

The second ground concerns the infringement of the principle of proportionality laid down in Article 39(3) of Regulation (EC) No 1260/1999, applied in relation to the guidelines defining the principles, criteria and indicative scales to be applied by the Commission staff in order to determine the financial corrections referred to in Article 39(3) of Regulation (EC) No 1260/1999⁽³⁾. First, by applying that correction of 2 % of the expenditure, even though the information provided by the Spanish authorities to the Commission showed that the risk to the Fund was substantially less than that percentage. Second, by extending the period concerned by the correction, so that not only the expenditure declared until the period covered by the Commission audit (17 December 2004) was included, but also the expenditure up until the date of the bilateral meeting (4 June 2008).

⁽¹⁾ Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds (OJ 1999 L 161, p. 1).

⁽²⁾ Commission Regulation (EC) No 438/2001 of 2 March 2001 laying down detailed rules for the implementation of Council Regulation (EC) No 1260/1999 as regards the management and control systems for assistance granted under the Structural Funds (OJ 2001 L 63, p. 21).

⁽³⁾ Document C (2001) 476 of 2 March 2001.

Action brought on 3 March 2010 — Portugal v Commission

(Case T-111/10)

(2010/C 113/106)

Language of the case: Portuguese

Parties

Applicant: Portuguese Republic (represented by: N. Mimoso Ruiz and P. Moura Pinheiro, lawyers, and L. Inez Fernandes, Agent)

Defendant: European Commission

Form of order sought

On 3 March 2010 the Portuguese Republic brought an action pursuant to Article 263 of the Treaty on the functioning of the European Union against the European Commission for annulment of European Commission Decision C(2009) 10624

of 21 December 2009 reducing the assistance granted through the European Regional Development Fund to the Operational Programme 'Modernisation of the economic fabric' CCI: 1994 PT 16 1 PO 004 (ex ERDF ref. 94.12.09.004), in so far as it concerns the financing of the Closed Tourist Real Property Investment Fund (FIIT).

Pleas in law and main arguments

A real property investment fund, set up by the authorities following approval by the European Commission of the Community support framework (CSF II) for action by the structural funds in regions concerned by Objective 1, for the period from 1 January 1994 to 31 December 1999, has been adapted in order to carry out the tasks of the European Regional Development Fund (FEDER).

Regulation (EEC) No 4254/88, amended by Regulation (EEC) No 2083/93, laying down provisions for implementing Regulation (EEC) No 2052/88 as regards the scope of the ERDF,⁽¹⁾ provides that that fund is to participate in the development of indigenous potential in the regions by measures improving access of small and medium-sized enterprises [sic] to the capital market. In the same way as the provision of guarantees and equity participation, activities mentioned merely by way of example in Regulation (EEC) No 2083/93, a real property investment fund is a funding mechanism appropriate for the purpose of encouraging and developing the activities of small and medium-sized undertakings.

The FIIT is intended, in particular, to fund small and medium-sized undertakings active in the tourism sector in Portugal, which generally own significant real property assets and encounter difficulties in access to the sources of finance available on the market.

The FIIT's activities during the period concerned played a part in supporting the development and modernisation of supply in the tourism sector in Portugal, by means of purchasing tourist establishments and then renting them to small and medium-sized undertakings.

The FIIT's activities are in strict keeping with the European Commission's Decision C(94) 464 approving, within the framework of CSF II, the operational programme 'Modernisation of the economic fabric' and Subprogramme 4 'Tourism and cultural heritage'. That decision provided for the creation of a tourism investment fund whose sphere of priority action included, in particular, the financial restructuring, modernisation and resizing of hotels.

The European Commission has failed to observe the principle *audi alteram partem* inasmuch as it was only in the contested decision that it raised the issue of the alleged failure to show deficiencies in the market for the financing of the small and medium-sized undertakings supported by the FIIT, and that it criticised the national authorities for supposedly failing to analyse sufficiently the economic viability of those undertakings, doing no more than refinance their debts.

The contested decision fails to observe the principle of the protection of legitimate expectations, by concluding that the FIIT project was ineligible for ERDF cofinancing, for the European Commission, while monitoring the programme, acted in such a way as to engender in the Portuguese authorities the firm and legitimate conviction that the financing of the FIIT would not be called in question, especially because the Community legal framework then in force being in no way unequivocal as to its being permissible or not did not make it possible to determine whether there existed a manifest error of assessment with regard to the lawfulness of that financial instrument.

(¹) Council Regulation (EEC) No 2083/93 of 20 July 1993 amending Regulation (EEC) No 4254/88 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards the European Regional Development Fund (OJ 1993 L 193, p. 34).

Action brought on 1 March 2010 — Prionics v Commission and EFSA

(Case T-112/10)

(2010/C 113/107)

Language of the case: German

Parties

Applicant: Prionics AG (represented by: H. Janssen and M. Franz, lawyers)

Defendant: European Commission and European Food Safety Authority (EFSA)

Form of order sought

— annul the ‘Scientific Opinion on Analytical sensitivity of approved TSE rapid tests’ of EFSA and the Commission, in

so far as that opinion does not currently recommend the use of two tests manufactured by the applicant, the Prionics-Check LIA and the Prionics-Check PrioSTRIP, for monitoring BSE;

— order EFSA and the Commission to pay the costs of the proceedings.

Pleas in law and main arguments

The applicant is challenging EFSA’s Scientific Opinion of 10 December 2009 on Analytical sensitivity of approved TSE rapid tests (‘the EFSA Opinion’). That opinion recommends *inter alia* that the analytical sensitivity of two test systems manufactured by the applicant for BSE (Prionics[®]-Check LIA and Prionics[®]-Check PrioSTRIP) be re-assessed by appropriate experiments.

The applicant puts forward four pleas in law in support of its action.

In its first plea, the applicant alleges infringement of the principle of sound administration on the ground that the defendants base their recommendation in the EFSA Opinion on an incorrect assessment of the facts and on contradictory data.

In its second plea, the applicant alleges an infringement of the principle that the right to be heard must be granted in procedures which may result in measures having an adverse effect on a party. In that connection, the applicant furthermore alleges an infringement of the general legal principles of equal treatment and protection of legitimate expectations on the ground that, contrary to its own published administrative provisions, EFSA did not grant the applicant the right to be heard prior to publication of the EFSA Opinion.

In its third plea, the applicant alleges infringement of the general legal principles of equal treatment and protection of legitimate expectations on the ground that, contrary to its own published administrative provisions, EFSA provided no information in its opinion on the possibility of lodging an appeal against that opinion.

In its final plea, the applicant alleges infringement of the fundamental right of freedom to pursue a professional activity and the fundamental right of freedom to conduct a business on the ground that the EFSA Opinion was published without any consideration of the harmful consequences for the applicant.