



Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 12 April 2018¹

Case C-4/17 P

Czech Republic
v

European Commission

(Appeal — EAGF — Exclusion of certain expenditure from EU financing — Expenditure incurred by the Czech Republic — Protection of vineyards against game and birds — Legal certainty — Protection of legitimate expectation — Fair hearing)

I. Introduction

1. The parties to this appeal have not made it easy for the Court of Justice. The Commission's conduct in the run-up to the dispute cannot, by any stretch of the imagination, be classed as sound administration. Nor, however, did the Czech Republic endeavour to clarify inconsistencies and doubts promptly, and it is still determined to profit from the Commission's errors. Moreover, the Czech Republic has almost failed to expound the arguments that are in fact successful in the final analysis.

2. The dispute concerns whether protection of vineyards from game and birds is a form of restructuring and conversion of vineyards and, in particular, an improvement to vineyard management techniques. Linked with this is the question of whether, if it considers that such a measure is not eligible, the Commission should object to it when a support programme is first submitted.

3. This dispute has arisen in connection with EU support for vineyards under Regulation No 479/2008.² That regulation provided that the Member States could only support specific, clearly defined measures and that planned support measures must be set out in a support programme. Those programmes were submitted to the Commission, which had three months within which to raise any objections.

II. Legal framework

4. The legal framework is somewhat complicated and the relevant provisions have been subject to continual amendment.

¹ Original language: German.

² Council Regulation (EC) No 479/2008 of 29 April 2008 on the common organisation of the market in wine, amending Regulations (EC) No 1493/1999, (EC) No 1782/2003, (EC) No 1290/2005, (EC) No 3/2008 and repealing Regulations (EEC) No 2392/86 and (EC) No 1493/1999 (OJ 2008 L 148, p. 1).

A. Support rules

5. Article 5 of Regulation No 479/2008 regulated the submission to the Commission of support programmes for vineyards:

‘1. Each producer Member State referred to in Annex II shall, for the first time by 30 June 2008, submit to the Commission a draft five-year support programme containing measures in accordance with this Chapter.

...

2. Support programmes shall become applicable three months after their submission to the Commission.

However, if the submitted support programme does not comply with the conditions laid down in this Chapter, the Commission shall inform the Member State thereof. In such case, the Member State shall submit a revised support programme to the Commission. The revised support programme shall become applicable two months after its notification unless an incompatibility persists in which case this subparagraph shall apply.

3. ...’

6. Article 7(1)(c) of Regulation No 479/2008 listed ‘restructuring and conversion of vineyards in accordance with Article 11’ as eligible measures. Article 11 defined those measures as follows:

‘1. The objective of measures relating to the restructuring and conversion of vineyards shall be to increase the competitiveness of wine producers.

2. ...

3. Support for the restructuring and conversion of vineyards may only cover one or more of the following activities:

- (a) varietal conversion, including by means of grafting-on;
- (b) relocation of vineyards;
- (c) improvements to vineyard management techniques.

The normal renewal of vineyards which have come to the end of their natural life shall not be supported.

4. ...’

7. Article 11(2) of the previous Regulation (EC) No 1493/1999³ also included the following rule on the objective of restructuring and conversion measures, which is, however, missing from Regulation No 479/2008:

‘The objective of the system shall be the adaptation of production to market demand.’

³ Council Regulation (EC) No 1493/1999 of 17 May 1999 on common organisation of the market in wine (OJ 1999 L 179, p. 1).

8. Commission Implementing Regulation (EU) No 202/2013⁴ introduced the following rule into Article 6 of Regulation (EC) No 555/2008:⁵

‘The following operations are not eligible:

...

(b) protection against damage by game, birds or hail;

...’

9. According to Article 114 of Regulation No 479/2008, the disputed support measure qualified as intervention to regulate agricultural markets as referred to in Article 3(1)(b) of Regulation (EC) No 1290/2005.⁶ That provision, which regulated certain expenditure under the European Agricultural Guarantee Fund (EAGF), can now be found in Article 4(1) of Regulation (EU) No 1306/2013.⁷

B. Control regulations

10. According to Article 52(1) of Regulation No 1306/2013 (formerly Article 31 of Regulation No 1290/2005), the Commission can retrospectively exclude certain expenditure from EU financing:

‘Where it finds that expenditure falling within the scope of Article 4(1) and Article 5 has not been effected in conformity with Union law ... the Commission shall adopt implementing acts determining the amounts to be excluded from Union financing. ...’

11. Article 11 of Regulation (EC) No 885/2006⁸ regulates the procedure that must be carried out before the Commission decides to exclude certain amounts:

‘1. When, as a result of any inquiry, the Commission considers that expenditure was not effected in compliance with Community rules, it shall communicate its findings to the Member State concerned and indicate the corrective measures needed to ensure future compliance with those rules.

The communication shall make reference to this Article. The Member State shall reply within two months of receipt of the communication and the Commission may modify its position in consequence. In justified cases, the Commission may agree to extend the period for reply.

After expiry of the period for reply, the Commission shall convene a bilateral meeting and both parties shall endeavour to come to an agreement as to the measures to be taken as well as to the evaluation of the gravity of the infringement and of the financial damage caused to the Community budget.

⁴ Commission Implementing Regulation of 8 March 2013 amending Regulation (EC) No 555/2008 as regards the submission of support programmes in the wine sector and trade with third countries (OJ 2013 L 67, p. 10).

⁵ Commission Regulation (EC) No 555/2008 of 27 June 2008 laying down detailed rules for implementing Council Regulation (EC) No 479/2008 on the common organisation of the market in wine as regards support programmes, trade with third countries, production potential and on controls in the wine sector (OJ 2008 L 170, p. 1).

⁶ Council Regulation (EC) No 1290/2005 of 21 June 2005 on the financing of the common agricultural policy (OJ 2005 L 209, p. 1).

⁷ Regulation (EU) No 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EEC) No 352/78, (EC) No 165/94, (EC) No 2799/98, (EC) No 814/2000, (EC) No 1290/2005 and (EC) No 485/2013 (OJ 2013 L 347, p. 549).

⁸ Commission Regulation (EC) No 885/2006 of 21 June 2006 laying down detailed rules for implementing 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), as amended under Commission Implementing Regulation (EU) No 375/2012 of 2 May 2012 amending Regulation (EC) No 885/2006 (OJ 2012 L 118, p. 4).

2. Within two months from the date of the reception of the minutes of the bilateral meeting referred to in the third subparagraph of paragraph 1, the Member State shall communicate any information requested during that meeting or any other information which it considers useful for the ongoing examination.

In justified cases, the Commission may, upon reasoned request of the Member State, authorise an extension of the period referred to in the first subparagraph. The request shall be addressed to the Commission before the expiry of that period.

After the expiry of the period referred to in the first subparagraph, the Commission shall formally communicate its conclusions to the Member State on the basis of the information received in the framework of the conformity clearance procedure. The communication shall evaluate the expenditure which the Commission envisages to exclude from Community financing under Article 31 of Regulation (EC) No 1290/2005 and shall make reference to Article 16(1) of this Regulation.

3. The Member State shall inform the Commission of the corrective measures it has undertaken to ensure compliance with Community rules and the effective date of their implementation.

The Commission, after having examined any report drawn up by the Conciliation Body in accordance with Chapter 3 of this Regulation, shall adopt, if necessary, one or more decisions under Article 31 of Regulation (EC) No 1290/2005 in order to exclude from Community financing expenditure affected by the non-compliance with Community rules until the Member State has effectively implemented the corrective measures.

...'

12. Articles 12 to 16 of Regulation No 885/2006 contain provisions governing the conciliation procedure to be followed by the Member State concerned and the Commission in order to find an agreed solution.

13. Regulation No 885/2006 was replaced with effect from 1 January 2015 by Commission Implementing Regulation (EU) No 908/2014,⁹ which contains similar rules.

III. Background to the dispute

14. According to the judgment of the General Court of 20 October 2016, *Czech Republic v Commission* (T-141/15, EU:T:2016:621, paragraphs 1 to 17, 'the judgment under appeal'), the background to the dispute is essentially as follows.

15. On 9 July 2008 the Czech Republic submitted a draft support programme for the 2009 to 2014 financial years to the Commission in accordance with Article 5(1) of Regulation No 479/2008. The measures listed in the draft programme included a measure to protect vineyards from game and birds involving either mechanical arrangements (for example fences around the vineyards) or various devices for frightening game and birds or, alternatively, active means of human intervention to drive them away.

⁹ Commission Implementing Regulation (EU) No 908/2014 of 6 August 2014 laying down rules for the application of Regulation (EU) No 1306/2013 of the European Parliament and of the Council with regard to paying agencies and other bodies, financial management, clearance of accounts, rules on checks, securities and transparency (OJ 2014 L 255, p. 59).

16. By letter dated 8 October 2008, the Commission objected to the aforementioned draft in accordance with Article 5(2) of Regulation No 479/2008. However, the Commission's objections did not concern the protective measures in question. The Czech Republic revised the draft in the light of the Commission's objections and sent the Commission a new draft on 12 February 2009. The second draft again included the protective measure in question, which had not been changed. The Commission did not raise any further objections by the two-month deadline, namely by 12 April 2009.

17. However, on 20 February 2009, the Commission sent the Czech Republic a communication in accordance with Article 11(1) of Regulation No 885/2006 concerning an audit carried out under reference VT/VI/2009/101/CZ to verify the compatibility of the measures by the Czech Republic to restructure and convert vineyards with the aid eligibility conditions in this sector in a previous wine year (2007/2008). That communication, in extract, reads as follows:

'This result shows, however, that the restructuring work was essentially confined to the protection of existing vineyards against animals without any other intervention. This approach raises a problem of conformity with respect to Article 11(2) of Regulation (EC) No 1493/1999, which provides that the objective of the system is the adaptation of production to market demand. In so far as restructuring in the Czech Republic was confined solely to protecting existing vineyards against animals, the expenditure is *prima facie* not eligible, as it is not related to the requirements of the legal provisions.'

18. By that same letter, the Commission explained that the Czech authorities 'should take all measures necessary to remedy the defects and lack of conformity'.

19. By letter of 22 September 2009, the Commission notified its intention to carry out an additional audit under reference VT/VI/2009/004/CZ. That investigation was related to the restructuring and conversion of vineyards in the Czech Republic in the 2008/2009 wine year.

20. In a communication of 22 March 2010 in accordance with Article 11(1) of Regulation No 885/2006, the Commission noted in particular in connection with the audit conducted under reference VT/VI/2009/004/CZ that:

'During the on-the-spot check the audit team expressed doubts as to whether active and passive protection against birds and wild animals was an eligible activity in connection with restructuring and conversion.'

21. In that same document, the Commission also advised the Czech Republic that 'active and passive protection against birds and wild animals cannot be regarded as a new measure by which vineyard management will be improved so as to adapt production to market demand'. Finally, the communication reiterates that 'Regulation No 1493/99 clearly states that the objective [of restructuring operations] is the adaptation of production to market demand'.

22. On 31 January 2011 the Commission sent the Czech Republic the minutes of a bilateral meeting on the two aforementioned audits held on 13 December 2010 between representatives of the Czech Republic and its own services in accordance with the third subparagraph of Article 11(1) of Regulation No 885/2006.

23. In those minutes, the Commission took the view that the expenditure incurred in the Czech Republic in connection with the protective measure in question was not eligible expenditure and asked the Czech Republic to refund the exact amount in expenditure notified for the 2008 to 2010 financial years. The Commission also referred in those minutes to the fact that the objective of vineyard restructuring and conversion measures under Regulation No 1493/1999 is to adapt production to market demand.

24. In addition, a reference to both the aforementioned audits appeared at the head of all the Commission's correspondence in this case from 31 January 2011.

25. On 3 December 2012 the Commission sent the Czech Republic a communication in accordance with the third subparagraph of Article 11(2) and Article 16(1) of Regulation No 885/2006. By that communication, the Commission reiterated and clarified its position that the forms of active and passive protection of vineyards provided for by the Czech Republic do not qualify as restructuring and conversion as referred to in Article 11 of Regulation No 1493/1999 and Article 11 of Regulation No 479/2008. In that regard, the Commission proposed a financial correction of CZK 52 347 157.43 and EUR 11 984 289.94 for the 2007 to 2010 financial years with Regulation No 1493/1999 applying for the 2007 and 2008 financial years and Regulation No 479/2008 applying for the remaining financial years.

26. Further to a request from the Czech Republic dated 17 January 2013, the conciliation body held a meeting on 19 June 2013 and published a final report on the conciliation procedure on 2 July 2013 under reference 13/CZ/552. In that report the conciliation body advised the Commission not to propose a financial correction for the expenditure in connection with the overall support programme for the period from 2009 to 2014 and to reconsider the proposed financial correction.

27. The Commission sent the Czech Republic its final opinion by letter dated 22 April 2014, following presentation of the Conciliation Body's report. In that opinion, the Commission repeated that, in its view, the protective measure in question could not be regarded as an eligible measure under the vineyard restructuring and conversion programme.

28. The Commission found in connection with the 2007 to 2009 financial years that, as the Commission had not objected to the draft support programme for the protective measure in question, the Czech Republic had rightly assumed that it was an eligible measure. However, the Commission took the view that, once it had received its letter of 22 March 2010, the Czech Republic could not have entertained any legitimate expectations on that count. For that reason, the Commission held that a financial correction was warranted for all expenditure incurred after 22 March 2010. It then proposed a financial correction totalling EUR 2 123 199.04 for the 2010 to 2012 financial years.

29. Finally, the Commission adopted, on the basis of Article 52 of Regulation No 1306/2013, Commission Implementing Decision (EU) 2015/103 of 16 January 2015 excluding from European Union financing certain expenditure incurred by the Member States under the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD) ('the contested implementing decision').¹⁰

30. By the contested implementing decision, the Commission excluded from the EAGF expenditure incurred by the Czech Republic totalling EUR 2 123 199.04 for the protective measure in question under the vineyard restructuring and conversion programme for the years 2010 to 2012.

31. By the judgment under appeal, the General Court dismissed the application by the Czech Republic for annulment of the contested implementing decision.

IV. Forms of order sought

32. The Czech Republic lodged this appeal against that judgment by pleadings dated 4 January 2017 and claims that the Court of Justice should:

(1) set aside the judgment under appeal;

¹⁰ OJ 2015 L 16, p. 33.

- (2) annul the contested implementing decision in so far as it excludes expenditure incurred by the Czech Republic in a total amount of EUR 2 123 199.04 from financing; and
 - (3) order the European Commission to pay the costs of the proceedings.
33. The European Commission contends that the Court of Justice should:
- (1) dismiss the appeal; and
 - (2) order the appellant to bear the costs.
34. The parties to the proceedings submitted written observations and presented oral argument at the hearing on 1 March 2018.

V. Legal assessment

35. The Czech Republic has raised three grounds of appeal. By its first ground of appeal it claims infringement by the judgment under appeal of Article 11 of Regulation No 479/2008; by its second ground of appeal it claims infringement of Article 5(2) of the regulation, in conjunction with the principles of legal certainty and protection of legitimate expectations; and by its third ground of appeal it claims procedural errors in the administrative procedure.

A. Admissibility and interpretation of the first ground of appeal

36. By its first ground of appeal, the Czech Republic addresses the findings of the General Court in paragraphs 83 to 90 that the disputed measures are incompatible with Article 11 of Regulation No 479/2008. Taken in isolation, this ground of appeal might appear to be inadmissible, as it does not refer to the assessment by the General Court of a corresponding plea in law.

37. That is because, on an appeal, the jurisdiction of the Court of Justice is confined to review of the findings of law at first instance. To allow a party to put forward for the first time before the Court of Justice a plea for or against the measure contested before the General Court which it has not raised before the General Court would be to authorise it to bring before the Court of Justice, whose jurisdiction on appeal is limited, a case of wider ambit than that which came before the General Court.¹¹

38. Nor, contrary to the contention of the Czech Republic, does the admissibility of this submission follow from the judgment in Cases C-231/11 P to C-233/11 P.¹² In those cases the ground of appeal that was new in relation to the submission at first instance was directed at findings made by the General Court in the exercise of its unlimited jurisdiction to review a sanction under competition law. The General Court had thus already extended the ambit of the dispute and, therefore, the objections in question were admissible in the appeal.

39. However, the Czech Republic argued in fact before the General Court, in connection with its complaint alleging infringement of the principle of legal certainty, that the disputed measures comply with the support rules laid down in Article 11 of Regulation No 479/2008.¹³

¹¹ Judgments of 1 June 1994, *Commission v Brazzelli Lualdi and Others* (C-136/92 P, EU:C:1994:211, paragraph 59); of 1 February 2007, *Sison v Council* (C-266/05 P, EU:C:2007:75, paragraph 95); and of 16 November 2017, *Ludwig-Bölkow-Systemtechnik v Commission* (C-250/16 P, EU:C:2017:871, paragraph 29). See also Article 170(1), second sentence, of the Rules of Procedure.

¹² Judgment of 10 April 2014, *Commission and Others v Siemens Österreich and Others* (C-231/11 P to C-233/11 P, EU:C:2014:256, paragraph 102).

¹³ Paragraph 63 of the application.

40. The General Court accordingly made the contested findings on Article 11 of Regulation No 479/2008 and relied on them in its judgment.

41. Although the Czech Republic also argued before the General Court that it did not intend to address the question of the compatibility of the disputed measure with Article 11 of Regulation No 479/2008, that argument is explained by the context, namely by the fact that it was essentially alleging infringement of Article 5(2) of the regulation. Indeed, in the same paragraph, the Czech Republic also reiterated that the measure is compatible with Article 11.¹⁴

42. The Czech Republic is therefore entitled in its appeal to contest these points of the judgment under appeal.

43. But that does not mean that the Czech Republic is entitled to use this argument in its appeal to attack directly the Commission's finding that the contested support measures are incompatible with Article 11 of Regulation No 479/2008, on which the contested implementing decision is based. That would constitute a new plea in law against that implementing decision, compared to the application at first instance. Yet an appeal cannot attack the contested decision; it can only attack the judgment under appeal.

44. In fact, objection to a judgment of the General Court can only take effect in relation to the legal assessment made by the General Court. The General Court made the contested findings on Article 11 of Regulation No 479/2008 in connection with the first plea in law, the subject matter of which was the same as that of the second ground of appeal, namely infringement of Article 5(2) of the regulation, in conjunction with the principles of legal certainty and protection of legitimate expectations.

45. So it makes sense to consider the first two grounds of appeal of the Czech Republic together and to examine the first ground of appeal in connection with the second part of the second ground of appeal.

B. First and second grounds of appeal

46. By its second ground of appeal, the Czech Republic claims infringement of Article 5(2) of Regulation No 479/2008 (see 1 below), in conjunction with the principles of legal certainty (see 2 below) and protection of legitimate expectations (see 3 below). The submissions on Article 11 must be considered as part of the second part of that ground of appeal on the principle of legal certainty.

1. First part of the second ground of appeal — Article 5(2) of Regulation No 479/2008.

47. The Czech Republic relies on the fact that the Commission did not raise any objections to the contested support measures following submission of the support programme in accordance with Article 5(2) of Regulation No 479/2008. The Commission therefore approved those measures and cannot refuse them after the event.

48. The General Court addresses this argument in paragraphs 29 to 67 of the judgment under appeal. It finds that the exclusion from financing is based on Article 52 of Regulation No 1306/2013 and that that decision does not conflict with Article 5(2) of Regulation No 479/2008. The fact that the Commission did not originally raise any objection cannot be understood to mean that the measure was approved or to substantiate an irrefutable presumption that the measure met the support rules.

49. That finding does not, in the final analysis, appear to contain an error in law.

¹⁴ Paragraph 10 of the reply before the General Court.

50. The Czech Republic submits that the power of the Commission to exclude measures from EU financing on the basis of Article 52 of Regulation No 1306/2013 *after the event* does not apply to measures subject to *ex ante* control as provided for in Article 5(2) of Regulation No 479/2008.

51. As the General Court explains in paragraphs 31 to 46 of the judgment under appeal, that opinion has no basis in the wording of the applicable rules. Neither is *ex post* control precluded by Article 5(2) or other provisions of Regulation No 479/2008, nor is the power conferred under Article 52 of Regulation No 1306/2013 limited in any way in relation to measures subject to *ex ante* control.

52. Although support programmes under Article 5(2) of Regulation No 479/2008 become applicable if the Commission does not raise objections in time, that does not mean, contrary to the contention of the Czech Republic, that *ex post* review of the allocation of measures to the objectives of the support rules is precluded.

53. On the contrary, according to Article 114 of Regulation No 479/2008, the disputed support measure qualifies as intervention to regulate agricultural markets as referred to in Article 3(1)(b) of Regulation No 1290/2005. That provision regulated certain expenditure under the EAGF and, when the Commission adopted the contested implementing decision, was to be found in Article 4(1) of Regulation No 1306/2013. Where such expenditure has not been incurred in conformity with EU law, the Commission adopts implementing acts in accordance with Article 52 of Regulation No 1306/2013 determining the amounts to be excluded from EU financing.

54. The overall context of those rules corroborates the interpretation of the General Court. It is settled case-law that the European Agricultural Funds only finance interventions within the framework of the common organisation of the agricultural markets that are carried out in accordance with EU legislation.¹⁵ Furthermore, the Commission rightly notes that, in accordance with Article 4(1) of Regulation No 479/2008, support programmes must comply with EU law.

55. Consequently, the Commission could not unilaterally ‘legalise’ expenditure that is incompatible with the rules on EU support adopted previously by the Council and now even by both the Council and the European Parliament. As the Commission rightly demonstrates, the General Court has thus previously actually upheld the exclusion from EU financing of measures which the Commission had previously expressly approved.¹⁶ That must apply a fortiori to support measures that, although subject to *ex ante* control by the Commission, already became applicable once the Commission had failed to raise any objections.

56. The practical problems of completing *ex ante* controls of at least potentially very comprehensive and complex support programmes in three or, for reviews, two months must also be taken into account here. Although the Czech Republic submits that the Czech programme was of very limited scope and clearly described the disputed support, it must nonetheless be assumed that other support programmes are much more comprehensive and complex. If support measures which flout the rules are ‘hidden’ in such programmes, failure on the part of the Commission to identify them immediately cannot mean that resources of the agricultural funds have to be disbursed contrary to the support rules.

¹⁵ Judgments of 7 February 1979, *Netherlands v Commission* (11/76, EU:C:1979:28, paragraph 8); of 10 November 1993, *Netherlands v Commission* (C-48/91, EU:C:1993:871, paragraph 14); of 6 March 2001, *Netherlands v Commission* (C-278/98, EU:C:2001:124, paragraph 38); of 24 February 2005, *Greece v Commission* (C-300/02, EU:C:2005:103, paragraph 32); and of 6 November 2014, *Netherlands v Commission* (C-610/13 P, not published, EU:C:2014:2349, paragraph 59).

¹⁶ Judgments of 30 September 2009, *Netherlands v Commission* (T-55/07, EU:T:2009:371, paragraph 97), and of 25 February 2015, *Poland v Commission* (T-257/13, EU:T:2015:111, paragraph 53), the latter implicitly upheld by judgment of 7 July 2016, *Poland v Commission* (C-210/15 P, not published, EU:C:2016:529, paragraph 43). See also *Ministru kabinetis* (C-120/17 (pending) (OJ 2017 C 168, p. 23)).

57. The Czech Republic raises the legitimate question of the point of *ex ante* control, if the Commission can nonetheless subsequently exclude from financing measures to which it did not originally object. But the answer seems clear: *ex ante* control of this type at least reduces the risk of supporting measures that do not comply with the support rules. Furthermore, as explained below,¹⁷ it may, under certain circumstances, establish a legitimate expectation.

58. Moreover, *ex ante* control makes the Commission accountable for the compatibility of support measures with the support rules. It would appear possible in theory at least to require the Commission to pay compensation for serious shortcomings in its *ex ante* control.

59. The first part of the second ground of appeal must therefore be dismissed, as failure by the Commission to raise objections to support measures in advance, in accordance with Article 5(2) of Regulation No 479/2008, does not preclude the exclusion of those measures after the event in accordance with Article 52 of Regulation No 1306/2013.

2. Second part of the second ground of appeal, in conjunction with the first ground of appeal — Legal certainty

60. By the second part of its second ground of appeal, the Czech Republic submits that the principle of legal certainty has been violated.

61. In so far as it again insists that failure on the part of the Commission to raise objections during its *ex ante* control brings about binding approval of the disputed measures, which cannot be called into question after the event, the above considerations on the first part of the second ground of appeal apply. *Ex ante* control has no such effect.

62. Nor does the fact that the Commission's communications are not binding change that, as it is the contested implementing decision, not the Commission's first letter, that excludes the measure from financing. The doubts and objections raised by the Commission before the event are simply warnings of the risk of such a decision. They do not infringe the requirement of legal certainty. On the contrary, this procedure is — in principle — an expression of the principle of sincere cooperation with the Member State (Article 4(3) TEU).

63. However, as with its first ground of appeal, the Czech Republic relies in the second part of its second ground of appeal on the fact that the disputed measures were in keeping with the support rules.

64. This submission is somewhat surprising in connection with the principle of legal certainty, which is usually argued where it is submitted that a legal position should be maintained, rather than as a separate argument against a decision such as the contested implementing decision. Ultimately, however, the aim here also is to maintain a position, namely that of the eligibility of the disputed measures.

¹⁷ See point 84 et seq. below.

65. The principle of legal certainty requires that rules enable those concerned to know precisely the extent of the obligations which are imposed on them, especially where they are liable to have financial consequences.¹⁸ Thus the Commission cannot rely, when making a correction at the time of the clearance of EAGF accounts, on an interpretation which departs from and is not dictated by the normal meaning of the words used.¹⁹ A fortiori, it cannot declare a measure to be incompatible with support rules when in fact it complies with the rules. Legal certainty obviously also means that one can rely on compliance with the law.

66. Consequently, the contested implementing decision is compatible with the principle of legal certainty if the excluded measures did not comply with the support rules. Conversely, it would be incompatible both with its legal basis and with the principle of legal certainty if the measures did in fact comply with the support rules.

67. This is, in a sense, the other side of the principles that preclude the argument of the Czech Republic as to the effects of the Commission's silence during the *ex ante* control procedure under Article 5(2) of Regulation No 479/2008. The facility on the part of the Commission to make a correction, that silence notwithstanding, exists to enforce compliance with the support rules.

68. In paragraph 83 of the judgment under appeal, the General Court finds that the wording of Article 11(3) of Regulation No 1493/1999 and Article 11(3) of Regulation No 479/2008 clearly does not cover measures, such as the protective measure in question, to protect vineyards from damage by animals or birds.

69. Contrary to the Commission's contention, that finding is not an *obiter dictum*, but a leading argument of the General Court. Without it, the Czech Republic would be able to complain of a defective statement of reasons, as the General Court would have failed to answer a relevant submission.

70. However, the finding of the General Court is vitiated by an error in law.

71. The Czech Republic rightly contends that, at least based on the wording, such protective measures may be improvements to vineyard management techniques within the meaning of Article 11(3)(c) of the applicable regulation. Where no such protective measures previously existed, their introduction undoubtedly improves vineyard management techniques.

72. The fact that the measures in question are classed as 'vineyard restructuring and conversion' does not change that. Although this classification could be understood to mean that the vineyards have to be converted structurally, first, measures to protect from damage by game and birds may be structural measures and, second, the category of improvements to vineyard management techniques within the meaning of Article 11(3)(c) in particular suggests a broader understanding that includes methodical changes, at least where their purpose is vineyard management.

73. At most, the exclusion of such protective measures from EU financing could be based on the objective of the type of support concerned.

74. In paragraph 89 of the judgment under appeal, the General Court finds in this regard that it is hard to see how the disputed measure would help to adapt production to market demand or to improve the competitiveness of wine producers.

¹⁸ Judgments of 15 December 1987, *Denmark v Commission* (348/85, EU:C:1987:552, paragraph 19), and of 21 June 2007, *ROM-projecten* (C-158/06, EU:C:2007:370, paragraphs 25 and 26).

¹⁹ Judgments of 27 January 1988, *Denmark v Commission* (349/85, EU:C:1988:34, paragraph 16); of 1 October 1998, *United Kingdom v Commission* (C-209/96, EU:C:1998:448, paragraph 35); of 1 October 1998, *France v Commission* (C-232/96, EU:C:1998:449, paragraph 37); of 1 October 1998, *Denmark v Commission* (C-233/96, EU:C:1998:450, paragraph 38); of 1 October 1998, *Ireland v Commission* (C-238/96, EU:C:1998:451, paragraph 81); and of 1 October 1998, *Italy v Commission* (C-242/96, EU:C:1998:452, paragraph 29).

75. Although this finding appears to make sense with regard to adaptation to market demand, even though that does not need to be decided in these proceedings, it is not convincing with regard to competitiveness.

76. As the Czech Republic rightly argues, reducing damage by game and birds improves the competitiveness of wine producers.

77. Adaptation to market demand was the objective of support under Article 11(2) of Regulation No 1493/1999, which applied prior to the disputed support. However, in Article 11(1) of Regulation No 479/2008, which applies here, the objective was worded in more general terms. It stated that measures to improve competitiveness are eligible.

78. Contrary to the Commission's contention, it does not follow from the recitals of Regulation No 479/2008 that the new rule is supposed to be identical in content to the old rule. On the contrary, recital 5 mentions a fundamental change intended in particular to improve the competitiveness of wine producers. There is no longer any mention of adaptation to market demand in connection with restructuring and conversion measures.

79. However, the Commission takes the view that vineyard restructuring or conversion measures should seek to bring about further qualitative improvements rather than maintain existing production structures.

80. Although this submission is convincing, it does not illustrate why this cannot be helped by measures to reduce damage by game and birds. Although the Commission notes in this regard that scarecrows and similar measures have been used for a long time, that does not mean that the support by the Czech Republic was not intended to improve practices used hitherto. That is corroborated, moreover, by the uncontested submission of the Czech Republic that production has almost tripled since the measure was introduced, which suggests that production methods have improved.

81. The Commission, in contrast, did not demonstrate, either in particular when the contested implementing decision was adopted or indeed during the judicial proceedings, that the particular measures supported only promoted the continuation of existing practices.

82. Even the Commission's submission that Article 14 of Regulation No 479/2008 allowed support for insurance policies covering damage by game and birds does not suggest otherwise; quite the contrary. It suggests that the legislature was in principle prepared to remedy such damage. Thus, it would appear to be unreasonable to exclude the disputed support measures from Article 11.

83. Thus the second part of the second ground of appeal must be upheld and the judgment under appeal must be set aside.

3. Third part of the second ground of appeal — Protection of legitimate expectations

84. In the light of the finding made above, the third part of the second ground of appeal is no longer relevant. However, I shall examine it in the alternative, in case the Court of Justice disagrees with my view, so that it would have to be assumed that the measures were not eligible for support.

85. By this submission the Czech Republic addresses the findings of the General Court on the protection of legitimate expectations in paragraphs 96 to 100 of the judgment under appeal.

86. The General Court notes in this regard, in paragraph 96, that the Commission did not give the Czech Republic any precise assurances. According to paragraph 97, there could not have been any such assurances, as silence during the *ex ante* control was not tantamount to a Commission decision on compatibility with support rules.

87. These findings of the General Court are based on settled case-law that everyone on whose part reasonable expectations have been promoted by the administration on account of precise assurances can rely on the principle of the protection of legitimate expectations.²⁰

88. However, when considered more closely in the light of Article 11 of Regulation No 479/2008, the Commission's failure to raise objections in the procedure under Article 5(2) comes very close to such an assurance.

89. Even if the Court of Justice disagrees with my interpretation of Article 11 of Regulation No 479/2008, it would at the very least not be totally unreasonable to assume, based on that provision, that the disputed support measures complied with the support rules. This is corroborated by Implementing Regulation No 202/2013 of 8 March 2013, as the Commission obviously considered it necessary to specify expressly, for the first time, that measures to prevent damage by game, birds or hail are not eligible.

90. In the light of these particular circumstances, the fact that no objections were raised during an *ex ante* control should, exceptionally, be construed not simply as silence on the question of eligibility but as approval of the support measures.

91. This interpretation is supported by the uncontested submission of the Czech Republic that the support programme was just eight pages long and clearly explained the disputed measure. Consequently, the Commission had ample opportunity to raise objections in time and to save everyone concerned the present judicial proceedings.

92. The other statements made by the Commission up to 3 December 2012 are seriously open to misunderstanding and, at the very least, allowed it to be assumed that the disputed measures were in fact compatible with the applicable support rules.

93. *First*, it is clear from its communication of 20 February 2009 that it already had doubts concerning the compatibility of the disputed support measures with the support rules when the support programme was submitted to it for review for the second time. Nonetheless, it did not raise any objections. It was therefore not unreasonable to assume that those doubts either had been dispelled when the deadline expired or only concerned previous support periods.

94. That is because, *second*, the aforementioned communication, the communication dated 22 March 2010 and the minutes dated 31 January 2011 were based entirely on the previous Regulation No 1493/1999. As discussed above,²¹ there are, however, marked differences between that regulation and Regulation No 479/2008 in terms of the objective of support.

95. The Commission refers to Regulation No 479/2008 for the first time in the communication of 3 December 2012. However, at that point, the disputed support had already been provided, as the Commission only excluded support in the years 2010 to 2012 from financing.

²⁰ See, for example, judgments of 16 December 1987, *Delauche v Commission* (111/86, EU:C:1987:562, paragraph 24); of 18 July 2007, *EAR v Karatzoglou* (C-213/06 P, EU:C:2007:453, paragraph 33); and of 9 November 2017, *LS Customs Services* (C-46/16, EU:C:2017:839, paragraph 35).

²¹ Points 74 to 77.

96. However, despite these serious deficiencies in communication on the part of the Commission, I consider that any expectation on the part of the Czech Republic as to the eligibility of the disputed measures ceased to be a legitimate expectation after the communication of 20 February 2009 at the latest.

97. There may well be occasions, if the law is unclear, when contradictory statements by the Commission give rise to legitimate expectation. However, Member States that spend EU funds are subject to enhanced duties of care. Thus even minor doubts as to the eligibility of certain measures should be clarified with the Commission. Such doubts existed after the Commission communication of 20 February 2009 at the latest.

98. The submission of the Czech Republic to the effect that the aforementioned communication is not binding does not change that. A legitimate expectation does not depend on binding effect. On the contrary, any information that gives rise to doubt is enough to preclude a legitimate expectation.

99. If the Court of Justice does address the third part of the second ground of appeal, it should dismiss it.

C. Third ground of appeal — Preliminary procedure of the contested implementing decision

100. By its third ground of appeal, which I shall also examine simply in the alternative, the Czech Republic challenges the findings of the General Court on the second plea in law at first instance. The ultimate issue here is that, although the Commission audited the 2007/2008 and 2008/2009 budget years and allowed the Czech Republic to comment on the results, the contested implementing decision reduced the expenditure recognised for 2010 to 2012. The Czech Republic submits that it was unable to comment adequately on that.

101. The General Court relied in paragraphs 110 to 114 of the judgment under appeal on the fact that the Court of Justice has already ruled that, where irregularities justifying the application of a financial correction persist after the date of the written communication of the results of the checks, the Commission is entitled and even obliged to take account of that situation when it determines the period to which the financial correction in question is to relate.²²

102. The General Court has given a lengthy statement of reasons, but it fails to highlight the key factor: in cases in which, because ineligible measures persist, the Commission extends a correction beyond the time frame of an audit, the Member State will in principle already have had sufficient opportunity during the audit to comment on the question of whether the measure complies with the support rules.

103. The Czech Republic rightly objects that the contested implementing decision not only extends the reduction in financing beyond the audit period but also covers, instead of the audited years, a completely different subsequent period. However, it wrongly deduces from this that the Commission acknowledged the lawfulness of the support measures in previous years and, therefore, that the opportunity to comment no longer sufficed.

104. On the contrary, it follows from the letter of 22 April 2014 that the Commission did in fact assume that the Czech Republic had a legitimate expectation in respect of the earlier period. However, the Commission abided by its opinion that the support measures did not comply with the support rules.

105. The Czech Republic's objection should therefore be rejected.

²² Judgment of 9 January 2003, *Greece v Commission* (C-157/00, EU:C:2003:5, paragraph 45).

106. The Czech Republic further objects that the General Court fails to recognise the fact that the legal basis for support has changed in the meantime. However, that legal basis was mentioned in the communication of 3 December 2012. The subsequent conciliation procedure afforded the Czech Republic ample opportunity to comment on the Commission's position.

107. The Czech Republic further submits that it only learned from the communication of 22 April 2014, following the conciliation body's report, that the Commission acknowledged in principle that it had a legitimate expectation as to the lawfulness of the support measures, but that this had lapsed again pursuant to the communication of 22 March 2010. The Czech Republic submits that it was unable to comment on that argument.

108. This argument is not convincing either. It follows in particular from the conciliation body's report²³ that the Czech Republic relied on the principle of the protection of legitimate expectations before the letter of 22 April 2014 and must therefore have considered which Commission communications could undermine that expectation. It could therefore have raised those questions with the Commission beforehand. At the very least, several months still remained following that communication from the Commission in which the Czech Republic could have reacted to the letter, before the Commission ultimately adopted the contested implementing decision.

109. Moreover, the first-time recognition of a legitimate expectation favours the Czech Republic. The Commission previously intended to exclude much larger sums from financing. However, an advantage based on the submission of the person favoured does not, as a rule, require further opportunity to comment.

110. In paragraph 115 of the judgment under appeal, the General Court further found that there was no need to comply with the procedural requirements of the second subparagraph of Article 11(3) of Regulation No 885/2006 for the purpose of extending the correction.

111. It should be noted in that regard that the procedural rules laid down in Regulation No 885/2006, on which the Czech Republic is relying, had ceased to apply when the contested implementing decision was adopted on 16 January 2015. The Commission had already repealed them with effect from 31 December 2014.²⁴ At the material time, similar rules were to be found in Article 34 of Commission Implementing Regulation No 908/2014.

112. However, those rules did not require the Commission to base reductions in financing on *ex post* inquiries any more than Article 11 of Regulation No 885/2006 did. Yet the specific procedures granting the opportunity to comment, the absence of which the Czech Republic complains of, depend on such *ex post* inquiries.

113. Thus, if the Court of Justice considers the third ground of appeal, it should be dismissed in its entirety.

VI. The application before the General Court

114. In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice, the latter may, where the decision of the General Court has been set aside, either itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

²³ Annex A.11 to the application before the General Court.

²⁴ Article 44(c) of Commission Delegated Regulation (EU) No 907/2014 of 11 March 2014 supplementing Regulation (EU) No 1306/2013 of the European Parliament and of the Council with regard to paying agencies and other bodies, financial management, clearance of accounts, securities and use of euro (OJ 2014 L 255, p. 18).

115. In the present case, the state of the proceedings permits the Court of Justice to give final judgment. For the reasons stated in points 63 to 83 above, the application should be allowed and the contested implementing decision should be annulled.

VII. Costs

116. Under Article 184(2) of the Rules of Procedure, where the appeal is well founded and the Court of Justice itself gives final judgment in the case, the Court of Justice is to make a decision as to the costs. Under Article 138(1) of those rules, which applies to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

117. As the Czech Republic has been successful and applied for costs, the Commission must be ordered to pay the costs.

VIII. Conclusion

118. Accordingly, the Court of Justice should in my opinion:

- (1) Set aside the judgment of 20 October 2016, *Czech Republic v Commission* (T-141/15, EU:T:2016:621);
- (2) Annul Commission Implementing Decision (EU) 2015/103 of 16 January 2015 excluding from European Union financing certain expenditure incurred by the Member States under the European Agricultural Guarantee Fund (EAGF) and under the European Agricultural Fund for Rural Development (EAFRD), in so far as it excludes expenditure incurred by the Czech Republic totalling EUR 2 123 199.04;
- (3) Order the European Commission to pay the costs.