Reports of Cases

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 30 April 2014[1]

Case C-417/12 P

Kingdom of Denmark
v

European Commission

(Appeals — Inadmissibility — EAGGF — 'Guarantee Section' — Exclusion from Community financing of certain expenditure incurred by the Kingdom of Denmark in respect of the setting-aside of land — Remote-sensing controls — Articles 15, 22 and 23 of Regulation (EC) No 2419/2001 — Article 19 of Regulation (EC) No 2316/1999 — Green cover on the parcels set aside — Burden and standard of proof — Conditions of application of a flat-rate correction)

I – **Introduction**

1. According to settled case-law, the Member States are required to organise a set of administrative and on-the-spot checks in order to ensure effective verification of compliance with the terms under which aids are granted by the European Agricultural Guidance and Guarantee Fund (EAGGF). Where instances of non-compliance are detected by the Commission and losses for the EAGGF are established, the Commission may exclude ineligible expenditure from financing. The same holds true where there is genuine, reasonable doubt in that regard and the Member State in question has failed to adduce evidence in support of arguments aimed at dispelling that doubt. This principle governs both the determination of the burden of proof and the application of flat-rate corrections where there are irregularities affecting the aid granted by the EAGGF.

2. By its appeal, the Kingdom of Denmark seeks to have set aside the judgment of the General Court of the European Union of 3 July 2012 ('the judgment under appeal')[2] dismissing its action seeking primarily partial annulment of Commission Decision 2009/253/EC of 19 March 2009 ('the contested decision')[3] in so far as it excludes certain expenditure incurred by the Kingdom of Denmark in respect of the setting-aside of land.

3. By the contested decision, the European Commission proposed to apply flat-rate financial corrections for the financial years 2002, 2003 and 2004, with regards to the Kingdom of Denmark in respect of the marketing years 2003, 2004 and 2005. Depending on the individual case, the corrections were 2%, 5% or 10% applied for weaknesses found in the remote-sensing controls and checks on compliance with regulatory requirements for the areas set aside ('checks on areas set aside').

1 — Original language: French.

2 — *Denmark* v *Commission*, T-212/09, EU:T:2012:335.

3 — Decision excluding from Community financing certain expenditure incurred by the Member States under the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) and under the European Agricultural Guarantee Fund (EAGF) (OJ 2009 L 75, p. 15).

II – **Background to the dispute, the procedure before the General Court and the judgment under appeal**

4. By application lodged at the Registry of the General Court on 2 June 2009, the Kingdom of Denmark brought an action seeking primarily partial annulment of the contested decision. That action, which was registered at the General Court Registry under case number T-212/09, was based on four pleas in law: (i) errors of law and of assessment of the rules governing remote-sensing controls; (ii) errors of law and of assessment of the rules governing checks on areas set aside; (iii) infringement of essential requirements; and (iv) errors of law and of assessment of the rules governing financial corrections.

5. By the judgment under appeal the General Court dismissed the application in its entirety and ordered the parties to bear their own costs.

6. Reference is made to the discussion in the judgment under appeal for a detailed description of the facts and procedure giving rise to the dispute.

III – **Forms of order sought and procedure before the Court**

7. By application lodged at the Registry of the Court of Justice on 13 September 2012, the Kingdom of Denmark brought an appeal against the judgment under appeal. It claims that the Court should set aside the General Court's judgment in whole or in part, uphold the claims made before the General Court or, in the alternative, refer the case back to the General Court for a fresh judgment.

8. The Kingdom of Denmark relies on five grounds of appeal. The first alleges error of law with regard to the interpretation of Article 15 of Regulation No 2419/2001, read in conjunction with Article 23 thereof, concerning weaknesses in remote-sensing control.[4] The second ground of appeal alleges two errors of law: incorrect interpretation of Article 19(4) of Regulation No 2316/1999 and an unjustified and undefined obligation to cut any green cover.[5] The third plea alleges distortion of the burden of proof. The fourth ground alleges misapplication of the conditions for a flat-rate correction, whilst the fifth ground alleges that the conditions for the application of flat-rate corrections of 5% and 10% respectively were not met.

9. The Commission contends that the Court should dismiss the appeal, uphold the judgment under appeal and order the Kingdom of Denmark to pay the costs.

4 — Under Article 15 of Commission Regulation (EC) No 2419/2001 of 11 December 2001 laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes established by Council Regulation (EEC) No 3508/92 (OJ 2001 L 327, p. 11), administrative and on-the-spot checks are to be made in such a way as to ensure effective verification of compliance with the terms under which aids are granted. Article 23(1) of that regulation provides inter alia that, if a Member State makes use of remote sensing on all or part of the sample, the zones to be controlled by remote sensing are, as far as possible, to be selected taking account of appropriate risk factors to be determined by the Member State. Article 23(2) provides that the Member State is to perform photo interpretation of satellite images or aerial photographs of all agricultural parcels to be checked with a view to recognising the ground cover and measuring the area, and check on the spot all applications for which photo interpretation does not make it possible to verify the accuracy of the declaration to the satisfaction of the competent authority. Article 23(3) provides that, if a Member State makes use of remote sensing the additional checks referred to in Article 18(2) are to be carried out by means of traditional on-the-spot checks if it is no longer possible to carry them out by means of remote sensing within the current year.

5 — Article 19(3) and (4) of Commission Regulation (EC) No 2316/1999 of 22 October 1999 laying down detailed rules for the application of Council Regulation (EC) No 1251/1999 establishing a support system for producers of certain arable crops (OJ 1999 L 280, p. 43) provides that '[a]reas set aside may not be used for agricultural production of any sort other than as provided for in Article 6(3) of Regulation (EC) No 1251/1999 or used for any lucrative purpose incompatible with the growing of arable crops', and that '[t]he Member States shall apply suitable measures compatible with the specific situation of areas set aside in order to ensure they are maintained and the environment is protected. Such measures may also involve green cover; in that case, the measures must ensure that the green cover cannot be used for seed production and that it cannot under any circumstances be used for agricultural purposes before 31 August or, before 15 January thereafter, to produce crops for marketing'.

10. The French Republic, the Kingdom of the Netherlands, the Republic of Finland and the Kingdom of Sweden were granted leave to intervene in support of the Kingdom of Denmark. Those Member States lodged statements in intervention.

11. At the hearing on 12 December 2013, the representatives of the Kingdom of Denmark, the Commission and the Kingdom of Sweden presented oral argument.

IV – **Legal analysis**

A – *The admissibility of the appeal*

12. The Commission submits, first of all, that the appeal should be 'dismissed', which I take to mean that it is, in fact, asking the Court to declare the appeal inadmissible. The Commission submits that the present appeal merely repeats or reproduces verbatim the pleas in law and arguments submitted to the General Court, including those based on facts expressly rejected by it. It adds that such an appeal amounts in reality to no more than a request for re-examination of the application submitted to the General Court, which the Court of Justice does not have jurisdiction to undertake.[6] In the Commission's submission, the Kingdom of Denmark's action concerns solely — or at least largely — the General Court's assessment of the facts.

13. I note that the appeal decidedly does contain some of the aspects criticised by the Commission. Nevertheless, the Kingdom of Denmark's complaints clearly allege errors in law made by the General Court. The appeal aims, in essence, to call into question the General Court's position on a number of questions of law submitted to it at first instance, including the General Court's legal categorisation of the facts. Thus, in accordance with the Court's case-law, in so far as that appeal contains precise indications with regard to the contested points of the judgment under appeal and the grounds and arguments upon which it is based, it cannot be declared inadmissible in its entirety.[7]

B – *The first ground of appeal: error of interpretation of Regulation No 2419/2001 and partial omission to rule*

1. Arguments of the parties

14. The Kingdom of Denmark, supported on the point by the French Republic, submits that the General Court misinterpreted Articles 15 and 23 of Regulation No 2419/2001 in holding, in paragraphs 51 and 52 of the judgment under appeal, that the Commission may, in order to assess the effectiveness of the Member States' remote-sensing controls, use any appropriate means, including land-based measures using a global positioning system (GPS) device, in order to make comparisons. The Kingdom of Denmark states that a difference between a measurement by remote sensing and a measurement by GPS cannot be used for the purpose of determining whether the remote sensing was sufficiently effective for the purposes of Article 15 of Regulation No 2419/2001.

15. It further submits that, in the judgment under appeal, the General Court failed to rule on some of the other pleas in law by which the Kingdom of Denmark disputed the validity of the Commission's findings about the effectiveness of the Danish measures for remote-sensing control, on the ground that those findings are based on a certain number of fundamental errors. The Kingdom of Denmark considers that, in those circumstances, the General Court did not give a faithful rendition of the facts

6 — Judgment in *Reynolds Tobacco and Others* v *Commission*, C-131/03 P, EU:C:2006:541, paragraphs 49 and 50.

7 — Judgment in *Poland* v *Commission*, C-335/09 P, EU:C:2012:385, paragraph 28.

when it stated, in paragraph 50 of the judgment under appeal, that the Commission had previously questioned the quality of the remote-sensing controls performed. The General Court also failed to take account of the corrective actions taken by the Kingdom of Denmark with regard to the use of the so-called HR (high resolution) images. [8]

16. The Commission submits that, in paragraphs 48 and 49 of the judgment under appeal, the General Court concluded, correctly, that the control conducted by the Danish authorities was ultimately weak and, in paragraphs 51 and 52 of the judgment under appeal, it found that the complaint repeated by the Kingdom of Denmark in its appeal was unfounded.

2. Assessment

17. The fact that the General Court held, correctly, that the question which arose in the present case was not whether the use of high-resolution images was permitted but how those images were to be used is, in my view, essential. [9] It follows from the relevant EU law provisions, in particular Article 15 and Article 22(1) [10] of Regulation No 2419/2001, that it is for the Member States to adopt the measures they deem capable of ensuring the effectiveness of controls and, therefore, the accuracy of the measurements taken using remote sensing. [11]

18. The Kingdom of Denmark is incorrect in stating that the General Court misinterpreted Articles 15 and 23 of Regulation No 2419/2001 as to the use of GPS for taking measurements in order to determine whether the remote sensing was sufficiently effective for the purposes of Regulation No 2419/2001.

19. In my view, the General Court correctly acknowledged not only the Member States' responsibility for the quality of the control, but also the Commission's right to carry out, where necessary, supplementary checks in order to be able to ascertain the reliability of the controls performed by the Member States. The General Court cannot be criticised for having favoured a given measuring method or for having drawn inappropriate inferences where different methods were used. Neither the wording nor the objective of Articles 15, 22 and 23 of Regulation No 2419/2001 requires the Commission to favour a certain method when it checks the reliability of the results of national controls.

20. Consequently, the General Court was correct in holding that the irregularities identified by the Commission in the course of the investigation highlight the weakness of the on-the-spot checks carried out by the Kingdom of Denmark in order to verify the measurements of the parcel areas initially carried out using high-resolution images. [12]

21. The General Court thus held that the Kingdom of Denmark had been incorrect in criticising the Commission for having used a different method from its own, namely GPS measurement, in the investigation carried out in 2002, 2003 and 2004. [13] When the applicable rules do not require the use of a specific method of measurement, the first sentence of Article 22(1) of Regulation No 2419/2001 allows the Member States to choose the means used to determine the agricultural parcel areas, but

8 — I note that the parties have not defined this concept.

9 — Paragraph 44 of the judgment under appeal.

10 — Article 22(1) provides: 'Agricultural parcel areas shall be determined by any appropriate means defined by the competent authority which ensure measurement of a precision at least equivalent to that required for official measurements under the national rules. The competent authority shall set a tolerance margin taking account of the measuring method used, the accuracy of the official documents available, local factors such as slope and shape of parcel and the provisions of paragraph 2.'

11 — Paragraph 41 of the judgment under appeal.

12 — Paragraph 49 of the judgment under appeal.

13 — Paragraph 51 of the judgment under appeal.

those means must meet certain requirements as to precision. Therefore, in order to determine whether the Member States have satisfied that requirement, the Commission must itself be able to use any appropriate means enabling it to determine, as accurately as possible, the parcel areas it is checking. [14] I concur entirely with the General Court's analysis.

22. Nor, in my view, is the interpretation advocated by the Kingdom of Denmark consistent with the two levels of control on which the clearance of EAGGF accounts is based. On the one hand, at national level, the paying agencies treat applications for financing and ensure in situ that the conditions for the disbursement of the aid are indeed met. On the other hand, at EU level, the Commission, on the basis of the paying agencies' national reports, itself carries out controls through on-the-spot sampling, in order to ensure the reliability of the national control systems. A perfect concordance between those two levels as to the methods used would undermine that system.

23. In alleging the General Court's omission to rule on some of the other pleas by which the Kingdom of Denmark had challenged the contested decision, that is to say, the pleas concerning the effectiveness of the Danish remote-sensing control measures, the Kingdom of Denmark bases itself on statements which in turn are largely based on references to pleadings lodged with the General Court, without explaining their content or explaining why the General Court ought to have taken them into account.

24. It is settled case-law that the General Court is not required by the Court of Justice to provide an account which follows exhaustively and point by point all the arguments put forward by the parties to the case. The grounds stated may therefore be implicit, on condition that they enable the persons concerned to know the reasons for which a particular ruling was made and provide the competent court with sufficient material for it to exercise its power of review. [15]

25. As to the assertion that the General Court failed to take account of the corrective actions implemented by the Kingdom of Denmark concerning the use of high-resolution images, it is useful to remember that the Court has held that the appraisal of the facts and the assessment of that evidence thus does not, save where they distort the evidence, constitute a point of law which is subject, as such, to review by the Court of Justice on appeal. [16] A distortion must be obvious — without any need for a new assessment of the facts and the evidence — from the documents on the Court's file. [17]

26. In my view, the General Court's assessments of the effectiveness of the Danish remote-sensing control measures do not show any distortion of the facts and the evidence.

27. It has also been argued that paragraph 50 of the judgment under appeal does not give a faithful rendition of the facts, yet it must be remembered that a review of the facts in the context of an appeal clearly lies outside the Court of Justice's jurisdiction. [18]

28. The first ground of appeal must therefore be rejected as being partially inadmissible and partially unfounded.

14 — Paragraph 52 of the judgment under appeal.

15 — Judgments in *Komninou and Others* v *Commission*, C-167/06 P, EU:C:2007:633, paragraph 22 and the case-law cited, and *FIAMM and Others* v *Council and Commission*, C-120/06 P and C-121/06 P, EU:C:2008:476, paragraph 96 and the case-law cited.

16 — Judgment in *Italy* v *Commission*, C-587/12 P, EU:C:2013:721, paragraph 31.

17 — Judgments in *Trubowest Handel and Makarov* v *Council and Commission*, C-419/08 P, EU:C:2010:147, paragraph 32, and *Greece* v *Commission*, C-547/12 P, EU:C:2013:713, paragraph 12. See also my Opinion in *France* v *Commission*, C-559/12 P, EU:C:2013:766, paragraph 78.

18 — In paragraph 50 of the judgment under appeal, the General Court observed that the Commission had informed the Kingdom of Denmark of its doubts as to the quality of the controls done by remote sensing as early as marketing year 2000.

C – *The second ground of appeal: incorrect interpretation of Article 19(4) of Regulation No 2316/1999*

1. Arguments of the parties

29. The Kingdom of Denmark, supported by the French Republic and the Republic of Finland, contests the General Court's interpretation to the effect that Article 19(4) of Regulation No 2316/1999 is aimed at the 'preservation of agronomic conditions'. The Kingdom of Denmark complains that the General Court found that that provision means that any green cover must be maintained in such a way as to ensure the preservation of agronomic conditions. It argues that the General Court does not specify what the expression 'preservation of agronomic conditions' might mean, in particular whether it includes an obligation to cut cover. The Kingdom of Denmark thus contests the General Court's interpretation of Article 19(4) of Regulation No 2316/1999 because it seems to recognise an implicit obligation to cut cover.

30. Next, the Kingdom of Denmark states that the General Court makes no assessment of the validity of the contested decision's findings on the maintenance obligation, either in the light of the rules of interpretation on which the Commission relied or the criterion ? which is not defined in any greater detail ? which the General Court seems to have gleaned from its interpretation of Article 19(4) of Regulation No 2316/1999.

31. Nor, according to the Kingdom of Denmark, did the General Court rule on the detailed and absolutely crucial evidence adduced, which shows inter alia that areas set aside were going to continue to be agricultural lands capable of being reintegrated immediately into production, or on the question of culling and areas which were allegedly too damp.

32. The Kingdom of Denmark states that, in consequence, the Commission's erroneous interpretation was so significant that the contested decision ought to have been annulled. It cannot be upheld on the basis of two minimal irregularities, namely the presence of haystacks and construction waste on the parcels set aside.

33. The Commission, by contrast, considers that the General Court held that the Member States are required to ensure that a cultivated area is maintained in compliance with the requirements applicable under the Common Agricultural Policy to areas set aside, adding that the Member State responsible therefore also had a duty to verify actual compliance with the maintenance obligation.[19] It is precisely the Member States which have the responsibility to ensure that EAGGF funds are paid out solely in accordance with adopted orientations and obligations under the Treaty.

34. In the Commission's submission, the facts of the case indicate that the Kingdom of Denmark failed in its obligation to ensure adequate controls. The General Court also confirmed that the irregularities found by the Commission showed serious weaknesses in the controls conducted by the Kingdom of Denmark and that that fact alone justified the exclusion from Community financing.

2. Assessment

35. As regards the interpretation of Article 19(4) of Regulation No 2316/1999, it seems to me that the Kingdom of Denmark has misconstrued the judgment under appeal. The General Court did not hold, explicitly or even implicitly, that Article 19(4) gives rise to an obligation to cut cover.

19 — Paragraphs 91 to 93 of the judgment under appeal.

36. In fact, the General Court held in that part of the judgment under appeal that Article 19(4) of Regulation No 2316/1999 should be interpreted as follows. First of all, the Member States are required to apply suitable measures which enable them to achieve both objectives pertaining to the setting-aside of land, namely the maintenance of areas set aside and environmental protection. Secondly, the retention of green cover on the parcels set aside constitutes one possible suitable measure for the purposes of that article. [20] The General Court held that the Commission had interpreted that article as meaning that the retention of green cover on land set aside was an exception in relation to the suitable measures aimed at achieving the maintenance objective for the parcels pursued by Article 19(4) of Regulation No 2316/1999. [21]

37. Nevertheless, the General Court concluded that '[i]t follows from all the considerations set out in the examination of the first plea that the Commission was incorrect in finding that, for the areas set aside, the retention of green cover was an exception in relation to the appropriate measures applied by the Member States under Article 19(4) of Regulation No 2316/1999. On the other hand, it was correct in finding that the green cover retained on parcels set aside were to be maintained for the purposes of Article 19(4) of Regulation No 2316/1999'. [22]

38. In consequence, even though the Kingdom of Denmark pleaded that the error committed by the Commission and found to be present by the General Court was 'significant', I take the view that an alleged obligation to cut cover is not apparent, either explicitly or implicitly, from the judgment under appeal.

39. The General Court went on to consider the consequences which were liable to ensue from that error of law committed by the Commission as to the lawfulness of the contested decision. [23] It observed correctly that, as evidenced by the reasons set out in the summary report enumerating the weaknesses of the checks on areas set aside carried out by the Kingdom of Denmark, the Commission found a number of types of irregularities in that report relating to those areas set aside which, in its view, are liable to form the basis of its decision to declare expenditure ineligible for the EAGGF. The General Court took the view that some of those irregularities were unrelated to the question whether green cover had been retained on those areas. [24]

40. The General Court accordingly held that the error of law committed by the Commission in regards to Article 19(4) of Regulation No 2316/1999 was not liable to produce legal effects for the assessment of the merits of the Commission's findings about those irregularities. [25]

41. It should be borne in mind in that regard that, according to settled case-law, an incorrect ground need not lead to annulment of the measure thereby vitiated if it is superfluous and there are other grounds which provide a basis for it. [26] The General Court in this case did not deem it necessary to obtain additional clarification of the interpretation of the concept of 'preservation of agronomic conditions' in order to assess the alleged irregularities.

20 — Paragraph 85 of the judgment under appeal.
21 — Paragraph 86 of the judgment under appeal.
22 — Paragraph 94 of the judgment under appeal.
23 — Paragraph 103 of the judgment under appeal.
24 — Paragraph 104 of the judgment under appeal.
25 — Paragraph 104 of the judgment under appeal.
26 — Judgment in *Greece* v *Commission*, C-321/09 P, EU:C:2011:218, paragraph 61 and the case-law cited.

42. The Kingdom of Denmark has failed to demonstrate that a more detailed statement of the General Court's position on this point was legally necessary for it to rule on the remainder of its second plea in law in so far as it concerned the application of the rules on checks on areas set aside. In fact the General Court took the view — rightly in my opinion — that the other aspects relied on by the Kingdom of Denmark were matters of assessment. [27]

43. For the foregoing reasons the second ground of appeal put forward by the Kingdom of Denmark must be dismissed as unfounded.

D – *The third ground of appeal: distortion of the burden of proof*

1. Arguments of the parties

44. The Kingdom of Denmark and the four intervening Member States do not dispute the accuracy of the overall description given by the General Court of the requirements as to the burden of proof borne by the Commission, as they have developed in the case-law relating to the clearance of EAGGF accounts and which, for practical reasons, are marked by a considerable mitigation of the Commission's burden of proof. More specifically, the General Court held that the Commission based its findings on a serious and reasonable doubt as to the adequacy of the controls carried out [28] and that it was for the Member State to adduce evidence liable to support its arguments aimed at dispelling those doubts. [29]

45. In the Kingdom of Denmark's submission, however, it cannot be inferred from that case-law that the Commission could discharge the burden of proof by relying only on facts established using controls by sampling carried out long after the end of the set-aside period of the land. The facts in question must at least be of such a nature as to constitute concrete evidence of those facts' having also occurred during that period.

46. The Kingdom of Denmark further submits that the General Court stated incorrectly in paragraph 123 of the judgment under appeal that the Kingdom of Denmark had not adduced any evidence capable of substantiating the claim that the Commission had not discharged its burden of proof. It was not for the Kingdom of Denmark to prove that the Commission had not discharged that burden; on the contrary, it needed only to refute any allegations made by the Commission.

47. The Kingdom of Denmark, supported by the Kingdom of the Netherlands on the point, submits that the judgment under appeal is based on an incorrect understanding of the burden and standard of proof resting on the Commission. Moreover, the substantive scope of the proof which the General Court requires the Member States to establish goes beyond what is advocated in settled case-law in this area and is impossible to achieve in practice. The General Court also clearly distorted, in a number of respects, the pleas relied on by the Kingdom of Denmark and the facts. On those grounds as well, the judgment under appeal must be set aside.

48. The Commission replies that it is not required to demonstrate exhaustively the weaknesses in the controls conducted by the national authorities, but rather only to present evidence of the serious and reasonable doubt it has with regard to those controls or figures.

27 — Paragraph 107 of the judgment under appeal.

28 — Paragraphs 57, 105 and 106 of the judgment under appeal.

29 — Paragraph 123 of the judgment under appeal.

49. The reason for this mitigation of the burden of proof on the Commission is that it is the Member State which is best placed to collect and verify the data required for the clearance of EAGGF accounts and, consequently, it is for that state to adduce the most detailed and comprehensive evidence that its controls or figures are accurate and, if appropriate, that the Commission's statements are incorrect. [30] If it is not able to show that they are inaccurate, the Commission's findings can give rise to serious doubts as to the existence of an adequate and effective series of supervisory and control measures. [31]

50. The Commission submits that that remark relating to the Member States' option of carrying out the controls does not in fact give rise to an obligation for each Member State to carry out an exhaustive, in-depth control of all parcels which have benefited from aid. It is the Member State which must prove that a weakness in the control which has been specifically demonstrated by the Commission is not the manifestation of a general weakness but, on the contrary, is a unique and completely isolated case.

51. Lastly, regarding the timing of the control, the Commission observes that, in most cases, given their nature, the circumstances which meant that areas set aside recognised as being eligible for aid by the Danish authorities could not be considered eligible could develop only over an extended period. It is therefore impossible that they appeared immediately after the end of the set-aside period. The timing of the audits was also irrelevant in most cases.

52. The Commission observes in parallel that it is for the Member States to ensure that the control of areas set aside is carried out before the expiry of the set-aside period and that any omissions may not serve to make the Commission's burden of proof any more onerous.

2. Assessment

53. I note that the rule on the distribution of the burden of proof applied by the General Court is not challenged by either the Member States or the Commission. Rather, it is the application of that rule which is called into question in the present case.

54. As the Kingdom of Denmark states that it has complied with its obligation to provide proof by furnishing sufficient factual evidence in support of arguments aimed at dispelling the doubts expressed, it is clear that its line of argument is aimed at prompting the Court to conduct a fresh assessment of the facts.

55. However, as to the standard of proof required of the Member State concerned, [32] construed as the degree of stringency applied by the judicature on examining the evidence before it, the question of law arises as to whether the General Court fixed a standard of proof which is impossible for the Member States to attain.

56. I note that the General Court held that 'for obvious practical reasons, the Commission is unable to conduct an exhaustive, in-depth control of *all the parcels concerned* in each Member State. It is the Member States which are best placed to conduct such a control' and that 'the Kingdom of Denmark merely presented evidence of the Commission's specific findings … from samples from the parcels

30 — Judgments in *Germany* v *Commission*, C-344/01, EU:C:2004:121, paragraph 58 and the case-law cited, and *Greece* v *Commission*, C-300/02, EU:C:2005:103, paragraph 36 and the case-law cited.

31 — Judgment in *Greece* v *Commission*, EU:C:2005:103, paragraph 35 and the case-law cited.

32 — In point 74 and footnote 64 of her Opinion in *Akzo Nobel and Others* v *Commission*, C-97/08 P, EU:C:2009:262, Advocate General Kokott explained the need to distinguish between the burden of proof and the standard of proof. See also my Opinion in *France* v *Commission*, EU:C:2013:766, paragraph 34.

tested. At no time did it present evidence concerning *all of the areas set aside*. That evidence is accordingly not sufficiently detailed and complete in order to substantiate its controls or figures and, therefore, does not discharge the burden of proof which the Member States have in the area of clearance of EAGGF accounts'. [33]

57. Despite a slightly questionable choice of terms in the two paragraphs referred to, I do not think that the General Court expected the Member State to provide evidence concerning all of the areas set aside in order to meet the standard of proof required in a situation where there is serious and reasonable doubt as to the adequacy of the controls conducted. Like the Commission, I think that a reading of those paragraphs in the light of paragraphs 57 and 58 of the judgment under appeal provides a basis for an interpretation to the effect that the General Court wishes to emphasise that, where controls by sampling reveal irregularities, it is for the Member State to show that it was an isolated case and that it would not be correct to conclude that the national control system as a whole is weak or unreliable. Support for this interpretation may be found in paragraph 167 of the judgment under appeal, where the General Court concludes that 'the Kingdom of Denmark has not provided the most detailed and complete evidence in order to substantiate its controls or figures and, as the case may be, to show that the Commission's statements are inaccurate'.

58. As regards the timing of the control, I note that the General Court held that had the Kingdom of Denmark implemented corrective actions before the end of the set-aside period, as it was required to do, inter alia by conducting enhanced on-the-spot checks, it would have been able to establish, with a greater degree of certainty, the presence or absence of haystacks or construction waste on certain parcels, [34] especially, in my view, during the set-aside period.

59. The inspections carried out by the Commission after the set-aside period gave rise to a serious and reasonable doubt as to the adequacy of the controls conducted by the Kingdom of Denmark. Where such doubts exist, it is for the Member State concerned to adduce evidence in support of arguments aimed at dispelling those doubts. In the present case, however, the General Court correctly held that the Kingdom of Denmark had not adduced any evidence in support of its arguments aimed at dispelling those doubts. [35]

60. The General Court furthermore criticised the method used by the Danish authorities, which, in the event of irregularities being found, such as the storage of haystacks on a parcel, consisted in giving the aid applicant the benefit of the doubt by considering that those haystacks had not been stored on the parcel in question during the set-aside period. The General Court was of the view that such a method did not comply with the control rules which the Member States must implement in order to ensure the proper use of EU funds in accordance with the applicable EU law provisions applicable to the clearance of EAGGF accounts. It in fact increases the risk of misuse of those funds because, in the event of detection of a possible irregularity during belated controls, the Danish authorities presumed that it would not have been identified during the set-aside period of the parcels in question. [36]

61. As to the alleged distortion of the pleas in law relied on by the Kingdom of Denmark and of the facts, I reaffirm the point of view expressed in points 24 and 25 to 27 above.

62. For the reasons set out above, I consider that the General Court did not err in law in the application of the rules and principles relating to the burden and standard of proof. In consequence, I propose that the Court should dismiss the third ground of appeal as unfounded.

33 — Paragraphs 161 and 162 of the judgment under appeal (emphasis added).

34 — Paragraph 120 of the judgment under appeal.

35 — Paragraph 123 of the judgment under appeal.

36 — Paragraphs 121 and 122 of the judgment under appeal.

E – *The fourth and fifth grounds of appeal: the conditions of application of the flat-rate corrections and the conditions of application of flat-rate financial corrections of 5% and 10% respectively*

1. Arguments of the parties

63. In respect of the fourth ground of appeal the Kingdom of Denmark begins by submitting that the General Court was incorrect in stating in paragraph 155 of the judgment under appeal that the Kingdom of Denmark had not expressed any doubts as to the well-foundedness of the choice to apply a flat-rate correction.

64. Next, on the question whether the EAGGF was exposed to an actual risk of loss or irregularity, the Kingdom of Denmark relies on a fundamental principle in this area, namely that the rate of correction must bear a clear relation to the probable loss. As the General Court did not rule on the alleged irregularities concerning the storage of haystacks and construction waste, the points alleged and criticised by the Commission [37] cannot be regarded as constituting irregularities, and even less as having exposed the EAGGF to an actual risk of loss. The two anomalies referred to by the General Court to justify its decision to consider the contested decision as well-founded can hardly be categorised as an actual risk of loss. Thus, in reality the General Court completely distorted the original context and the basis of that decision, thereby substituting its basis for that of the Commission. That fact alone justifies the annulment of the contested decision.

65. Under the fifth ground of appeal concerning the conditions of application of flat-rate financial corrections of 5% and 10% respectively, the Kingdom of Denmark submits that the conditions of application of such flat-rate corrections are not met and that it proved that there was no actual risk of loss for the EAGGF. Moreover, in paragraph 158 of the judgment under appeal, the General Court gave an inaccurate account of the Kingdom of Denmark's allegations and of the facts of the case.

66. In the Kingdom of Denmark's submission, the General Court's approach, which consists in basing its dismissal of the Kingdom of Denmark's position entirely on the minimal irregularities in question and not ruling on the essential aspects on which the Commission based itself in order to take its decision, means that the conditions for applying flat-rate corrections of 5% and 10% respectively cannot be held to have been met.

67. The French Republic, the Republic of Finland and the Kingdom of Sweden dispute the right to apply flat-rate financial corrections in the present case, on the ground that the general conditions for their application are not met. They add that the actual application of the flat-rate financial corrections is disproportionate.

68. The Commission argues that since the Danish scheme did not in any way guarantee continuous maintenance, it did not comply with any of the requirements laid down in Article 19 of Regulation No 2316/1999. It was therefore necessary, in the general interest and in order to protect Community resources, to apply a flat-rate financial correction.

69. This is why a financial correction at the respective rates of 5% and 10% was applied for the years 2003, 2004 and 2005, due to weaknesses in the check of compliance with the requirements relating to the areas set aside.

70. In the present case, flat-rate financial corrections of 2%, 5% and 10% respectively, calculated on a very small part of the EAGGF funds distributed to Danish farmers by the Danish authorities in 2003, 2004 and 2005 were applied. The Commission contends that this application of flat-rate financial corrections is both legitimate and proportionate.

37 — Relating to green cover, the maintenance obligation, culling, damp lands, etc.

2. Assessment

71. It should be borne in mind at the outset that the General Court did not hold that there was an obligation to cut, but rather based its judgment on the conclusion that the Commission had legitimately based its findings on a serious and reasonable doubt as to whether the controls conducted were adequate, without the relevant Member State having adduced evidence in support of its arguments aimed at dispelling that doubt. That reasoning is based on the finding of irregularities which had not been detected in national inspections, including the presence of haystacks or construction waste on certain parcels, and on the application of an unsuitable method by the Danish authorities.

72. The General Court also applied that reasoning in respect of the application of flat-rate corrections and in setting the level of those corrections. Thus it concluded in paragraph 168 of the judgment under appeal that '[i]t follows from all the foregoing considerations that, firstly, the Commission has established to the requisite legal standard proof substantiating its serious and reasonable doubt regarding the key controls of the parcels set aside as conducted by the Kingdom of Denmark and, secondly, it concluded reasonably that the risk of loss for the EAGGF was significant and, therefore, without infringing the principle of proportionality, imposed a flat-rate correction of 5% or 10%'.

73. As I have stated earlier, in accordance with the Court's settled case-law, although it is for the Commission to prove that Community rules have been infringed, once that infringement has been established it is for the Member State to demonstrate, where necessary, that the Commission made an error as to the financial consequences to be attached to that infringement. [38] As rightly observed by the Commission, in accordance with Document No VI/5330/97 of 23 December 1997, [39] when it is not possible to evaluate precisely the losses suffered by the Community a flat-rate correction may be envisaged. [40]

74. I note in that regard that, in accordance with the Court's case-law, where, instead of disallowing all the expenditure affected by the infringement, the Commission has endeavoured to establish rules for treating irregularities differently, depending on the extent of the shortcomings in the controls and the degree of risk to the EAGGF, it is for the Member State to show that those criteria are arbitrary and unfair. [41]

75. It is clear that in the present case the Kingdom of Denmark has failed to establish that the maximum loss to which the EAGGF was exposed is less than the amount arrived at by applying the flat-rate financial correction, although it states repeatedly that the application of the flat-rate corrections was based solely on minor, isolated irregularities. In my view, that line of argument in reality calls into question the method of the controls by sampling in the context of the clearance of EAGGF accounts. However, in the absence of proof substantiating the controls carried out by the Member State or the figures presented by it and, where necessary, proof of the inaccuracy of the Commission's statements, or where there has been no attempt to make out such proof, the financial corrections applied must be regarded as an appropriate and proportionate means of compensating for the loss suffered by the EAGGF due to the weaknesses in the Danish control system.

38 — Judgments in *Greece* v *Commission*, C-5/03, EU:C:2005:426, paragraph 38 and the case-law cited, and *Belgium* v *Commission*, C-418/06 P, EU:C:2008:247, paragraph 135.

39 — Commission document entitled 'Guidelines regarding the calculation of the financial consequences on preparation of the decision for clearance of the EAGGF Guarantee accounts', referred to in paragraph 151 of the judgment under appeal.

40 — Judgments in *United Kingdom* v *Commission*, C-346/00, EU:C:2003:474, paragraph 53, and *Belgium* v *Commission*, EU:C:2008:247, paragraph 136.

41 — Judgments in *Netherlands* v *Commission*, C-28/94, EU:C:1999:191, paragraph 56; *Spain* v *Commission*, C-130/99, EU:C:2002:192, paragraph 44; *Italy* v *Commission*, C-242/96, EU:C:1998:452, paragraph 75; and *Belgium* v *Commission*, EU:C:2008:247, paragraph 138.

76. Even though the principle of proportionality was referred to by the Kingdom of Denmark only at the hearing, that principle must of course be observed when financial corrections are applied, so that they are restricted to what is actually necessary, given the seriousness of the infringements established. [42]

77. It is settled case-law that, so far as the amount of the financial correction is concerned, the Commission may refuse to charge to the EAGGF the whole of the expenditure in question if it finds that there are no adequate control procedures. [43] A fortiori, it is not possible to assert that the flat-rate corrections levied by the Commission due to serious shortcomings in the control mechanisms are disproportionate. The Commission is bound by the guidelines adopted by it and in this case followed them correctly, as observed by the General Court in the judgment under appeal. [44]

78. In the present case, the limited number of the samples — namely the parcels where irregularities were found on the basis of which conclusions were drawn as to the quality of the control systems and the magnitude of the irregularities — does not affect the significance of the infringement. The method of control by sampling follows the principle known as 'pars pro toto', according to which a conclusion as to the whole is drawn from the features of those parts considered to be representative. Nevertheless, the estimate of the quantitative scope of the irregularities concerning that whole must of course be based on an extrapolation derived from those samples and not an aggregate thereof.

79. Consequently, I propose that the Court should dismiss the fourth and fifth grounds of appeal.

V – **Conclusion**

80. In conclusion, I propose that the Court should:

— dismiss the appeal and order the Kingdom of Denmark to pay the costs; and

— order the intervening Member States to bear their own costs.

42 — See, in that regard, paragraph 148 of the judgment under appeal, where the General Court observes that 'it is settled law that the principle of proportionality requires that the measures adopted by Community institutions must not exceed what is appropriate and necessary for attaining the objective pursued': judgments in *Denkavit Nederland*, 15/83, EU:C:1984:183, paragraph 25, and *Air Inter* v *Commission*, T-260/94, EU:T:1997:89, paragraph 144.

43 — Judgment in *Spain* v *Commission*, C-349/97, EU:C:2003:251, paragraph 273.

44 — Paragraphs 152 to 158 of the judgment under appeal.