

JUDGMENT OF THE GENERAL COURT (Fifth Chamber)

22 April 2010*

In Cases T-274/08 and T-275/08,

Italian Republic, represented by S. Fiorentino, lawyer,

applicant,

v

European Commission, represented by F. Jimeno Fernández and P. Rossi, acting as Agents,

defendant,

* Language of the case: Italian.

APPLICATION, in Case T-274/08, for partial annulment of Commission Decision 2008/396/EC of 30 April 2008 on the clearance of the accounts of the paying agencies of Member States concerning expenditure financed by the European Agricultural Guarantee Fund (EAGF) for the 2007 financial year (OJ 2008 L 139, p. 33) in so far as it includes interest on the sums charged to the budget of the Italian State under Article 32(5) 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), and, in Case T-275/08, for partial annulment of Commission Decision 2008/394/EC of 30 April 2008 on the clearance of the accounts of certain paying agencies in Germany, Italy and Slovakia concerning expenditure financed by the European Agricultural Guidance and Guarantee Fund (EAGGF), Guarantee Section, for the 2006 financial year (OJ 2008 L 139, p. 22) in so far as it includes interest on the sums charged to the budget of the Italian State under Article 32(5) of Regulation No 1290/2005,

THE GENERAL COURT (Fifth Chamber),

composed of M. Vilaras, President, M. Prek (Rapporteur) and V.M. Ciucă, Judges,
Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearings on 25 November 2009,

gives the following

Judgment

Legal context

Rules relating to the financing of the common agricultural policy

- 1 The basic rules relating to the financing of the common agricultural policy are constituted, in respect of expenses incurred from 1 January 2007, by Council Regulation (EC) No 1290/2005 of 21 June 2005 on the financing of the common agricultural policy (OJ 2005 L 209, p. 1) ('the basic regulation').
- 2 Article 49 of the basic regulation provides:

'[The basic regulation] shall apply from 1 January 2007 ...

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

— ...

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

— ...'

3 Recital 25 in the preamble to the basic regulation is worded as follows:

'In order to protect the financial interests of the Community budget, measures should be taken by Member States to satisfy themselves that transactions financed by the Funds are actually carried out and are executed correctly. Member States should also prevent and deal effectively with any irregularities committed by beneficiaries.'

4 Recital 26 in the preamble to the basic regulation states:

'As regards the EAGE, sums recovered should be paid back to this Fund where the expenditure is not in conformity with Community legislation and no entitlement existed. Provision should be made for a system of financial responsibility for irregularities in the absence of total recovery. In this respect a procedure should be established permitting the Commission to safeguard the interests of the Community budget by deciding on a partial charging to the Member State concerned of sums lost as a result of irregularities and not recovered within reasonable deadlines. In certain cases of negligence on the part of the Member State, it is justified to charge the full sum to the Member State concerned. However, subject to Member States complying with

obligations under their internal procedures, the financial burden should be divided fairly between the Community and the Member State.’

- 5 Article 30(1) of the basic regulation provides that ‘[p]rior to 30 April of the year following the budget year in question, the Commission shall take a decision concerning the clearance of the accounts of the accredited paying agencies ... on the basis of the information transmitted in accordance with Article 8(1)(c)(iii)’.

- 6 Under Article 8(1)(c)(iii) of the basic regulation, Member States are to send to the European Commission for measures relating to operations financed by the European Agricultural Guarantee Fund (EAGF) ‘the annual accounts of the accredited paying agencies with a statement of assurance signed by the person in charge of the accredited paying agency, accompanied by the requisite information for their clearance, and a certification report drawn up by the certification body ...’

- 7 According to Article 32(1) of the basic regulation, ‘[s]ums recovered following the occurrence of irregularity or negligence and the interest on these shall be made over to the paying agency and booked by it as revenue assigned to the EAGF in the month in which the money is actually received.’

- 8 Under Article 32(3) of the basic regulation, when the annual accounts are sent, as provided for in Article 8(1)(c)(iii), Member States are to provide the Commission with a summary report on the recovery procedures undertaken in response to irregularities. This must 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.

9 Article 32(4) of the basic regulation provides:

‘[T]he Commission may decide to charge the sums to be recovered to the Member State in the following cases:

- (a) if the Member State has not for recovery purposes initiated all the appropriate administrative or judicial procedures laid down in national and Community legislation within one year of the primary administrative or judicial finding;

- (b) if there has been no administrative or judicial finding, or the delay in making it is such as to jeopardise recovery, or the irregularity has not been included in the summary report ... for the year in which the primary administrative or judicial finding is made.’

10 Article 32(5) of the basic regulation 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 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.'

- 11 Under Article 6 of Commission Regulation (EC) No 885/2006 of 21 June 2006 laying down detailed rules for the application of [the basic regulation] 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), '[t]he annual accounts referred to in Article 8(1)(c)(iii) of [the basic] [r]egulation ... shall include ... the table of the amounts to be recovered for the end of the exercise, following the model set out in Annex III.'

Rules relating to the general budget of the European Communities

- 12 Under Article 71(4) of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1) ('the financial regulation'), '[t]he conditions in which interest on late payment is due to the Communities shall be laid down in the implementing rules.'
- 13 Under Article 86(1) of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of the [financial regulation] (OJ 2002 L 357, p. 1), '[w]ithout prejudice to any specific provisions deriving from the application of sectoral rules, any amount receivable not repaid ... shall bear interest.'

Background to the disputes

- 14 With a view to the certification in respect of the 2006 and 2007 financial years of certain Italian paying agencies, in particular the Agenzia per le erogazioni in agricoltura (AGEA, the agency for the grant of aid in the agricultural sector), pursuant to Article 30 of the basic regulation, and in order to prepare the communication to the Commission of the information requested from them, an inspection by members of the Commission's Directorate-General (DG) for Agriculture and Rural Development was carried out in Italy from 27 to 30 November 2007. The purpose of that inspection was to ascertain the information to send to the Commission regarding the sums relating to irregularities in respect of which the recovery procedure had been initiated.
- 15 By letters of 1 February 2008, the AGEA sent to the Commission the summary reports on the recovery procedures undertaken in response to irregularities, together with explanatory notes in which it stated that it 'reserved the right to take any initiative to protect the financial interests of the Italian State in respect of compensation

for sums which appeared not to be due as a result of the application of the criteria established for the calculation of interest like that claimed by the Community’.

- 16 On 28 March (Case T-274/08) and 22 April (Case T-275/08) 2008, the Commission sent to the Italian Republic a note in which it mentioned the accounts of the paying agencies which would be proposed for clearance and stated that the amounts established by way of financial consequences stemming from the non-recovery of sums due as a result of irregularities had been determined on the basis of the information sent by the AGEA.
- 17 On 30 April 2008, the Commission adopted, on the basis of the information provided by the paying agencies of the Member States, Decision 2008/396/EC on the clearance of the accounts of the paying agencies of Member States concerning expenditure financed by the European Agricultural Guarantee Fund (EAGF) for the 2007 financial year (OJ 2008 L 139, p. 33) (Case T-274/08) and Decision 2008/394/EC of on the clearance of the accounts of certain paying agencies in Germany, Italy and Slovakia concerning expenditure financed by the European Agricultural Guidance and Guarantee Fund (EAGGF), Guarantee Section, for the 2006 financial year (OJ 2008 L 139, p. 22) (Case T-275/08).
- 18 Decisions 2008/396 and 2008/394 state the amounts which must be recovered from each Member State or which must be paid to them, including the amounts resulting from the application of Article 32(5) of the basic regulation.
- 19 As regards the Italian Republic, Decisions 2008/396 and 2008/394 provide, respectively, for deductions from the advances paid to it of EUR 114 581 208.51 and EUR 99 839 568.22 by way of the amounts recoverable as a result of irregularity or negligence. Those sums include amounts corresponding to the financial consequences charged to the Italian Republic pursuant to Article 32(5) of the basic regulation, if recovery of the amounts payable as a result of irregularity or negligence 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.

Procedure and forms of order sought

- 20 By applications lodged at the Registry of the Court on 11 July 2008 and registered as Cases T-274/08 and T-275/08, the Italian Republic brought the present actions.
- 21 On hearing the report of the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral procedure in those two cases.
- 22 The parties presented oral argument and replied to the questions put by the Court at the hearings on 25 November 2009.
- 23 After hearing the parties' views at the hearings, the Court (Fifth Chamber) considered that the two cases should be joined for the purposes of the judgment pursuant to Article 50(1) of its Rules of Procedure.
- 24 In Case T-274/08, the Italian Republic claims that the Court should annul Decision 2008/396 in so far as it calculates interest on the sums charged to the budget of the Italian State in respect of the 2007 financial year under Article 32(5) of the basic regulation.

25 In Case T-275/08, the Italian Republic claims that the Court should annul Decision 2008/394 in so far as it calculates interest on the sums charged to the budget of the Italian State in respect of the 2006 financial year under Article 32(5) of the basic regulation.

26 In Cases T-274/08 and T-275/08, the Commission contends that the Court should:

— dismiss the action;

— order the Italian Republic to pay the costs.

Law

27 In support of its actions, the Italian Republic relies on a single plea in law alleging breach of Article 32(5) of the basic regulation.

Arguments of the parties

28 The Italian Republic submits that the Commission misinterpreted Article 32(5) of the basic regulation. In essence, it complains that the Commission requested it to pay the

sums, under that article, with interest, even though it is not possible, under Italian law, to include interest without a judicial decision.

- 29 First, the Italian Republic submits that Article 32(5) of the basic regulation must be interpreted as relating only to the sums and not to the possible interest which may have accrued on those sums. It states, in that regard, that that provision does not relate to the accrual of interest although Article 32(1) mentions interest expressly. It concludes from that that the legislature intended to govern two different situations in Article 32(1) and (5) of the basic regulation. Article 32(1) of the basic regulation refers to situations in which the recovery procedure has come to an end and the interest has already been recovered from the beneficiaries. It would therefore be inappropriate if the State could 'hoard' it. By contrast, Article 32(5) of the basic regulation concerns pending procedures in respect of which the inclusion of interest and the date from which it runs remain uncertain.
- 30 Furthermore, the Italian Republic submits that, in so far as Article 32(5) of the basic regulation is exceptional and is a derogation from the general principle set out in Article 32(1), it should be interpreted strictly, taking into account the fact that the word 'interest' is not expressly mentioned.
- 31 Secondly, the Italian Republic submits that that interpretation takes into account the legal impossibility of a Member State's ascertaining the amount of interest as long as the claim against the beneficiary of the funds has not been established in legal proceedings, in so far as, under Article 2033 of the codice civile (Italian Civil Code), it is for the court to specify the starting point for the calculation of interest according to whether the beneficiary of the funds is in good or bad faith. Furthermore, the Italian Republic considers that taking into account the interest only when the amounts payable are definitively attributable best corresponds to the logic of Article 32(5) of the basic regulation, a reading of the third, fourth and fifth subparagraphs of which shows

that what is involved is a flat-rate, interim clearance in respect of which there may be subsequent compensation.

³² Thirdly, the Italian Republic submits that it did not accept, even tacitly, the calculation criteria imposed by the Commission. First, the Italian paying agency has always maintained that, when recovery procedures are challenged before the national courts, the amounts payable by the Member State under Article 32(5) of the basic regulation must not include interest and, secondly, it expressly informed the Commission thereof during the pre-litigation phase and reserved the right to bring the matter before the Community Courts. Consequently, the fact that the paying agency, when it sent to the Commission the requisite documents to clear the accounts, included interest in the amounts payable under Article 32(5) of the basic regulation is irrelevant.

³³ The Commission disputes the Italian Republic's arguments and submits that it did not misinterpret Article 32(5) of the basic regulation.

Findings of the Court

³⁴ It should be noted at the outset that, in its single plea, the Italian Republic seeks to show that Decisions 2008/396 and 2008/394 must be annulled inasmuch as the Commission, by taking into account interest under Article 32(5) of the basic regulation, misinterpreted that provision. As the Commission imposed on the Italian Republic deductions from the advances, pursuant to Article 32 of the basic regulation, of EUR 114 581 208.51 (Case T-274/08) and EUR 99 839 568.22 (Case T-275/08), deductions which include amounts under Article 32(5), the Italian Republic complains that the Commission took interest into account when it calculated those amounts.

- 35 Article 32 of the basic regulation relates to Member States' obligations as regards the recovery of sums from beneficiaries who have committed irregularities or demonstrate negligence.
- 36 Article 32(5) of the basic regulation relates to specific situations in which a Member State has not recovered sums, either within four years 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'.
- 37 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).
- 38 It is in the light of those principles that it must be examined whether the words 'financial consequences' in Article 32(5) of the basic regulation must be understood as referring only to the sums which have not been recovered or as referring to both those sums and the interest on them.
- 39 First, it appears that the answer to that question may be deduced from a literal interpretation of Article 32(5) of the basic regulation in the light of the clear meaning of the words 'financial consequences'. It must, in that regard, be pointed out that those words have a wide scope in so far as they are capable of including all the effects of a financial nature linked to non-recovery of sums irregularly paid. The interest which

should have been paid under Article 32(1) of the basic regulation is necessarily one of those effects.

- 40 Secondly, that literal interpretation is borne out by Article 34(1)(a) of the basic regulation under which '[t]he following shall be regarded as assigned revenue within the meaning of Article 18 of [the financial] [r]egulation ... sums which, under Articles 31, 32 and 33 of this Regulation, must be paid to the Community budget, including interest thereon.'
- 41 The interpretation referred to in paragraph 39 above is also consistent with the general scheme of the accounts clearance procedure. Article 32(5) of the basic regulation must be read in the light of Article 32(1) of that regulation, which constitutes the general framework as regards reimbursement to the Community of amounts payable as a result of irregularity or negligence in the use of funds. In so far as Article 32(5) does not amend the principle of the inclusion of interest, but merely divides the financial responsibility between the Member State and the Community budget where there is non-recovery of the amounts payable within reasonable periods, it assuredly follows from that that the 'financial consequences' referred to in Article 32(5) of the basic regulation include, *inter alia*, the principal sums and the interest thereon.
- 42 Furthermore, the argument to the effect that the absence of the word 'interest' in Article 32(5) shows the legislature's intention to cover a situation different from that provided for in Article 32(1), in that Article 32(5) relates to a merely flat-rate and interim clearance, must also be rejected. It is true that, under the third subparagraph of Article 32(5), a Member State must pursue recovery procedures. It necessarily follows from that that the amount of the financial consequences may possibly be subject to subsequent corrections. However, that possibility of corrections relates to the financial consequences calculated under Article 32(5) of the basic regulation as a whole, including the interest on the principal sums. There is therefore no contradiction between the taking into account of interest in respect of the financial consequences

referred to in the first subparagraph of Article 32(5) of the basic regulation and the interim nature of that clearance.

- 43 Consequently, it is necessary to reject the various arguments of the Italian Republic relating, first, to the fact that only Article 32(1) of the basic regulation refers expressly to the inclusion of interest and, secondly, to the fact that Article 32(5) of the basic regulation is a derogation from Article 32(1) and should therefore be interpreted strictly, taking into account the fact that the word 'interest' is not expressly mentioned in that provision.
- 44 Thirdly, it is apparent from the preamble to the basic regulation, and in particular from recitals 25 and 26 in that preamble, that the system of shared financial responsibility established by Article 32(5) of the basic regulation is designed to protect the financial interests of the Community budget by a partial charging to the Member State concerned of sums payable as a result of irregularities and not recovered within reasonable deadlines. As the Commission rightly states, the obligation to recover the interest outstanding for the period from the time when the irregularity was discovered to the time when the sums in question were actually recovered is compensatory in nature in so far as the interest relates to the temporary damage suffered by the Community budget as a result of the fact that it has not been in receipt of a credit entered in its favour. Consequently, the exclusion of interest from the sum to be recovered, and therefore a reduction in the amount charged to the Member State concerned, would be incompatible with the protection of the financial interests of the Community budget as that budget would thus bear most of the financial consequences of non-recovery, within reasonable periods, of amounts payable as a result of irregularity.
- 45 Fourthly, it must be pointed out that the principle that interest is ancillary to the principal amount and follows the same accounting regime is of general application in the context of the rules relating to the Community budget as is evidenced by Article 86(1) of Regulation No 2342/2002, implementing Article 71(4) of the financial regulation, which states that '[w]ithout prejudice to any specific provisions deriving from the application of sectoral rules, any amount receivable not repaid ... shall bear interest'.

- 46 In view of the foregoing, it must be held that the Italian Republic is wrong to claim that the Commission misinterpreted Article 32(5) of the basic regulation by including interest in the sums payable under that provision.
- 47 That finding cannot be called into question by the Italian Republic's argument that it is impossible for it to apply Article 32(5) of the basic regulation on account of Article 2033 of the *codice civile*, which precludes a starting point for the calculation of interest from being determined with precision until a claim has been established in legal proceedings.
- 48 First, such a reference to national law is irrelevant as regards the sole question at issue in these proceedings, namely the interpretation of Article 32(5) of the basic regulation and, more specifically, the question of whether interest must be taken into account under that provision.
- 49 Secondly, it is true that, in the absence of provisions of Community law, disputes concerning the recovery of amounts wrongly paid under Community law must be decided by national courts in application of their own domestic law, subject to the limits imposed by Community law in the sense that the detailed rules provided for by national law may not have the effect of making it impossible in practice to implement the Community rules and that national legislation must be applied in a manner which is not discriminatory as compared to procedures for deciding similar national disputes (see Joined Cases C-383/06 to C-385/06 *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening and Others* [2008] ECR I-1561, paragraphs 48 to 50, and the case-law cited). Although it necessarily follows from that that all ancillary questions not governed by Community provisions and relating to the recovery by the Italian Republic of amounts unduly paid by the Community budget must be settled according to the relevant rules of national law, such an application cannot call into question the principle that interest must be taken into account under Article 32(5) of the basic regulation.

50 Thirdly and lastly, the Commission is right to state that the fact that the paying agency included interest in the sums which it communicated to it so that it could calculate the amounts referred to in Decisions 2008/396 and 2008/394 shows that it is possible to include that interest in the amounts which Member States must reimburse under Article 32(5) of the basic regulation. Furthermore, it must be pointed out that the Italian Republic did not communicate to the Commission the sum of the amounts payable, under Article 32(5) of the basic regulation, before capitalised interest.

51 It follows from all the foregoing that the Commission did not err in law in interpreting Article 32(5) of the basic regulation by taking the view that interest should be taken into account in the sums payable by a Member State under that provision.

52 Consequently, the actions must be dismissed in their entirety.

Costs

53 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.

54 Since the Italian Republic has been 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 (Fifth Chamber)

hereby:

- 1. Joins Cases T-274/08 and T-275/08 for the purposes of judgment;**

- 2. Dismisses the actions;**

- 3. Orders the Italian Republic to pay the costs.**

Vilaras

Prek

Ciucă

Delivered in open court in Luxembourg on 22 April 2010.

[Signatures]