JUDGMENT OF THE GENERAL COURT (Second Chamber)

26 October 2010 *

In Case T-236/07,

Federal Republic of Germany, represented initially by M. Lumma and J. Möller, and subsequently by Möller and N. Graf Vitzthum, acting as Agents,

applicant,

v

European Commission, represented by F. Erlbacher, acting as Agent,

defendant,

* Language of the case: German.

APPLICATION for the partial annulment of Commission Decision 2007/327/EC of 27 April 2007 on the clearance of the accounts of the paying agencies of Member States concerning expenditure financed by the European Agricultural Guidance and Guarantee Fund (EAGGF), Guarantee Section, for the 2006 financial year (OJ 2007 L 122, p. 51),

THE GENERAL COURT (Second Chamber),

composed of I. Pelikánová, President, K. Jürimäe and S. Soldevila Fragoso (Rapporteur), Judges,

Registrar: K. Andová, Administrator,

having regard to the written procedure and further to the hearing on 19 May 2010,

gives the following

Judgment

Legal context

Regulation (EEC) No 595/91

1 Article 3 of Council Regulation (EEC) No 595/91 of 4 March 1991 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organisation of an information system in this field and repealing Regulation (EEC) No 283/72 (OJ 1991 L 67, p. 11) provides:

'1. During the two months following the end of each quarter, Member States shall communicate to the Commission a list of irregularities which have been the subject of the primary administrative or judicial findings of fact.

To this end they shall as far as possible give detailed information concerning:

— the provision which has been infringed,

— the nature and amount of the expenditure; in cases where no payment has been made, the amounts which would have been wrongly paid had the irregularity not been discovered, except where the economic operator is guilty of error or negligence detected before payment and not resulting in any administrative or judicial penalty,

— the common organisation of the market and the product or products or measure concerned;

— the period during which, or the moment at which, the irregularity was committed,

— the practices adopted in committing the irregularity,

— the manner in which the irregularity was discovered,

— the national authorities or bodies which recorded the irregularity,

— the financial consequences and possibilities of recovery,

— the date and source of the first information leading to suspicion that an irregularity existed,

— the date on which the irregularity was discovered,

— where appropriate, the Member States and third countries involved,

— the identity of the natural and legal persons involved, save in cases where such information is of no relevance in combating irregularities on account of the character of the irregularity concerned.

2. Where some of this information, and in particular that concerning the practices adopted in committing the irregularity and the manner in which this was discovered, is not available, Member States shall as far as possible supply the missing information when forwarding subsequent quarterly lists of irregularities to the Commission.

3. If national provisions provide for the confidentiality of investigations, communication of this information shall be subject to the authorisation of the competent court.'

2 Article 5(1) of that regulation states: 'During the two months following the end of each quarter, Member States shall inform the Commission of the procedures instituted following the irregularities notified under Article 3 and of all important changes

resulting therefrom …'. Article 5(2) thereof provides that 'where a Member State considers that an amount cannot be totally recovered, or cannot be expected to be totally recovered, it shall inform the Commission, in a special notification, of the amount not recovered and the reasons why the amount should, in its view, be borne by the Community or by the Member State', that 'this information must be sufficiently detailed to enable the Commission to decide who shall bear the financial consequences, in accordance with Article 8(2) of Regulation (EEC) No 729/70' and that 'this decision shall be taken in accordance with the procedure laid down in Article 5 of that Regulation'.

Regulation (EC) No 1287/95

3 Article 1(2) of Council Regulation (EC) No 1287/95 of 22 May 1995 amending Regulation (EEC) No 729/70 on the financing of the common agricultural policy (OJ 1995 L 125, p. 1), states:

'Article 5 shall be replaced by the following:

"*Article 5*

…

2. …

(c) … A refusal to finance may not involve expenditure effected prior to twenty-four months preceding the Commission's written communication of the results of those checks to the Member State concerned. However, this provision shall not apply to the financial consequences:

— of irregularities as referred to in Article 8(2);

— …'"

Regulation (EEC) No 1258/1999

4 Regulation (EEC) No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy (OJ 1970 L 94, p. 13), as last amended by Regulation No 1287/95, established the general rules applicable to the financing of the common agricultural policy. Council Regulation (EC) No 1258/1999 of 17 May 1999 on the financing of the common agricultural policy (OJ 1999 L 160, p. 103) has replaced Regulation No 729/70 and applies to expenditure effected as from 1 January 2000.

5 Under Article 1(2)(b) and Article 3(1) of Regulation No 729/70 and Article 1(2)(b) and Article 2(2) of Regulation No 1258/1999, the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) finances, in the context of

the common organisation of agricultural markets, intervention intended to stabilise those markets, undertaken according to Community rules.

6 Article 7(4) of Regulation No 1258/1999 provides:

'The Commission shall decide on the expenditure to be excluded from the Community financing referred to in Articles 2 and 3 where it finds that expenditure has not been effected in compliance with Community rules.

Before a decision to refuse financing is taken, the results of the Commission's checks and the replies of the Member State concerned shall be notified in writing, after which the two parties shall endeavour to reach agreement on the action to be taken.

If no agreement is reached, the Member State may ask for a procedure to be initiated with a view to mediating between the respective positions within a period of four months, the results of which shall be set out in a report sent to and examined by the Commission, before a decision to refuse financing is taken.

The Commission shall evaluate the amounts to be excluded having regard in particular to the degree of non-compliance found. The Commission shall take into account the nature and gravity of the infringement and the financial loss suffered by the Community.

A refusal to finance may not involve:

(a) expenditure referred to in Article 2 effected prior to 24 months preceding the Commission's written communication of the results of those checks to the Member State concerned;

(b) expenditure for a measure or action referred to in Article 3 in respect of which the final payment was effected prior to 24 months preceding the Commission's written communication of the results of those checks to the Member State concerned.

However, the fifth subparagraph shall not apply to the financial consequences:

(a) of irregularities as referred to in Article 8(2);

(b) concerning national aids, or infringements, for which the procedures referred to in Articles [88 EC] and [226 EC] of the Treaty have been initiated.'

7 Article 8(2) of Regulation No 1258/1999 provides:

'In the absence of total recovery, the financial consequences of irregularities or negligence shall be borne by the Community, with the exception of the consequences of irregularities or negligence attributable to administrative authorities or other bodies of the Member States.

The sums recovered shall be paid to the accredited paying agencies and deducted by them from the expenditure financed by the Fund. The interest on sums recovered or paid late shall be paid into the Fund.'

Regulation (EC) No 1290/2005

8 Article 32(3) of Council Regulation (EC) No 1290/2005 of 21 June 2005 on the financing of the common agricultural policy (OJ 2005 L 209, p. 1) states: 'When the annual accounts are sent, as provided for in Article 8(1)(c)(iii), Member States shall provide the Commission with a summary report on the recovery procedures undertaken in response to irregularities. This shall give a breakdown of the amounts not yet recovered, by administrative and/or judicial procedure and by year of the primary administrative or judicial finding of the irregularity'. It also states that 'Member States shall make available to the Commission detailed particulars of the individual recovery procedures and of the individual sums not yet recovered'.

9 Article 32(5) of Regulation No 1290/2005 provides:

'If recovery has not taken place within four years of the primary administrative or judicial finding, or within eight years where recovery action is taken in the national courts, 50 % of the financial consequences of non-recovery shall be borne by the Member State concerned and 50 % by the Community budget.

Member States shall indicate separately in the summary report referred to in the first subparagraph of paragraph 3 the amounts not recovered within the time-limits specified in the first subparagraph of this paragraph.

The distribution of the financial burden of non-recovery in line with the first subparagraph shall be without prejudice to the requirement that the Member State concerned must pursue recovery procedures in compliance with Article 9(1) of this Regulation. Fifty percent of the amounts recovered in this way shall be credited to the [European Agricultural Guarantee Fund (EAGF)], after application of the deduction provided for in paragraph 2 of this Article.

Where, in the context of the recovery procedure, the absence of any irregularity is recorded by an administrative or legal instrument of a definitive nature, the Member State concerned shall declare as expenditure to the EAGF the financial burden borne by it under the first subparagraph.

However, if for reasons not attributable to the Member State concerned, recovery could not take place within the time-limits specified in the first subparagraph, and the amount to be recovered exceeds EUR 1 million, the Commission may, at the request of the Member State, extend the time-limits by a maximum of 50 % of the initial time-limits.'

10 Under Article 32(6) of Regulation No 1290/2005, 'if there is justification for doing so, Member States may decide not to pursue recovery'. That provision states that such a decision may be taken only in the following cases:

'(a) if the costs already and likely to be incurred total more than the amount to be recovered, or

(b) if recovery proves impossible owing to the insolvency, recorded and recognised under national law, of the debtor or the persons legally responsible for the irregularity.'

That provision states that 'the Member State shall show separately in the summary report referred to in the first subparagraph of paragraph 3 the amounts for which it has been decided not to pursue recovery and the grounds for its decision'.

11 Article 32(8) of Regulation No 1290/2005 provides that:

'Following completion of the procedure laid down in Article 31(3), the Commission may decide to exclude from financing sums charged to the Community budget in the following cases:

(a) under paragraphs 5 and 6 of this Article, if it finds that the irregularity or lack of recovery is the outcome of irregularity or negligence attributable to the administrative authorities or another official body of the Member State;

(b) under paragraph 6 of this Article, if it considers that the grounds stated by the Member State do not justify its decision to halt the recovery procedure.'

12 Article 46 of that regulation provides:

'… Regulation … No 595/91 is hereby amended as follows:

1. Article 5(2) shall be deleted;

2. Article 7(1) shall be deleted.'

13 Article 47(1) of that regulation provides: 'Regulation No 25, Regulation … No 723/97 and Regulation … No 1258/1999 are hereby repealed.'

14 The first to third subparagraphs of Article 49, relating to the entry into force of that regulation, provide:

'…This Regulation shall enter into force on the seventh day following that of its publication in the *Official Journal of the European Union* [on 18 August 2005].

It shall apply from 1 January 2007, except for Article 18(4), which shall apply as soon as it enters into force, without prejudice to the provisions of Article 47.

However, the following provisions shall apply from 16 October 2006:

— …

— Article 32, as regards cases notified under Article 3 of Regulation … No 595/91 and for which full recovery has not yet taken place by 16 October 2006,

…'

Background to the dispute

15 On 12 February 2007, the Federal Republic of Germany sent to the Commission a summary report on the recovery procedures undertaken in response to irregularities, in accordance with Article 32(3) of Regulation No 1290/2005, including the cases falling within Article 5(2) of Regulation No 595/91. On 30 March 2007, the Commission sent to the Federal Republic of Germany a document relating to the clearance of the accounts for the 2006 financial year, setting out the method used to make its calculations and providing a table showing, for each paying agency, the amounts to recover. It had therefore envisaged applying Article 32(5) of Regulation No 1290/2005 to all

the irregularities which had been the subject of the primary administrative or judicial findings of fact, in accordance with Article 3 of Regulation No 595/91. Therefore, 50 % of the amounts corresponding to two types of irregularities were attributed to the Federal Republic of Germany:

— the irregularities which had been the subject of an administrative finding of fact more than four years previously (eight years in the case of an action introduced before the national courts) and which had not yet given rise to recovery;

— the irregularities which had given rise to an administrative finding of fact or the introduction of an action before the national courts, which then were the subject of a special notification under Article 5(2) of Regulation No 595/91 within between four and eight years, and for which the Commission had not yet adopted a decision on their attributability on the basis of Article 8(2) of Regulation No 1258/1999.

16 On 16 April 2007, the Federal Republic of Germany questioned the Commission about the methods for calculating the amounts notified on 30 March 2007, stating that the *Land* Saarland could not understand the calculation. By e-mail of 18 April 2007, the Commission replied to the Federal Republic of Germany by setting out the method used to calculate the amount payable by the *Land* Saarland, under Article 32(5) of Regulation No 1290/2005. The Federal Republic of Germany did not request further information from the Commission. At the 14th meeting of the Committee on the Agricultural Funds of 20 April 2007, in response to several Member States, including the Federal Republic of Germany, the Commission again provided clarifications of that method of calculation.

17 By Decision 2007/327/EC of 27 April 2007 on the clearance of the accounts of the paying agencies of Member States concerning expenditure financed by the EAGGF, Guarantee Section, for the 2006 financial year (OJ 2007 L 122, p. 51, 'the contested decision'), the Commission established a reduction of EUR 22 008 515.16 from the amount of assistance paid to the Federal Republic of Germany.

Procedure and forms of order sought

18 By application lodged at the Registry of the General Court on 4 July 2007, the Federal Republic of Germany brought the present action. The defence was lodged on 26 September 2007, the reply on 26 November 2007 and the rejoinder on 14 January 2008.

19 The Federal Republic of Germany claims that the Court should:

— annul the contested decision inasmuch as it imposed an amount of EUR 1 750 616.27 on it;

— order the Commission to pay the costs.

20 The Commission contends that the Court should:

— declare the action inadmissible to the extent that the amount at issue is greater than EUR 1 602 814.31;

— dismiss the action as unfounded;

— order the Federal Republic of Germany to pay the costs.

Law

Admissibility

Arguments of the parties

21 In its defence, the Commission stated that the action was inadmissible in so far as it concerned an amount greater than EUR 1 602 814.31, which represents the amount in respect of which it had in fact applied Article 32(5) of Regulation No 1290/2005.

The Federal Republic of Germany, first, was mistaken about the calculation of 50 % of the starting amount of EUR 3 347 636.98 representing the 34 cases of recovery which it considered in dispute, amounting to EUR 1 673 818.49 and not to EUR 1 750 616.27 and, secondly, it wrongly included six cases of recovery unconnected with Article 32(5) of Regulation No 1290/2005, amounting to EUR 71 004.18.

22 In its reply, the Federal Republic of Germany maintained its claim. Nevertheless, it wished to amend parts of the contested decision which it sought to have annulled, so as to correct certain errors of calculation and in response to matters that had arisen during the written procedure. Firstly, it acknowledged that it had miscalculated the amount representing 50 % of the starting amount of EUR 3 347 636.98 concerning the 34 irregularities in dispute. Secondly, it stated that it had wrongly included six cases which had been attributed entirely to the Community budget for the amount of EUR 71 004.18. Finally, it indicated that it had omitted three cases in which 50 % had been attributed to it, for an amount of EUR 862 413.65. It therefore stated that it wished to offset the cases it had wrongfully included in its request against a part of those it had omitted.

23 In order to explain why it wished to amend the provisions of the contested decision which it sought to have annulled, the Federal Republic of Germany stated that it had not been possible for it to determine the cases coming under Article 5(2) of Regulation No 595/91 which had been taken into account at the time when its application had been made, since the Commission had never sent it a list of those cases, and that solely the Commission's defence had allowed it to correct those errors of fact. It also stated that it unsuccessfully requested the Commission prior to the introduction of its application to provide a list of cases coming under those provisions.

24 At the hearing, the Federal Republic of Germany confirmed that it withdrew its claim for annulment relating to the six cases mentioned in the application, which had been entirely attributed to the Community budget for an amount of EUR 71 004.18. The Court took formal note thereof in the minutes of the hearing.

25 It also stated that it considered that it had not amended the form of order sought, but that the inclusion of three new cases of irregularity in its application for annulment should be classified as a new plea, which it was entitled to raise at the stage of the reply. The Commission rejected that argument.

Findings of the Court

26 The Court must rule on the admissibility of the claim set out by the Federal Republic of Germany in the reply, namely the application for partial annulment of the contested decision in so far as it exceeds the amount of EUR 1 602 814.31 and concerns the three cases of irregularity in which 50 % had been attributed to it, which it had omitted in its application.

27 Under Article 44(1)(d) of the Rules of Procedure of the General Court, the applicant is to state the form of order sought by it in its application. Thus, only the form of order set out in the originating application may be taken into consideration (Case 83/63 *Krawczynski* v *Commission* [1965] ECR 623, paragraph 2) and the substance of the application must be examined solely with reference to the order sought in the application instituting the proceedings (Case 232/78 *Commission* v *France* [1979] ECR 2729, paragraph 3).

28 Article 48(2) of the Rules of Procedure allows new pleas in law to be introduced on condition that they are based on matters of law or of fact which came to light in the course of the procedure. It is apparent from the case-law that that condition governs *a fortiori* any amendment to the forms of order sought and that, in the absence of matters of law or of fact which came to light in the course of the written procedure, only the order sought in the application may be taken into consideration (*Krawczynski* v *Commission*, paragraph 2).

29 In the present case, the Federal Republic of Germany claims that when its application was made, it was not possible for it to determine the cases which had been taken into account in the contested decision, since the Commission had never sent it a list of cases coming under Article 5(2) of Regulation No 595/91, and that solely the Commission's defence allowed it to correct those errors of fact.

30 Firstly, it should however be noted that the Federal Republic of Germany was perfectly aware of the method of calculation used by the Commission when it applied Article 32(5) of Regulation No 1290/2005, since the Commission explained that method to the applicant on three occasions, as stated in paragraphs 15 and 16 of this judgment. The Commission sent to it on 30 March 2007, that is to say before the adoption of the contested decision, a document relating to the clearance of the accounts for the 2006 financial year, annex 3 to which set out that method in detail. Furthermore, on 18 April 2007, the Commission replied to the Federal Republic of Germany again explaining that method to it and applying it to the case of the *Land* Saarland. Also, at the 14th meeting of the Committee on the Agricultural Funds of 20 April 2007, in response to several Member States, including the Federal Republic of Germany, the Commission again provided clarifications of that method of calculation. Finally, as stated by the Commission, its defence did not provide any specific information relating to the method of calculation used.

31 Secondly, the Commission, as it has emphasised, carried out its calculations on the basis of data that the Member States are obliged to send to it in accordance with Article 6(f) of and Annex III, tables 1, 2 and 5, to Commission Regulation (EC) No 885/2006 of 21 June 2006 laying down detailed rules for the application of Council Regulation (EC) No 1290/2005 as regards the accreditation of paying agencies and other bodies and the clearance of the accounts of the EAGF and of the EAFRD (OJ 2006 L 171, p. 90).

32 The Federal Republic of Germany, which therefore had available to it the method and the relevant data, was thus in principle in a position to determine by itself, when it made its application, the cases coming under Article 5(2) of Regulation No 595/91 which had been taken into account by the Commission in the contested decision. In any event, it has not established that the amendment to the order sought was attributable to matters of fact and of law which came to light in the course of the written procedure. Therefore, its claim for annulment is inadmissible to the extent that it concerns an amount exceeding EUR 1 602 814.31.

33 It should finally be noted that, although the Federal Republic of Germany submitted at the hearing that it had not amended the order sought, but that the inclusion of three new cases of irregularity in its application for annulment should be classified as a new plea in law, that submission has no bearing on admissibility, since, as was noted by the Commission at the hearing, according to Article 44(1)(c) and Article 48(2) of the Rules of Procedure, the applicant is obliged to state a summary of the pleas in law invoked in its application and that no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which came to light in the course of the procedure.

Substance

34 The Federal Republic of Germany raises two pleas in support of the form of order sought. Firstly, it claims that the Commission erred in law in the application of Article 32(5) of Regulation No 1290/2005 and, secondly, it considers that the Commission disregarded its unilateral declaration of 4 May 1995.

The first plea, alleging an error of law in the application of Article 32(5) of Regulation No 1290/2005

— Arguments of the parties

35 The Federal Republic of Germany claims that the Commission erred in law by applying, from 16 October 2006, the rule that the Member State is liable for 50 % of sums not recovered by it within four years of the primary administrative or judicial finding of fact or within eight years where recovery action is taken in the national courts, laid down in Article 32(5) of Regulation No 1290/2005. It claims that, by reason of Articles 46 and 49 of that regulation, Article 32(5) of Regulation No 1290/2005 was applicable, at that time, only to cases provided for in Article 3 of Regulation No 595/91, that is to say, those cases in relation to which the Member States had communicated to the Commission, during the two months following the end of each quarter, a list of irregularities which had been the subject of the primary administrative or judicial findings of fact and had not been totally recovered on 16 October 2006. That provision

was not applicable to cases coming under Article 5(2) of Regulation No 595/91, relating to special notifications sent by a Member State to the Commission where it considers that an amount cannot be totally recovered, or cannot be expected to be totally recovered, as a result of the irregularities communicated in application of Article 3 of that regulation. Thus, in its opinion, cases of ongoing recovery that were the subject of special notifications under Article 5(2) of Regulation No 595/91, had, until 31 December 2006, to be treated on the basis of the rules applicable at the time of those notifications, namely those in Article 8(2) of Regulation No 1258/1999, which provide that cases of non-recovery will be fully borne by the Community budget where the Member State concerned is not responsible for that non-recovery.

36 The Federal Republic of Germany submits that a different interpretation, to the effect that all cases of recovery which have been the subject of a special notification, including under Article 5(2) of Regulation No 595/91, fall within the scope of application of Article 32(5) of Regulation No 1290/2005 from 16 October 2006, would negate the effectiveness of Article 46 of Regulation No 1290/2005, which provides that Article 5(2) of Regulation No 595/91 be deleted only from 1 January 2007, and would thus be contrary to the intention of the legislature.

37 The Federal Republic of Germany states also that its interpretation of Regulation No 1290/2005 does not infringe Article 47(1) of that regulation, which repeals Regulation No 1258/1999, by reason of the principles derived from the case-law in Case C-339/00 *Ireland* v *Commission* [2003] ECR I-11757, paragraph 38.

38 It also emphasises that the need to make a distinction between the situations governed by Article 5(2) of Regulation No 595/91, which concern concluded cases, and the cases covered by Article 3 of that regulation, which concern only those for which

recovery is still ongoing and for which only the Commission may decide the financial consequences of the impossibility of recovering amounts granted. It states that cases which have been the subject of a special notification in accordance with Article 5(2) of Regulation No 595/91 are no longer truly suspended, since they are concluded for the Member State which has excluded the possibility of recovering their amount, and that it is solely for the Commission to decide the financial consequences of that state of affairs. To consider that there is no difference between those two types of case would amount to automatically attributing to the Community budget all the cases notified under Article 5(2) of Regulation No 595/91 after the expiry of the periods of four and eight years provided for by Article 32(5) of Regulation No 1290/2005, which would render those time-limits redundant. It states moreover that few cases are the subject of special notifications under Article 5(2) of Regulation No 595/91.

39 The Federal Republic of Germany maintains, furthermore, that the legislature did not provide for a clearance function with regard to the specific cases of insolvency of the debtor, since Article 32(6)(b) of Regulation No 1290/2005 provides that, in those cases, the Member States may decide not to pursue any recovery and that the amount is thus entirely attributed to the Community budget.

40 Finally, it points out that, when it sent on 12 February 2007 a summary report on the recovery procedures undertaken in response to irregularities, in accordance with Article 32(3) of Regulation No 1290/2005, it included the cases covered by Article 5(2) of Regulation No 595/91, while retaining the identification number that they had in the special notification under Article 5.

41 The Commission disputes the Federal Republic of Germany's arguments and considers that it did not err in law in its application of Article 32(5) of Regulation No 1290/2005.

— Findings of the Court

42 First of all, it should be noted that, in this plea, the Federal Republic of Germany seeks to show that the contested decision must be annulled in so far as the Commission wrongly interpreted the second and third subparagraphs of Article 49 of Regulation No 1290/2005, according to which the regulation applies from 1 January 2007, apart from, in particular, Article 32, which is applicable from 16 October 2006 'as regards cases notified under Article 3 of Regulation No 595/91 and for which full recovery has not yet taken place by 16 October 2006'. The Commission considered that Article 32 of Regulation No 1290/2005 was also applicable from 16 October 2006 to cases communicated under Article 3 of Regulation No 595/91, and then the subject of a special notification, in accordance with Article 5(2) of Regulation No 595/91, and for which full recovery had not yet taken place by 16 October 2006.

43 It is apparent from Article 15(4) of Regulation No 1290/2005 that the financial year starts on 16 October and ends on 15 October of the following year, the Member States' expenditure incurred between 1 and 15 October being added to the month of October, whereas that incurred between 16 and 31 October is added to the month of November. Article 32 of Regulation No 1290/2005 relates to the Member States' obligations regarding the recovery of amounts from beneficiaries who have committed irregularities or acted negligently. Article 32(5) of that regulation covers specific

situations in which the Member State did not recover the amounts, either within four years of the date of the primary administrative or judicial finding, or within eight years where recovery action is taken in the national courts. In such situations, it is then stated that '50 % of the financial consequences of non-recovery shall be borne by the Member State concerned and 50 % by the Community budget'.

44 According to settled case-law, in interpreting a provision of Community law, it is necessary to consider not only its wording but also the context in which it occurs and the objects of the rules of which it is part (see Case C-17/03 *VEMW and Others* [2005] ECR I-4983, paragraph 41 and the case-law cited; and Joined Cases T-22/02 and T-23/02 *Sumitomo Chemical and Sumika Fine Chemicals* v *Commission* [2005] ECR II-4065, paragraph 47).

45 Those principles must be applied when considering whether the phrase 'as regards cases notified under Article 3 of Regulation No 595/91 and for which full recovery has not yet taken place by 16 October 2006', in the second indent of the third subparagraph of Article 49 of Regulation No 1290/2005, must be understood as covering only the cases which are the subject of a notification under Article 3 of Regulation No 595/91 and for which recovery has not taken place on 16 October 2006 or as covering also the cases communicated under Article 3 of that regulation and then the subject of a special notification, in accordance with Article 5(2) of Regulation No 595/91, and for which recovery has not taken place on 16 October 2006.

46 First, it is apparent that the answer to that question can be deduced from a literal interpretation of the second indent of the third subparagraph of Article 49 of Regulation No 1290/2005, in the light of the clear meaning of the phrase 'as regards cases notified under Article 3 of Regulation No 595/91'. It should be noted that that phrase

has a wide scope in so far as it encompasses all the cases which are the subject of a notification under Article 3 of Regulation No 595/91. Those cases necessarily include those which are the subject of a first notification under Article 3, then a special notification under Article 5(2).

47 It should be recalled that, prior to the entry into force of Regulation No 1290/2005, the procedure relating to irregularities was in particular defined by Articles 3 and 5 of Regulation No 595/91. Thus, under Article 3, each quarter the Member States are to communicate to the Commission a list of irregularities which have been the subject of primary administrative or judicial findings of fact. Article 5(1) required them subsequently to send to the Commission, each quarter, information relating to the procedures instituted following the irregularities communicated under Article 3, and Article 5(2) provided for the sending of a special notification for the amounts that the Member States considered they were unable to recover. Thus, Article 3 and Article 5(2) of Regulation No 595/91 do not relate to different cases, as claimed by the Federal Republic of Germany, but to different stages, Article 5(2) covering irregularities previously communicated under Article 3 and considered by the Member State to be irrecoverable.

48 It should also be noted that the Federal Republic of Germany cannot rely on principles derived by the Court in *Ireland* v *Commission* (paragraph 37 above), since the characteristics of the present case are not the same as those which led to the Court's interpretation of Regulation No 1258/1999, which did not include transitional provisions. In the present case, Regulation No 1290/2005 set out in detail the rules relating to its entry into force, its application, the necessary repeals and the transitional measures with the other provisions relating to the EAGGF. It provided in particular for the

application, from 16 October 2006, of Article 32 to cases notified under Article 3 of Regulation No 595/91 and for which full recovery had not yet taken place.

49 Secondly, the interpretation referred to in paragraph 46 of this judgment is also consistent with the general scheme of the new accounts clearance procedure created by Regulation No 1290/2005. In the previous system, under Article 8(2) of Regulation No 1258/1999, the financial consequences of irregularities or negligence were borne by the Community, unless the consequences of irregularities or negligence were attributable to administrative authorities or other bodies of the Member States. However, by adopting Regulation No 1290/2005, the Council of the European Union set itself the objective of creating a procedure which allows the Commission to uphold the interests of the Community budget by deciding to attribute to the Member State concerned part of the amounts lost as a result of irregularities and which have not been recovered within reasonable deadlines (recitals 25 and 26). Thus, Article 32(5) of that regulation provides that the amounts for which recovery has not taken place within four or eight years of the primary administrative or judicial findings of fact are thereafter attributed equally between the Member State and the Community budget.

50 In that regard, according to Article 49 of Regulation No 1290/2005, the articles relating to clearance of accounts (Articles 30 and 31) and to irregularities (Article 32) are applicable from 16 October 2006. It would therefore not be consistent, in the light of the objective of protecting the financial interests of the Community budget pursued by the legislature, to hold that it implicitly intended that special treatment be given to irregularities which had been the subject of a special notification under Article 5(2) of Regulation No 595/91, despite its providing that all the provisions relating to clearance of accounts and irregularities be applicable from 16 October 2006.

51 Thirdly, the interpretation suggested by the Federal Republic of Germany would result in the application of a provision repealed by the legislature. Article 49 states that the application of the regulation from 1 January 2007 does not affect Article 47 thereof, relating to repeals, and in particular to repeal of Regulation No 1258/1999. Article 47 of Regulation No 1290/2005 provides that Regulation No 1258/1999 be repealed from the date of its entry into force, namely 18 August 2005, except with respect to expenditure incurred by the Member States, for which the regulation remains applicable until 15 October 2006, and to that incurred by the Commission, for which the regulation remains applicable until 31 December 2006. However, the Federal Republic of Germany's argument that the cases which are the subject of a special notification on the basis of Article 5(2) of Regulation No 595/91 do not fall within the scope of application of Article 32(5) of Regulation No 1290/2005 before 1 January 2007 and had therefore, until that date, to be the subject of a Commission decision concerning their attribution, would have obliged the Commission to apply Article 8(2) of Regulation No 1258/1999 although it had been repealed on 16 October 2006 with respect to expenditure incurred by the Member States. Such an interpretation would clearly be contrary to the intention of the legislator.

52 Fourthly, the interpretation referred to in paragraph 46 of this judgment is consistent with Article 5(2) of Regulation No 595/91 remaining in force until 31 December 2006. It is not disputed that the amendments provided for by Article 46, which delete in particular Article 5(2) of Regulation No 595/91, are applicable only from 1 January 2007. Although the legislature intended that that provision remain in force between 16 October and 31 December 2006, that is explained, as the Commission contends, by the need for the Commission to receive the information relating to special notifications with respect to the irregularities of the third quarter of 2006, so as to have information for its task of combating fraud, and independently of the procedure for the clearing of accounts.

53 Finally, the other arguments put forward by the Federal Republic of Germany cannot call in question the interpretation of the second subparagraph of Article 49(3) of Regulation No 1290/2005 referred to in paragraph 46 of this judgment.

54 Thus, the fact that, when it sent to the Commission, on 12 February 2007, a summary report on the recovery procedures undertaken in response to irregularities, in accordance with Article 32(3) of Regulation No 1290/2005, the Federal Republic of Germany included the cases coming under Article 5(2) of Regulation No 595/91, retaining the identification number that they had in the special notification undertaken under Article 5, is of no relevance to the present action, since those two articles do not cover different cases, but different stages (see paragraph 47 of this judgment).

55 Likewise, the fact, assuming it were established, that few cases have been the subject of a notification under Article 5(2) of Regulation No 595/91 is not relevant to the interpretation of Article 49 of Regulation No 1290/2005, since such a purely quantitative element cannot have any bearing on a rule of law.

56 Furthermore, the interpretation referred to in paragraph 46 of this judgment does not have the effect, by treating irregularities notified under Article 3 of Regulation No 595/91 in the same way as those which have then been the subject of a special notification under Article 5(2) of that regulation, of rendering meaningless the four- and eight-year time-limits provided for by Article 32(5) of Regulation No 1290/2005. In accordance with the methods set out by the Commission in its document of 30 March 2007, relating to the clearance of accounts for the 2006 financial year (see paragraph 15 of this judgment), that interpretation has the effect only of penalising the Member States when they have sent a special notification more than four years (eight in the case of legal proceedings) after the primary finding of an irregularity, which is compatible with the objective of encouraging the Member States to recover within a reasonable period the amounts in relation to which irregularities have been found.

57 Finally, the interpretation referred to in paragraph 46 of this judgment is consistent with Article 32(6)(b) and Article 32(8) of Regulation No 1290/2005 relating to cases of insolvency of the debtor, which are entirely borne by the Community budget on condition that they are not the result of irregularities or negligence on the part of the Member State and that sufficient justification has been given by that Member State for deciding to terminate its recovery procedure. Assuming it were established, the fact that the irregularities which were the subject of a special notification under Article 5(2) of Regulation No 595/91 cover certain cases of insolvency of the debtors is not sufficient to consider that the legislature intended that provision to replace Article 32(6)(b) of Regulation No 1290/2005.

58 It follows from all the foregoing that the Commission did not err in law in the interpretation of the second indent of the third subparagraph of Article 49 of Regulation No 1290/2005 by holding that Article 32(5) of that regulation was applicable from 16 October 2006 to cases notified under Article 3 of Regulation No 595/91, and then the subject of a special notification, in accordance with Article 5(2) of Regulation No 595/91, and which had not given rise to recovery by that date.

The second plea, alleging infringement of the Commission's unilateral declaration of 4 May 1995

— Arguments of the parties

59 The Federal Republic of Germany claims that the contested decision infringes the principle of good administration by violating the unilateral undertaking made by the

Commission in a declaration annexed to the minutes of the Coreper meeting of 4 May 1995, requesting the Council to adopt, at its meeting of 22 May 1995, the proposal for a regulation relating to the amendment of Regulation No 729/70 and to annex that declaration to its own minutes. In that declaration, the Commission undertook to take a decision on the attribution of unrecovered amounts at the latest 24 months after the notification under Article 5(2) of Regulation No 595/91. However, 6 of the 34 cases at issue in the contested decision, representing an amount of EUR 280 638.03, 50 % of which were attributed to its budget, namely EUR 140 319.01, were notified to the Commission on 1 January 2002 and 1 January 2003, that is to say more than 24 months prior to the adoption of the contested decision. The Federal Republic of Germany considers that that Commission declaration constituted a legally binding undertaking.

60 The Commission rejects the Federal Republic of Germany's arguments.

61 In its reply, the Federal Republic of Germany amended the terms of its application by stating that only two cases out of the six referred to were in reality affected by this plea, totalling EUR 195 165.46, of which 50 % is attributed to its national budget, namely EUR 97 582.73.

— Findings of the Court

62 It should first of all be stated that this second plea seeks only a partial annulment of the contested decision, totalling EUR 97 582.73, the parties having reached agreement about that amount during the second round of written submissions.

63 As a preliminary point, it must also be noted, and it is moreover agreed by the parties, that no regulation required the Commission to adopt a decision relating to a special notification under Article 5(2) of Regulation No 595/91 within a specific period. The examination of the second plea, on the contrary, leads the Court to rule on the binding force of the unilateral decision taken by the Commission and annexed to the minutes of the meeting of Coreper of 4 May 1995, requesting the Council to adopt, at its meeting of 22 May 1995, the proposal for a regulation relating to the amendment of Regulation No 729/70 and to annex that declaration to its own minutes. In that declaration relating to Article 5(2)(c) of the proposal for a regulation, which became Regulation No 1287/95, the Commission had stated that it undertook to adopt its decisions relating to the possible attribution of amounts not recovered by the Member States within a period of at most 24 months after the sending of a special notification under Article 5(2) of Regulation No 595/91.

64 It should nevertheless be noted that, upon the adoption of the proposal for a regulation relating to the amendment of Regulation No 729/70, the Council did not include a provision relating to such a period. Conversely, Article 5(2)(c) of Regulation No 729/70, as amended by Regulation No 1287/95, states expressly that the maximum period of 24 months between the date on which the expenditure was incurred by the Member State and the Commission's refusal to finance does not apply to the financial consequences of irregularities within the meaning of Article 8(2). Regulation No 1258/1999, which repealed Regulation No 729/70, reproduced that provision in point (a) of the fifth subparagraph of Article 7(4) thereof, cited in paragraph 6 of this judgment.

65 According to settled case-law, a declaration recorded in the minutes of the Council during the adoption of a text cannot be used to interpret a provision of secondary law where no reference is made to the content of the declaration in the wording of the provision in question, and the declaration therefore has no legal significance (Case 429/85 *Commission* v *Italy* [1988] ECR 843, paragraph 9; Case C-292/89 *Antonissen* [1991] ECR I-745, paragraph 18; and Case C-25/94 *Commission* v *Council* [1996] ECR

I-1469, paragraph 38). The same applies to unilateral declarations of a Member State (Case 143/83 *Commission* v *Denmark* [1985] ECR 427, paragraph 13).

66 In the present case, it is not even established that the Commission's declaration was recorded in the minutes of the meeting of 22 May 1995 during which the Council adopted that regulation. In any event, and *a fortiori*, such a declaration cannot, therefore, in accordance with the case-law cited above, be admitted for the interpretation of Regulation No 729/70 as amended by Regulation No 1287/95.

67 It must finally be noted that, although the Federal Republic of Germany considers that the binding nature of that Commission declaration follows from the principle of proper administration, it must be recalled that that principle cannot transform into an obligation something which the legislature did not regard as being an obligation (see, to that effect, Case C-255/90 P *Burban* v *Parliament* [1992] ECR I-2253, paragraph 20).

68 Therefore, the second plea and the action in its entirety must be rejected.

Costs

69 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

70 Since the Federal Republic of Germany was unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby:

1. Dismisses the action;

2. Orders the Federal Republic of Germany to pay the costs.

Pelikánová Jürimäe Soldevila Fragoso

Delivered in open court in Luxembourg on 26 October 2010.

[Signatures]