handling conditions, are monitored by an approved body which issues a certificate of conformity.

If the packaging assemblies satisfy the destructive tests, within the deformation limits allowed, then the thickness of the sheet metal and the quality of the carton used must be considered adequate.

The use of thicker sheet metal would increase the load weight and hence the transport cost, but would not provide an absolute guarantee against damage to the container or the content in the event of a drop or fall.

However, suitable metal hoops would certainly secure the cartons more effectively.

Incidentally, the standards adopted are those used in international trade and it was clear *de visu* during a visit to a packaging establishment that the tests carried out are satisfactory.

One should generally also bear in mind the storage conditions which await the goods on their arrival at the destination. Efforts are, at all events, being made to secure improvements.

Markings

2.15. and Annex 1, paragraph 74

The Commission had no knowledge, either before or during the clearance of accounts up to and including financial year 1979, of the failure of contractors to ensure proper markings on the packages, as stipulated in the Regulations on tendering.

As regards aid operations in respect of which expenditure has been declared by the Member States during financial years 1980 *et seq.*, the Commission continues to ensure that any failings in this regard are penalized prior to the current clearance of accounts.

The responsibility for checking correct markings on the packaging falls, at present, to the Member State of mobilization.

Transport

2.16. For a FOB delivery, the choice of port of shipment by the contractor, subject to certain conditions (port accessible to seagoing vessels and connected with the country of destination by a regular shipping or charter service during the shipment period) is essential in order to guarantee competition within the Community for this type of delivery. Free competition is essential as a minimum assurance of equal treatment between the various regions of the Community and between operators. This is why the Commission has allowed for a single transshipment in the case of deliveries of processed and packaged products.

This basic rule has also to meet the requirements of sound economic and financial management. Leaving the recipient to choose the port of shipment would be just as likely, if not more so, to lead to faulty or incompetent operations in cases where the port chosen was generally unsuited or had no proper equipment for handling exports or loading the products in question.

Moreover, the designation in advance by the recipient of a single port of shipment would very often result in the Community budget having to bear very high additional delivery costs.

Example: rice, necessarily from Italy or Spain, to be loaded on board ship in Antwerp/Rotterdam.

2.17. It is perfectly logical that the Community regulations should stipulate the age, classification and sanitary condition of vessels in respect of CIF deliveries only.

The basic reason is that if the contractor assumes responsibility for sea transport, the transfer of risks and responsibilities effectively occurs at the port of shipment, as well as take-over by the recipient. The system in force establishes specific guarantees for the aid recipient in the case of this type of delivery, covering *inter alia* requirements in respect of the vessel and the endorsement, to the order of the recipient, of the non-negotiable bill of lading and of the marine insurance policy.

These provisions were not used in the past for 'free at destination' deliveries since the contractor directly accepted all risks up to the final destination and the take-over there by the recipient.

3. MONITORING THE APPLICATION OF THE RULES

Non-specific checks

Adequacy of the non-specific checks

Lack of sufficient evidentiary effect

3.5. Every consignment of cereals supplied as food aid is checked at the time of shipment. In addition, the intervention agency regularly checks its stocks and is fully aware of the quality of the batches of cereals which it keeps in store. It selects consignments according to the quality prescribed in the regulation in question and, if necessary, undertakes drying of cereals containing excessive moisture.

As regards milk products held in intervention that are delivered in the natural state, it has not previously been judged necessary to carry out a specific check on such products prior to shipment.

Failure to take account of requirements peculiar to food aid

Complementarity with the specific checks

The approval of the manufacturer

3.8. to 3.12. The quality conditions laid down in respect of food aid deliveries are sometimes more stringent than the rules on the eligibility of a product for purchase by intervention agencies. This is true in the case of the quality

of cereals (moisture rate, protein content, etc.). However, this comment cannot be extended generally to all deliveries, particularly in the case of milk products to which the market regulation rules apply.

It follows from the above observation that any specific qualities stipulated required for a product supplied as food aid do not call for special manufacturing methods or equipment. This is why, in the case of milk products, Regulation (EEC) No 1354/83 lays down that products to be supplied as food aid may be manufactured by an undertaking which satisfies the conditions of approval stipulated in the market regulations with regard to entry into intervention (conditions concerning the standard of equipment, but also the keeping of records and stock accounts, for the purposes of inspection).

Manufacturing supervision

3.17. The Commission takes note of the Court of Auditors' comments. It would ask to be informed of this type of occurrence in time to initiate an enquiry if necessary, in accordance with Article 6 of Council Regulation (EEC) No 283/72.

With regard to the case of fraud committed in 1976 and 1977, the Commission would point out that it was not possible to institute a recovery procedure on account of the declared insolvency of the contractor and that it intends to close this dossier.

The Commission is not able without further information to refute or confirm the Court's suspicion concerning the supply of milk powder to Indonesia.

Quality control at the time of or with a view to shipment

3.20. and 3.21. It is not feasible to check the conformity of milk products at the time of shipment because of analyses which have to be carried out in laboratory and necessitate a delay of several days. This is why products mobilized on the market are checked at an earlier stage, at the time of manufacture or packaging, the products subsequently being placed under customs or administrative control until shipment in order to prevent any substitution. This is why Article 20 of Regulation (EEC) No 1354/83 requires the contractor to submit appropriate documentation and also requires the intervention agency concerned to make a further, final check in the event of a dispute.

The draft new Regulation will resolve this type of problem since it systematically provides for a check at the time of shipment irrespective of delivery terms.

Specific checks*Approval of contractors*

3.22. Burkina Faso and Annex 1, paragraphs 26 and 27

The checks carried out by the Commission in respect of the seven operations quoted by the Court of Auditors have been completed. In two cases it was found that the product did not conform to specifications.

Given that there no longer exists the physical evidence by which the quality of the products supplied could be established objectively, the Commission has sought to verify, using documents provided by the intervention agency concerned:

- (i) that the checks specified in the Community regulations were carried out at the proper place having regard to the delivery stage agreed, and
- (ii) that the results of such checks conformed to the quality and quantity characteristics required.

In the case of Burkina Faso and Tanzania, it was found that the quality standards had not been properly fulfilled. These conclusions were brought to the attention of the intervention agency and the financial consequences inherent in such irregularities will be dealt with when the accounts are cleared.

The deductions for missing quantities were applied by the intervention agency itself.

Note that the cereals Regulation precedes the milk Regulation (see answer for cereals in paragraph 2.8. above).

The quality control carried out by contractors

3.23. In the case of a product mobilized from intervention stock, the contractor organizes the transport of goods placed at his disposal by the intervention agency for subsequent delivery. The intervention agency retains responsibility for any defects in the quality of the product provided the contractor is able to show that he has met all his own obligations and that the fault cannot be ascribed to him.

3.24. The contractor does bear the cost of the checks. The contractor bears the risks if the goods upon shipment do not conform with their description in the notice of invitation to tender.

The quality control carried out at the initiative of the intervention agency at the time of or with a view to shipment

3.26. (a) Since the intervention bodies are supposed to operate in the Community public interest the fact that they themselves carry out the checks should not mean that they are less objective.

3.27. (a) Reference should be made to the answers given under paragraphs 4.30 and 4.42.

3.27. (b) and 3.22., 3.41. (a), 4.28., 4.39., 4.49., 4.52., 4.54. and Annex I, paragraphs 15, 18 and 25.

At the Commission's request, the competent French authorities investigated the contractor. The results of the investigation confirmed the information provided initially by the intervention agency concerning the quality of the maize shipped. Since there is no longer any physical evidence by which the quality of the maize could be objectively established, the Commission considers the quality to have been established by the results of the three analyses carried out on samples taken from the shipment. Any financial consequences will be dealt with when the accounts are cleared.

3.28. The Commission does not consider that the recipient's absence at the time of shipment could lead to less thorough checking on the part of the intervention agencies.

In issuing the acceptance certificate in place of the recipient, the intervention agencies accept responsibility for the quality and quantity of the goods at the time of shipment and thus if anything have an interest in carrying out stricter checks, since they would have to bear the penalties at the time of the clearance of accounts resulting from any defect discovered, should it be established that at the time of shipment the consignment did not comply with Community rules.

In addition, the Court refers to a number of examples, a large majority of which relate to the period prior to 1984.

*Common observations in respect of checks with a view to shipment**Excessive importance attached to taking-over or compliance certificates on shipment*

3.35. The mobilization Regulations for cereals and milk products, which to a large extent adopted the rules governing commercial deliveries FOB and CIF, contain a number of legal safeguards enabling an aid recipient to institute proceedings should the consignment prove defective. The Commission can if necessary hand over the

non-negotiable net bill of lading made out to the order of the recipient which, constituting the title to the goods concerned, enables an action to be brought against the carrier. The same applies in the case of the marine insurance document also endorsed to the order of the recipient, which should in many cases enable an action to be brought by the latter against the insurer.

It is true, nevertheless, that aid recipients themselves, unlike commercial operators, do not or cannot operate the machinery available to ensure that they get the benefit of Community aid. This is why the new draft mobilization Regulation introduces the port of landing stage instead of the CIF stage. In addition, the Commission is studying the most appropriate type of insurance.

3.36. and 3.37. If it is adopted, this new mobilization Regulation will impose more stringent requirements regarding the availability of results of analyses prior to the shipment of goods. There is thus every reason to believe that shortcomings such as described could be avoided.

3.39. The Commission does not accept the conclusion of this paragraph, which it does not consider justified.

Control and monitoring of implementation after shipment

3.40. The draft new mobilization Regulation ratifies and makes official practice the checking procedure described by the Court of Auditors.

3.41. See paragraph 3.27. (b).

3.42. The overall supervision hitherto provided independently by the intervention agencies has perhaps made it more difficult for the Commission to keep a close watch on supplies. However, one cannot conclude from this division of responsibilities that the Commission takes no interest in the implementation of the aid. Once notified of any problems, the Commission has always acted to facilitate the implementation of operations. The new guidelines for monitoring take account of the need for more general information and for closer supervision of deliveries.

4. RESPONSIBILITIES AND GUARANTEES

Unequal value of the various delivery stages as regards quality

4.4. The new guidelines contained in the draft new mobilization Regulation accord with the Court of Auditors'

conclusions regarding the unsuitability of CIF terms for food aid.

On a technical level the Commission would point out that the contractor may decide to conclude a specific contract for unloading if the delivery terms stipulated in the charter party do differ from those contained in the notice of invitation to tender.

Obligations, guarantees and penalties at the various stages

The economic operator's obligations

The intervention agencies' obligations

4.7. It must be stressed that the relations between the intervention agency and the Commission can in no sense be understood legally in terms of mandate or agency.

As the Court of Justice pointed out in its Eurico judgment of 18.10.1984, the national agency appointed by the Member State has to apply the Community legislation direct, acting independently, and also takes responsibility for organizing invitations to tender and monitoring supplies. The links between the agency and the Commission are not in the nature of subordinate authority or administrative hierarchy, but reflect a division of functions and cooperation within the Community. It is necessary to make this legal point in order to get a clear view of how the Community system operates. The alternative is thus simply for the Commission itself to take over the supervision of supplies.

Insurance

Marine transport insurance of products delivered CIF

4.10, 4.25, 4.28, 4.36, 4.41, 4.47, 4.48, 4.49, 5.22, 5.23, 5.24.

In as much as the Court itself implicitly recommends the abandonment of CIF deliveries (see paragraph 6.3) — which the Commission has done in the draft new mobilization Regulation — the problem of the designation of the recipient and the precise insurance cover becomes irrelevant in the case of a consignment 'delivered port of landing'.

It should be noted also that the Commission itself is not always the most suitable authority to approve the release of securities. For geographical as much as technical reasons, it is better to rely on experts present during loading and/or unloading operations. The Commission has adopted this solution.

With regard to utilization of the insurance compensation, this will henceforth be a decision for the contractor alone, and it will be in his interest to show due diligence since he will be required to replace missing or damaged products.

Securities

Tendering security

4.12. (a) The difference in the amount of the securities is explained by the fact that in the case of products supplied from intervention, the tendering security is replaced by a delivery security covering the value of the goods, while in the case of market mobilization, there is a single security which covers the entire supply operation.

4.12. (b) The fixing of the amount of the security in the specific tendering Regulations allows for adjustment of the security if necessary on a case by case basis.

Comparative assessment in the light of the quality objective

Who benefits from the guarantee?

4.22. The duties of the intervention agencies are basically to ensure proper implementation of the food aid Regulations and to carry out those tasks for which they are responsible under the Regulations in the Community interest and in such a way that the Community can fulfil its international obligations.

The provision for consultations reflects the division of labour between the intervention agencies and the Commission. Their aim is to ensure the necessary consultation and coordination prior to any claims which the Commission may have to make on the recipient.

Guarantees which may be mobilized directly or via a third party

4.29. If any intervention agencies were to release securities in error, they would be penalized at the clearance of accounts in that the sum of the security improperly released would not be accepted as expenditure. Such cases are, however, rare, since the practice of the agencies is to inform the Commission before releasing the security where doubt exists as to the decision to take.

4.30., 4.42. and Annex 1, paragraphs 65 and 93

The delivery of the 500 tonnes of milk powder in question was perfectly correct, except for a minor detail concerning

packaging, which did not prevent the product reaching its destination in perfect condition. An action has been brought over the packaging by the Member State against the contractor. An appeal has been lodged against the judgment in these proceedings.

Legal proceedings were also instituted against the contractor for failure to deliver the remaining 1 500 tonnes. Once the liability of the first contractor had been definitively established, tenders were once again invited for the allocation of these 1 500 tonnes.

The financial aspect of these deliveries will be settled at the clearance of accounts in the light of the judgments of the national courts.

4.33. The Commission is aware of certain problems which may arise as a result of the backlog in the clearance of accounts. As the Court has pointed out, this backlog is currently being reduced.

However, the Commission would emphasize that expenditure is subject to systematic monthly checking from the initial stage when the advance is made to the Member States and declared for the monthly entry against the budget.

Each operation is in any case monitored systematically from beginning to end so that as far as possible an immediate technical solution can be found to any problems arising — in the interest of rapid delivery — as well as a financial solution, where liability for any fault can already be established.

Hence, the intervention agencies apply any penalties, either on their own initiative or as a result of reservations by the Commission when it is informed of certain difficulties.

Declared expenditure is admittedly immediately charged to the budget, but at this stage this does not in any way amount to a recognition of the justification of the expenditure.

It should also be borne in mind that many problems will already have been resolved prior to the expenditure declaration, thus the solution is incorporated in the declaration.

Lastly, the financing system just described allows financial regularization by the Member State at any time after the initial declaration, which means that a given problem does not have to wait to be dealt with until the clearance of accounts.

Obviously, cases whose complexity prevents a clear determination of responsibilities — pending legal proceedings, investigation in progress — cannot be regularized except at the clearance of accounts.

Clearance by sampling is justified on the one hand by the large number of operations to be checked in relation to the staff available, and on the other hand by the existence of the system of prior and concomitant monitoring described above.

Extent of financial responsibility and definition of obligations

4.38. There are many cases in which intervention agencies reject the goods before shipment and require the contractor to replace them.

Moreover, a product cannot be replaced on account of poor quality observed at its place of destination unless it is established that it is unfit for human consumption and the quality impairment is not a manifest consequence of poor handling and storage on the part of the recipient.

At all events, contractors are always penalized if they are found to be at fault. The frequency with which financial penalties are imposed, which the Court considers low, obviously depends on the number of infringements detected by the Commission and/or the intervention agencies.

In any case, in the event of faulty performance the operation will be repeated if the Commission considers there to be conclusive evidence that the fault is not attributable to the conduct of the recipient.

Very often the guarantee holder does not put the guarantee into effect

4.39., 4.53. and Annex 1, paragraphs 33, 34 and 35.

With regard to Tunisia, the Commission is not for the time being able to offer fresh information concerning the operation referred to by the Court of Auditors.

In any case, the intervention agencies do not accept products that do not conform to standard. The Commission has sometimes accepted minor departures from quality standards which do not affect the overall quality of the product, when asked to do so by the intervention agencies, and in the interest of prompt delivery at the request of the recipient.

Any discrepancy also results in either a price reduction or the forfeiture of all or part of the security.

The 5 000 t of soft wheat supplied to Benin (under reg. 1824/80), mentioned by the Court, will be the subject of a decision during the clearance of accounts procedure relation to the 1980 exercise.

4.40. Ghana's failure to submit a claim to the insurance company is not unfortunately an isolated case. The Commission reacted by instructing its officials and in particular its delegations to arrange, at its own expense, for a supervisory body to carry out a damage assessment.

This measure was announced in the Commission's reply to paragraph 10.15 in the 1984 Report.

Although CIF deliveries — the only cases in which the recipients are required to handle the insurance — are about to be discontinued, steps have been taken to arrange for official damage assessments, which are essential in order to obtain insurance compensation.

4.41. The Commission is aware that the situation mentioned by the Court can cause problems and always reminds recipients of the obligations arising under the official letters, which are a matter for them.

The contractor's obligations are not strict enough

Permitted discrepancies in respect of weight

4.43. These tolerances are a practice objectively justified by the weight losses due to handling and transport. They are not a 'privilege' for the contractor.

Cases where the contractor is released from his obligations

4.44. (ii) *Force majeure* is a generally acknowledged ground for exoneration of responsibility in Community law and cannot be excluded. As regards its application, the Member States and the Commission refer to precedent judgments of the Court of Justice.

Obligation to carry out precise operations or obligation to achieve a result

4.48., 5.18. It is well known that insurance companies do not cover all the risks inherent in an intercontinental

delivery of goods, especially where certain destinations have caused problems as a result of political conflicts, infrastructure constraints, or arbitrary decisions by the recipient countries. In such marginal cases, 'force majeure' is and will continue to be the sole factor determining exoneration or responsibility.

4.49. The Commission does not share the Court of Auditors' view regarding the unlikelihood of a product delivered 'free at destination' being replaced.

The Community's guarantee: the final guarantee or the first?

4.54. and Annex 1, paragraph 32 — WFP butteroil.

The replacement was agreed because budget funds so allowed. This is not, however, always the case.

5. POINTS FOR DISCUSSION WITH A VIEW TO REFORMING THE SYSTEM

Simplifying and speeding up the procedures

Overcoming the political complexity of food aid

5.1. Since the reform of food aid under Regulation (EEC) No 3972/86 of 22 December 1986, the number of stages in the procedure has been considerably reduced.

5.7. Certain of the recipient countries are consulted with the speed recommended in the Report.

Ensuring the consistency of management documents

5.12., 5.13., 5.14. Even in the context of the food aid reform described in the General Observations, it is not possible to envisage a single document applicable both to contractors and recipients.

However, there can and must be an effort to achieve greater consistency. This will be done as a corollary to the single mobilization Regulation, by redrafting the standard official letters.

Better definition of controls and responsibilities

5.15., 5.16., 5.17., 5.20. The new draft mobilization Regulation provides for a system of checks and monitoring which will meet the concern expressed by the Court of Auditors.

5.17. The checks in force, where they reveal a defect, determine as far as possible where the responsibility lies and penalize any failure by the contractor to fulfil his obligations. As the Commission has already pointed out in paragraph 3.35, the recipient has guarantees and legal instruments at his disposal, but is not always able to make use of them.

Awarding more contracts with an obligation to achieve a result

5.19., 5.20., 6.2. en 6.3. (b) (conclusion).

The Commission shares the Court of Auditor's view as regards the desirability of using a single contractor.

It notes, however, that the Court itself recognizes that this type of contract cannot be used systematically, without first considering factors such as the efficiency of the operation, the safety of the goods, and the comparative cost of single and split contracts.

There is also the incidence of indirect aid, which likewise splits up deliveries for reasons which are sometimes pure expediency.

Under the new mobilization Regulation which it is proposing, the Commission will have the legal and practical means to set up a system that will ensure optimal implementation of the aid, taking account of the various parameters.

The presence of a Commission representative is stipulated both at loading and at unloading as well as at any intermediate reloading points. The representative will not only carry out quality and quantity checks but also monitor operations with a view to ensuring coordination between the various operators. A redirection of budget resources is accordingly envisaged.

6. CONCLUSION

6.3. (a) See paragraphe 4.4.

ANNEX 1

List and description of deliveries of substandard goods noted by the Court

The Commission takes note of the Court of Auditors' observations. However, it would point out that in some cases it has been unable to check all the points mentioned. Nevertheless, the Commission can assure the Court that whatever the circumstances, the financial implications of any failings on the part of contractors and/or the Member States have been and will continue to be taken into consideration when the accounts are cleared.

A. Inadequacies relating to the amount delivered (or the value transferred)

12. The 33,4 missing tonnes represent 0,22 % of the 15 000 tonnes to be supplied (23,3 tonnes = 0,16 %, hence 1,6‰). This is well below the permitted tolerance.

15. See paragraph 3.27. (b).

16. Article 13 (5) of Regulation (EEC) No 1974/80 applies to all aid under CIF contracts, including UNHCR/Pakistan aid, and the contractor's obligations covered wharfage.

B. Inadequacies relating to the type and quality of the product

24. It should be noted that maize produced in Europe is generally of superior quality to United States maize imported into the Community.

25. 26. 27. See reply to paragraph 3.28. (first part of the Report).

36. This example is out-of-date; since 1981, common wheat must be of breadmaking quality.

37. See reply paragraph 46 (Djibouti).

38. Since the installation of modern milling facilities financed by foreign capital, European flour, or indeed European wheat are apparently no longer suitable for this recipient country.

39. A checking system which gives results prior to shipment is difficult to arrange for unprocessed products (see paragraphs 3.35 to 3.39. of the Report).

41. The answers were supplied following the Report referred to in this paragraph. The rice aid deliveries in 1979, in which the quality of the product was at issue, will be dealt with when the accounts for financial year 1980 are cleared.

46. See reply B.37. The results of the analysis carried out by the two Belgian laboratories are not open to question. This transport problem should be regarded as an accident, which could happen again at any time.

D. Inadequacies relating to the time and place of delivery or distribution

85. For very small quantities, such as 109 tonnes of the unprocessed product to be delivered FOB, there is little commercial incentive, which accounts for the lack of tenders.

87. See second part of the reply to paragraph B.47.

95. The Court of Auditors' question and the Commission's reply are contained in the Report for financial year 1982.

98. The implementation of this aid, especially the cereals, was delayed owing to the fact that the decision had been taken to deliver CIF, whereas the recipient was a landlocked country. It was therefore necessary to negotiate with the bodies concerned for free-at-frontier delivery.

99. The delay noted is due to the exchange of official letters with the recipient country and to the mobilization request submitted by it.

105. It should be noted that since the second half of 1981, all requests for the mobilization of cereals aid have been processed and despatched without delay.

Burundi, paragraph 2; UNHCR, paragraph 12; Bangladesh, paragraph 57; Benin, paragraph 61. The new mobilization Regulation, if adopted, will prevent this type of problem since losses and damage will be charged to the contractor.

Ghana, paragraph 4, paragraph 8, paragraph 31; Tanzania, paragraph 10; UNHCR, paragraph 12; Cape Verde, paragraph 24; WFP, paragraph 32; Tunisia, paragraph 34; Bangladesh, paragraph 36; Benin, paragraph 39; Zambia, paragraph 44. The introduction of checking and monitoring at all delivery stages (General Observations) will make for improved surveillance of the quality and quantity of products supplied.

Ghana, paragraph 9; Zambia, paragraph 13; Brurundi, paragraph 69. The Commission is aware that efforts could be made to improve the general packaging of products supplied as food aid. It has already formulated preliminary considerations which could serve as a basis for pilot schemes under the new mobilization Regulation. It is possible that this approach may not be sufficient by itself and if circumstances allow, the Commission may have a study carried out by an outside consultant with a view to obtaining recommendations on the most appropriate type of presentation or packaging for each product and each recipient separately, taking into account *inter alia* the practice of certain bilateral aid authorities which seem to be fairly efficient.

The investigations envisaged could, if appropriate, be extended to cover storage conditions in the recipient countries.

Comoros, paragraph 6; paragraph 47. As stated in the answers to the Court of Auditors' comments concerning financial year 1982 (paragraph 10.16.), the unloading conditions are well known to the Commission, which takes the necessary steps each time, as far as is possible. A more radical solution will be possible once CIF contracts are discontinued.

UNHCR, paragraph 16. The charter terms are part of the contractor's obligations. He is required under Article 13(5) of Regulation (EEC) No 1974/80 to deliver the goods up to and including wharfage. The recipient has the same contract rules and should therefore have refused to pay the unloading costs.

Ghana, paragraph 23. An answer was given by the Commission to the Court following the Report for financial year 1984.

Tunisia, paragraph 33. The facts criticized by the Court would not have arisen if the taking-over certificate had been rejected by the recipient or his representative. The new mobilization Regulation will make stricter stipulations in this regard.

Djibouti, paragraph 37; paragraph 46; paragraph 87. The Court of Auditors' observations and the Commission's replies are contained in the Report for financial year 1983.

Indonesia, paragraph 42. The Court of Auditors' observations and the Commission's replies are contained in the Report for financial year 1984.

Morocco, paragraph 49, paragraph 72, paragraph 79. The Court's observations and the Commission's replies concerning the goods delayed in Casablanca, the prolonged storage and the incorrect handling and markings are contained in the Report for financial year 1982.

Cape Verde, paragraph 50. It would appear that the situation reported by the Court was the responsibility of the recipient country.

Bangladesh, paragraph 83. The delay noted in recent years in the delivery of cereals aid is the fault of the recipient country, which takes too long accepting the delivery terms specified in the official letters.

WFP, paragraph 85. It is hardly surprising that such a small consignment should have difficulty in attracting tenders immediately.

Senegal, paragraph 88. This sort of dispute between the contractor and the shipowner to which the Commission is not a party is one of the most difficult types of problem to resolve. The adverse consequences for recipients will be less following the adoption of contracts 'delivered port of unloading'.

Senegal, paragraph 89. At the WFP's initiative, basic aid coordination was written into the Dublin Plan. It has brought about improvements, but there is little sign yet of genuine coordination between donors.

UNHCR, paragraph 90. It is true that staff shortages have sometimes considerably slowed down payments.

WFP, paragraph 96. It may be common agricultural policy rules that dictate the repeat of a notice of invitation to tender.

NGO — Sri Lanka, paragraph 102. A common organization is often used to centralize food-aid deliveries to NGOs, a fact which may affect the time scheduling.

ANNEX 2

Differences between the system for mobilizing cereals and that for milk products which may affect the quality of aid*A. Provisions that do not provide as good a quality guarantee for milk products as for cereals*

Broadly speaking, the differences between the legislation covering cereals and that for milk products derive from the fact that the two sets of rules were drawn up with an interval of several years, after very long and sensitive discussions and meetings involving experts anxious to preserve certain provisions specific to their sector. Each of the two Regulations contained new provisions and technical improvements by comparison with the previous rules, at the same time setting about a gradual harmonization of the principal procedures.

The ultimate objective is the adoption of a single instrument for all sectors supplying food aid products.

Hence, for example:

1. The cereals Regulation (EEC) No 1974/80 calls for a single security to cover the contractor's obligations up to the supply stage. It is not a tendering security in the technical sense, and that term does not appear in the Regulation.
 3. The place of checking is fixed implicitly, as either the place of manufacture or processing, or the place of preparation or packaging (Regulation (EEC) no 1354/83, Article 8 (4)). The timing of the check is for the body responsible for analysis and verifications to decide. The article in question also specifies that the lots to be supplied may not be dispatched from the control premises until authorization is granted.
 5. The difference between the two Regulations is explained by the fact that in the case of cereal products, the recipient may be present or represented at the port where the sampling operations and checks are to be carried out, in accordance with trade practices. However, in the case of milk products, the checks must be carried out at an earlier stage, at the place of manufacture or packaging, and the Member States have so far been most reluctant to contemplate the presence on such occasions of representatives of the recipients.
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