

Action brought on 8 March 2010 — Spain v Commission

(Case T-113/10)

(2010/C 113/108)

*Language of the case: Spanish***Parties**

Applicant: Kingdom of Spain (represented by: J. Rodríguez Cárcamo)

Defendant: European Commission

Form of order sought

— Annulment of Commission Decision No 10678 of 23 December 2009 reducing the assistance from the European Regional Development Fund (ERDF) for the País Vasco operational programme Objective 2 (1997-1999) in Spain pursuant to Decision C(98) 121 of 5 February 1998, ERDF No 97.11.09.007, and

— an order that the Commission should pay the costs.

Pleas in law and main arguments

The origin of this case is Decision C(98) 121 of 5 February 1998 by which the Commission granted assistance from the European Regional Development Fund (ERDF) and the European Social Fund (ESF) for an operational programme in the País Vasco region, forming part of the Community support framework for action by the structural funds in the Spanish regions concerned by Objective No 2 in the period 1997-1999, for a maximum amount of EUR 291 862 367.

The decision contested in these proceedings maintains that in the carrying out of that operational programme irregularities occurred in 24 of the 37 projects audited, which affects a total of ESP 4 844 712 820 and entails a financial correction of EUR 27 794 540,77.

In support of its claims the applicant puts forward the following pleas in law:

— infringement of Article 24 of Council Regulation (EEC) No 4253/88 of 19 December 1988, ⁽¹⁾ in that the extrapolation method was used in the contested decision, given that that

article does not provide for it to be possible to extrapolate irregularities found in specific actions to the whole body of actions included in the operational programmes financed by ERDF funds. The correction applied by the Commission in the contested decision has no basis in law, because the Commission's internal guidelines of 15 October 1997 concerning net financial corrections in the context of the application of Article 24 of Regulation (EEC) No 4253/88 cannot, in accordance with the judgment of the Court of Justice in Case C-443/97 *Spain v Commission*, ⁽²⁾ be considered to produce legal effects vis-à-vis the Member States, and because that provision envisages the reduction of assistance only when examination of that assistance reveals an irregularity, a principle breached by the application of corrections by extrapolation;

— as a subsidiary plea, infringement of Article 24 of Regulation (EEC) No 4253/88 read in conjunction with the present Article 4(3) TEU (principle of sincere cooperation), for the correction was applied by extrapolation although no deficiency had been revealed in the management, supervision or audit systems regarding the amended contracts, given that the management bodies applied the Spanish legislation which has not been declared by the Court to be contrary to the law of the European Union. The Kingdom of Spain takes the view that the management bodies' observance of national law, even though it may lead to a finding by the Commission of irregularities or of actual infringements of European Union law, cannot serve as a basis for extrapolation on the ground of failings in the system of management, when the law applied by those bodies has not been declared contrary to European Union law by the Court of Justice and when the Commission has not brought an action against the Member State under Article 258 TFEU;

— as a subsidiary plea, infringement of Article 24 of Regulation (EEC) No 4253/88, in that the sample used for the application of the financial correction by extrapolation was unrepresentative. In this respect it is claimed that the Commission formed the sample for the application of extrapolation with a very limited number of projects (37 out of 3 348), without taking into consideration all the essential parts of the operational programme, including expenditure withdrawn beforehand by the Spanish authorities, taking as the starting point the expenditure declared and not the assistance granted and by using an IT programme which offered a level of reliability of less than 85 %. The Kingdom of Spain considers, therefore, that the sample does not satisfy the conditions of representativity required in order for it to serve as a basis for extrapolation;

— finally, the Kingdom of Spain considers that the communication of irregularities to the Spanish authorities (which took place in August 2005, in most cases concerning irregularities committed during the years 1998 and 1999) must

determine the moment from which the period of four years laid down in Article 3 of Regulation No 2988/95 ⁽³⁾ started to run with regard to those irregularities.

⁽¹⁾ Council Regulation (EEC) No 4253/88 of 19 December 1988, laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 374, p. 1).

⁽²⁾ Case C-443/97 *Spain v Commission* (2000) ECR I-2415.

⁽³⁾ Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests (OJ 1995 L 312, p. 1).

Action brought on 4 March 2010 — United Kingdom v Commission

(Case T-115/10)

(2010/C 113/109)

Language of the case: English

Parties

Applicant: United Kingdom of Great Britain and Northern Ireland (represented by: S. Ossowski, acting as agent, assisted by D. Wyatt, QC and M. Wood, Barrister)

Defendant: European Commission

Form of order sought

— annul Commission Decision 2010/45/EU, of 22 December 2009 adopting, pursuant to Council Directive 92/43/EEC (the Habitats Directive) ⁽¹⁾, a third updated list of sites of Community importance for the Mediterranean biogeographical region ⁽²⁾, to the extent that it lists the Estrecho Oriental site of Community importance, identified by code ES6120032,

— award costs against the Commission.

Pleas in law and main arguments

By means of the present application, the applicant challenges the validity of Commission Decision 2010/45/EU (notified under document number C(2009) 10406) to the extent of its listing of the Estrecho Oriental site of Community importance, and seeks annulment of the listing of the Estrecho Oriental site of Community importance.

The applicant puts forward the following pleas in law in support of its claims.

First, the applicant submits that the contested decision was adopted in breach of Directive 92/43/EEC, in that the listing of the Spanish Estrecho Oriental site of Community importance was incompatible with it, because:

— a very substantial area of that site is located within British Gibraltar Territorial Waters (BGTW), which fall within the effective control of the United Kingdom rather than Spain, and

— because it completely overlaps the existing UK Southern Water of Gibraltar site of Community importance.

Secondly, the applicant claims that the contested decision was adopted in breach of the principle of legal certainty, in that the listing of the Estrecho Oriental site of Community importance purports to impose obligations on Spain under Directive 92/43/EEC in respect of an area within an existing site of Community importance, in respect of which the Government of Gibraltar is already subject to identical obligations under that Directive. The effect is to purport to qualify or call into question the authority of the Government of Gibraltar to implement the Directive in the Southern Waters of Gibraltar site of Community importance, and to enforce the law of Gibraltar in BGTW, creating legal uncertainty for the Government of Gibraltar, and for EU citizens.

Thirdly, the applicant contends that the contested decision was adopted in breach of the principle of proportionality, in that the listing of the Spanish Estrecho Oriental site of Community importance so as to include the whole of the UK Southern Waters of Gibraltar site of Community importance and other areas of BGTW is neither appropriate, nor necessary, to attain the environmental objectives pursued by Directive 92/43/EEC.