Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 4 October 2018 [1]

Case C-587/17 P

Kingdom of Belgium
v

European Commission

(Appeal — Common agricultural policy — Regulation (EC) No 1290/2005 — Financing of the common agricultural policy — European Agricultural Guarantee Fund (EAGF) — Articles 9 and 32 — Obligations of Member States — Expenses excluded from financing by the European Union — Restitution of unduly paid export refunds — Need to exhaust all domestic remedies — No request for a preliminary ruling — Negligence attributable to a Member State — Criteria of assessment)

1. By its appeal, the Kingdom of Belgium asks the Court to set aside the judgment of 20 July 2017, *Belgium* v *Commission*,[2] by which the General Court dismissed its action for annulment of Commission Implementing Decision (EU) 2016/417[3] in so far as it excluded the Kingdom of Belgium from financing by the European Agricultural Guarantee Fund ('EAGF') of a sum of EUR 9 601 619.

2. The present appeal gives the Court an opportunity to clarify the extent of the obligation of Member States to recover unduly paid sums in the context of the EAGF. More specifically, the Court must decide whether the General Court was right to hold that, in the circumstances of the case at hand, a decision taken by the competent Belgian authorities not to exhaust all domestic remedies in attempting to recover unduly paid export refunds constitutes negligence attributable to the Kingdom of Belgium within the meaning of Article 32(8)(a) of Council Regulation (EC) No 1290/2005.[4]

I. Legal framework

3. Regulation No 1290/2005 lays down the framework for the financing of the common agricultural policy.

4. According to recital 25 of the regulation, measures should be taken by Member States to ensure that transactions are actually carried out and are executed correctly. Member States should also prevent and deal effectively with any irregularities committed by beneficiaries.

1 Original language: English.

2 T-287/16, not published, EU:T:2017:531 ('the judgment under appeal').

3 Decision of 17 March 2016 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) (OJ 2016 L 75, p. 16, 'the decision at issue').

4 Regulation of 21 June 2005 on the financing of the common agricultural policy (OJ 2005 L 209, p. 1). That regulation is no longer in force. It was replaced by 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 485/2008 (OJ 2013 L 347, p. 549, and corrigendum OJ 2016 L 130, p. 6).

5. Recital 26 states that in certain cases of negligence on the part of the Member State, it is justified to charge the full sum to the Member State concerned. The same recital clarifies however that subject to Member States complying with obligations under their internal procedures, the financial burden should be divided fairly between the European Union and the Member State concerned.

6. According to recital 27, recovery procedures can delay the recovery of unduly paid sums further, with no guarantee that the outcome will be successful. The cost of implementing such procedures may also be out of proportion to the amounts which are or may be collected.

7. Article 3 of Regulation No 1290/2005 states inter alia:

'1. The EAGF shall finance in a context of shared management between the Member States and the [European Union] the following expenditure, which shall be effected in accordance with [EU] law:

(a) refunds for the exportation of agricultural products to third countries;

…'

8. Article 9 of Regulation No 1290/2005 provides:

1. Member States shall:

(a) within the framework of the common agricultural policy, adopt all legislative, regulatory and administrative provisions and take any other measures necessary to ensure effective protection of the financial interests of the [European Union], and particularly in order to:

(i) check the genuineness and compliance of operations financed by the EAGF and the EAFRD;

(ii) prevent and pursue irregularities;

(iii) recover sums lost as a result of irregularities or negligence.

…'

9. Article 31(1) of the regulation states:

'If the Commission finds that expenditure as indicated in Article 3(1) and Article 4 has been incurred in a way that has infringed [EU] rules, it shall decide what amounts are to be excluded from [EU] financing in accordance with the procedure referred to in Article 41(3).'

10. Article 32 of Regulation No 1290/2005 reads:

'…

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

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

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

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

…

6. If there is justification for doing so, Member States may decide not to pursue recovery. A decision to this effect may be taken only in the following cases:

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

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

…

8. Following completion of the procedure laid down in Article 31(3), the Commission may decide to exclude from financing sums charged to the [EU] budget in the following cases:

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

…'

II. Background to the proceedings

A. The fraudulently obtained export refunds (1992 to 1993)

11. In 1992, Générale Sucrière, the rights of which were later taken over by Saint-Louis Sucre by way of succession, sold a total of 24 000 tonnes of sugar to Metelmann and Sucre Export. According to the sales contracts, the sugar was to be exported from the European Union.

12. Metelmann and Sucre Export resold 6 000 tonnes of the sugar to Proud Trading and Shawline Offshore by way of two intermediaries. Those contracts also provided that the sugar was destined for a third country outside the (what is now) European Union, and that it was to be shipped from the territory of the European Union without delay upon its loading.

13. Saint-Louis Sucre commissioned Belgian Bunkering, on the one hand, and Stevedoring et Manufert ('Manuport Services'), on the other, to draw up the relevant documentation and to receive and load the sugar onto ships.

14. The sugar, which was to be shipped from the port of Antwerp (Belgium) to Uzbekistan, was loaded between 20 January and 29 March 1993.

15. Manuport Services drew up and transmitted the relevant documents and export declarations to the competent authority, that is, the Bureau d'intervention et de restitution belge (the Belgian Intervention and Refund Bureau; 'BIRB'). On the basis of the documentation, BIRB made an advance payment to Saint-Louis Sucre relating to the export refund that Saint-Louis Sucre was entitled to. The payment was made final when proof had been adduced by Saint-Louis Sucre that the sugar had left the territory of the (what is now) European Union Customs Union.

16. After the payment had been made, it was discovered that the 6 000 tonnes of the sugar resold by Metelmann and Sucre Export to Proud Trading and Shawline Offshore had, after being shipped from the port of Antwerp, been diverted from its initial destination and had been re-imported fraudulently to the European Union on the basis of false documents. Saint-Louis Sucre spontaneously informed BIRB of the discovery.

B. The criminal proceedings (1994 to 2004)

17. After the re-importation of the sugar was discovered, criminal proceedings were brought against the two individuals that had acted as intermediaries between Metelmann and Sucre Export, on the one hand, and Shawline Offshore and Proud Trading, on the other.

18. By judgment of 22 October 2003 of the Hof van Beroep Antwerpen (Antwerp Court of Appeal, Belgium), the two individuals were convicted of fraud, the drawing up of false documents and the use of false documents.

19. In those proceedings, BIRB, Saint-Louis Sucre, Metelmann, Sucre Export and Manuport Services lodged a civil claim and were granted a provisional amount of 1 cent by way of compensation for the damage caused by the two individuals.

C. The civil recovery procedure (1994 to 1997 and 1997 to 2012)

20. On 16 March 1994, after having been informed of the fraudulent export, BIRB demanded that Saint-Louis Sucre reimburse the payment of the export refund. According to BIRB, Saint-Louis Sucre had re-imported the sugar, which had previously been declared and proved exported by certain documents (form T5), by way of false documents (form T2E).

21. Saint-Louis Sucre contested the claim contending that it did not bear any responsibility for the irregularity.

22. Nevertheless, Saint-Louis Sucre agreed to make a provisional payment of the amount claimed by BIRB in order to stop the interest from running. The amount paid corresponded to the amount demanded by BIRB with interest for the period 19 April 1994 to 16 May 1997.

23. After having received the payment by Saint-Louis Sucre, the Kingdom of Belgium paid an amount corresponding to 80% of the amount received from Saint Louis Sucre to the EAGF and withheld the remaining 20% of the amount in accordance with Council Regulation (EEC) No 595/91.[5]

24. On 18 June 1997, Saint-Louis Sucre brought proceedings before the tribunal de première instance de Bruxelles (District Court, Brussels, Belgium) in order to recover the amount paid to BIRB as well as interest and costs.

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

25. By judgment on 20 March 2008, that court ordered BIRB to repay the requested amount to Saint-Louis Sucre.

26. BIRB brought an appeal before the cour d'appel de Bruxelles (the Court of Appeal, of Brussels, Belgium). BIRB asked that court to refer three questions to the Court of Justice of the European Union for a preliminary ruling. In its judgment of 3 May 2012, the cour d'appel de Bruxelles, however, upheld the judgment of the tribunal de première instance de Bruxelles and ordered BIRB to pay Saint-Louis Sucre an amount of EUR 10 114 003.39, corresponding to a sum of EUR 5 133 087.54 with interest from 1 June 1997 and various other costs. That court did not consider it necessary to refer any questions to the Court for a preliminary ruling.

27. After the judgment by the cour d'appel de Bruxelles, BIRB requested the opinion of a lawyer authorised to act before the Cour de cassation (Court of Cassation, Belgium), since, under Belgian law, a party is not allowed to bring an appeal before the Cour de cassation unless it has first obtained such an opinion.

28. After an in-depth analysis of the file and of the case-law of the Court, the lawyer authorised to act before the Cour de cassation gave her opinion, concluding that it would not be possible for BIRB to successfully bring an appeal before the Cour de cassation.

29. After having obtained that opinion, BIRB decided not to bring an appeal against the judgment rendered by the cour d'appel de Bruxelles. Consequently, BIRB paid the amount it had been ordered to pay to Saint-Louis Sucre.

D. The amount incurred by the EAGF (2012 to 2016)

30. Following the judgment of the cour d'appel de Bruxelles, BIRB informed the Commission of its intention to charge the amount it was liable to pay Saint-Louis Sucre to the EAGF and subsequently proceeded to do so. As a consequence, BIRB's annual report of 2012 included a positive correction of EUR 9 601 619.85.

31. The amount was accounted for by the European Union in the financial year of 2012 and consequently paid to the Kingdom of Belgium. [6]

E. The administrative procedure before the Commission (2013 to 2016)

32. After that payment the Commission initiated a so-called conformity clearance procedure, a procedure that allows the Commission to verify whether a Member State has made correct use of the funds placed at its disposal. [7] The Commission considered that the amount could not be charged to the EAGF on two grounds: first, all possible remedies had not been exhausted since no appeal had been lodged before the Cour de cassation, and second, the Commission contested the charging of interest after the year 1997.

6 Commission Implementing Decision C(2016)1543 final of 17 March 2016 on the clearance of the accounts of certain paying agencies in Belgium and Germany as regards expenditure financed by the European Agricultural Guarantee Fund (EAGF) for the 2012 financial year.

7 Reference CEB/2013/003BE.

33. By letter of 23 May 2013, BIRB contested that assessment on the basis of Article 32(5), fourth subparagraph, of Regulation No 1290/2005. It also pointed out, on the one hand, that an appeal before the Cour de cassation would not have necessarily and automatically resulted in a request for a preliminary ruling under Article 267 TFEU and, on the other hand, that given the role of the lawyer authorised to act before the Cour de cassation, it had no choice in taking the decision not to bring an appeal.

34. Because of persisting disagreement between BIRB and the Commission, a bilateral meeting was held between the parties on 13 October 2014.

35. Following that meeting, the Kingdom of Belgium provided, by letters of 17 October 2014 and 21 January 2015, further information regarding the exportation and the various procedures regarding the fraudulent exports of the sugar.

36. In a communication of 12 June 2015 based on Articles 10 and 11 of Commission Regulation (EC) No 885/2006,[8] the Commission maintained its position that not all national remedies had been exhausted in order to recover the amount. The communication indicated that BIRB was not, in accordance with Article 32(8)(a) of Regulation No 1290/2005, entitled to charge the funds from the EAGF. Therefore, an amount of EUR 9 601 619 would be excluded from financing by the European Union.

37. On the basis of a summary report of 22 February 2016, the Commission adopted the decision at issue which excluded the above amount from financing by the European Union, in respect of the Kingdom of Belgium. The Kingdom of Belgium was notified of the decision on 18 March 2016.

III. Procedure before the General Court

38. By application lodged at the Registry of the General Court on 30 May 2016, the Kingdom of Belgium requested the annulment of the decision at issue.

39. In the judgment under appeal, the General Court dismissed the action in its entirety.

IV. Procedure before the Court and forms of order sought

40. By its appeal, the Kingdom of Belgium asks the Court to:

– set aside the judgment under appeal in its entirety;

– annul the decision at issue, in so far it excluded from financing by the European Union an amount of EUR 9 601 619 (budgetary post 6701);

– order the Commission to pay the costs of these proceedings and of the proceedings before the General Court.

41. The Commission contends that the Court should dismiss the appeal and order the appellant to pay the costs.

42. A hearing was held on 27 June 2018 at which both parties presented oral argument.

8 Regulation of 21 June 2006 laying down detailed rules for the application of Regulation No 1290/2005 (OJ 2006 L 171, p. 90).

V. Analysis

43. In its appeal, the Kingdom of Belgium puts forward a single ground of appeal by which it contends that the General Court misinterpreted Article 32(8)(a) of Regulation No 1290/2005 in the judgment under appeal.

44. On the one hand, by the first part of the single ground of appeal, the Kingdom of Belgium argues that the General Court erred in concluding that the Belgian authorities had not exhausted all domestic remedies since it had not lodged an appeal before the Cour de cassation.[9] In the appellant's view, the General Court should have taken into account the case-law of the European Court of Human Rights ('ECtHR') in determining whether all domestic remedies had been exhausted.

45. On the other hand, by the second part of the single ground of appeal, the Kingdom of Belgium maintains that the General Court erred in considering that the Kingdom of Belgium had been negligent in recovering the sums in question since it had not brought an appeal before the Cour de cassation.[10]

46. The Commission takes the view that the first part of the ground of appeal is inadmissible since it concerns an issue not raised before the General Court. In any event, according to the Commission both parts of the single ground of appeal are unfounded.

47. Before addressing the single ground of appeal put forward in this appeal, I will briefly explain the (legal) context of this case.

A. Introduction: the role of the Member States in the system set up by Regulation No 1290/2005 and the present case

48. Two agricultural funds, the EAGF and the EAFRD, were established by dint of Regulation No 1290/2005 to replace the European Agricultural Guidance and Guarantee Fund ('EAGGF'), the instrument by which the CAP was initially financed.[11] The EAGF and EAFRD are financed by the EU budget and, just as their predecessor, are used to finance the CAP in general and rural development in particular.[12]

49. More specifically, the EAGF was put in place to finance, among other things, refunds for the exportation of agricultural products to third countries (such as the sugar in the present case).[13] The EAGF is managed jointly by the EU and the Member States, though the Member States have, in that regard, a particularly crucial role to play. They are responsible for making payments, charging levies and recovering undue payments within the framework of the EAGF. Those executive tasks are carried out autonomously by the Member States.

50. Given their crucial role in the system set up by Regulation No 1290/2005, Member States are under the express obligation, laid down in that regulation, to protect the financial interests of the European Union.[14] In accordance with Article 9(1)(a) of the regulation, Member States are to adopt all legislative, regulatory and administrative provisions and take any other measures necessary to ensure effective protection of the financial interests of the European Union.

9 Paragraph 56 of the judgment under appeal.

10 Paragraphs 55 to 57 and 62 of the judgment under appeal.

11 Regulation No 25 on the financing of the common agricultural policy (OJ, English Special Edition 1959-1962(I), p. 126).

12 Recitals 1 and 2 of Regulation No 1290/2005.

13 Article 3(1)(a) of Regulation No 1290/2005.

14 See, in particular, recital 25 of Regulation No 1290/2005.

51. In addition to that general obligation laid down in Article 9(1), Regulation No 1290/2005 also provides for specific mechanisms that aim to encourage timely and efficient recovery of unduly paid sums under the EAGF. Significantly, Article 32(5) of the regulation introduced a mechanism that allows the equal distribution (50/50) of the financial burden of non-recovery between the EU budget and the Member State concerned where recovery has not taken place within four years of the primary administrative or judicial finding, or within eight years where recovery action is taken in the national courts. Moreover, on the basis of Article 32(8), the Commission may decide, where appropriate, to exclude certain refunds from the financing of the EU budget in accordance with Article 32(8) of Regulation No 1290/2005. That is, for example, the case where the Commission considers that a Member State, or its authorities, has been negligent in attempting to recover sums lost due to irregularities.

52. The need for those mechanisms can be explained by inter-related factors pertaining to the logic of the financing system set up by Regulation No 1290/2005.

53. In fact, it should not be forgotten that payments made within the framework of the EAGF by the Member States in accordance with the relevant EU legislation are, as a rule, reimbursed by the EU budget. The mechanisms referred to above thus constitute exceptions to the general rule of EU financing of expenditure incurred by Member States in the context of the CAP. As has been observed, given that Member States act on behalf of the European Union, it is appropriate that the European Union should in principle bear losses caused by the conduct of individuals where the Member States have done all in their power to ensure that transactions financed by the CAP are actually carried out and are executed correctly to prevent and deal with irregularities and to recover sums lost.[15] However, to ensure that inaction is not encouraged, those mechanisms form part of measures which ensure that Member States take appropriate action to fight fraud, a frequently occurring problem in the context of agricultural subsidies, and make a full attempt to recover unduly paid sums.[16]

54. In the decision at issue, the Commission had recourse to Article 32(8) of Regulation No 1290/2005 in order to exclude the sums in question from financing by the European Union, a decision confirmed by the General Court in the judgment under appeal. Thus, in the present proceedings, the Court must determine whether the General Court was correct in holding, on the one hand, that by not bringing an appeal against the judgment of 3 May 2012 (by which (i) the judgment delivered at first instance against BIRB was confirmed and (ii) a request by BIRB to make an order for reference to the Court regarding the interpretation of Commission Regulation (EEC) No 3665/87[17] was refused) before the Cour de cassation, the Kingdom of Belgium did not take all the measures at its disposal and thus failed to act with sufficient diligence in recovering the sums in question and, on the other hand, that the absence of recovery was therefore caused by negligence attributable to that Member State.[18]

55. In that regard, it can be seen from the case file that in order to bring an appeal before the Cour de cassation, an appellant must first request an opinion from a lawyer authorised to act before that court. The lawyer will then assess the possibility of bringing an appeal before the Cour de cassation on points of law.

15 See for a discussion on the scope of Article 8(2) of Regulation (EEC) No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy (OJ, English Special Edition 1970(I), p. 218), a predecessor to Article 32(8)(a) of Regulation No 1290/2005, Opinion of Advocate General Capotorti in *Netherlands v Commission*, 11/76, EU:C:1978:220, p. 290 et seq.

16 On fraud in this sector and sub-optimal rates of recovery, see Court of Auditors Special Report No 3/2004 on recovery of irregular payments under the Common Agricultural Policy together with the Commission's replies (OJ 2004 C 269, p. 1), in particular pp. 4 to 9; and Court of Auditors Opinion No 1/2005 on the proposal for a Council Regulation on the financing of the common agricultural policy (COM(2004) 489 final of 14 July 2004) (OJ 2005 C 121, p. 1), pp. 6 and 7.

17 Regulation of 27 November 1987 laying down common detailed rules for the application of the system of export refunds on agricultural products (OJ 1987 L 351, p. 1).

18 Paragraph 62 of the judgment under appeal.

56. In this case, after the judgment of 3 May 2012 was delivered, BIRB requested an opinion from a lawyer authorised to act before the Cour de cassation. After examining the file, the lawyer consulted by BIRB considered that it was not possible to criticise, with an appreciable chance of success, the judgment of 3 May 2012. Following that advice, BIRB did not bring an appeal before the Cour de cassation.

57. Bearing those specific factual circumstances in mind, the appeal brought by the Kingdom of Belgium essentially raises the question whether the decision not to appeal alone can amount to negligence attributable to the Member State concerned. More specifically: how far is a Member State to go in order to recover lost sums?

58. In this appeal, the Court will therefore have to determine the parameters on the basis of which it must be assessed whether a Member State has acted negligently in the context of recovering sums lost due to irregularities. Indeed, to protect adequately the financial interests of the European Union, an appropriate balance must be struck between, on the one hand, the requirement to take all necessary measures to recover lost funds and, on the other, the need to avoid that Member States take unnecessary and costly actions. [19]

B. The first part of the single ground of appeal: the relevance of the case-law of the ECtHR regarding admissibility

1. Arguments of the parties

59. By the first part of its single ground of appeal, the Kingdom of Belgium claims that the General Court erred in law because it failed to apply the case-law of the ECtHR in assessing whether the Belgian authorities had been negligent by not exhausting all possible domestic remedies. [20]

60. In particular, the Kingdom of Belgium maintains that the ECtHR has recognised in its case-law the specific and mandatory role of the lawyer authorised to act before the Cour de cassation: according to that case-law, an applicant may be considered to have done all in his power to exhaust all domestic remedies even in circumstances where that applicant had not lodged an appeal, when to do so would have been contrary to the negative opinion of the lawyer authorised to act before the Cour de cassation.

61. The Commission argues that the first part of the single ground of appeal is inadmissible, because the argument concerning the case-law of the ECtHR had not been raised before the General Court. In any event, the Commission is of the view that the first part of the single ground of appeal is unfounded since, in essence, the case-law of the ECtHR is of no relevance in this context.

62. I will begin by addressing briefly the admissibility issue raised by the Commission before examining the substance of the first part of the single ground of appeal.

19 See recitals 25 to 27 of Regulation No 1290/2005.

20 Paragraph 56 of the judgment under appeal.

2. Assessment

63. In the judgment under appeal, the General Court found that it was unusual, yet possible, for an appellant to bring an appeal before the Cour de cassation, notwithstanding the negative opinion of the lawyer authorised to act before that court. The General Court concluded on that basis that the Belgian authorities had not exhausted all domestic remedies and that as a result, it had not acted with sufficient diligence. [21]

(a) Admissibility: new arguments may be put forward as long as the subject matter of the dispute remains the same

64. As regards the admissibility of the first part of the single ground of appeal, it should be recalled at the outset that new pleas are generally not permissible on appeal. [22]

65. Before the General Court, the Kingdom of Belgium argued that it had exhausted all *possible* domestic remedies. Before that court, that Member State explained at length why, on the one hand, an appeal before the Cour de cassation could not be regarded as a third degree of (substantive) jurisdiction and, on the other hand, why it was practically impossible to bring a successful appeal before that court where the lawyer consulted had given a negative opinion on the chances of successfully bringing an appeal before the Cour de cassation. The Kingdom of Belgium did not, however, specifically argue that the General Court should have applied the case-law of the ECtHR for the purposes of establishing that it had exhausted all possible domestic remedies and that it had not been negligent in recovering the lost sums.

66. It is therefore true, as the Commission points out, that the relevance of the case-law of the ECtHR on interpreting Article 32(8)(a) of Regulation No 1290/2005 was not discussed at first instance.

67. However, the Court does not apply a strict standard as concerns the admissibility of new arguments. Rather, what matters is that the subject matter of the proceedings at first instance is not changed on appeal.

68. More specifically, as the Court has held, it follows from Article 58 of the Statute of the Court of Justice, read in conjunction with Article 113(2) of the Rules of Procedure of the Court of Justice, that, on appeal, an appellant may bring forward *any relevant argument*, provided only that the subject matter of the proceedings before the General Court is not changed in the appeal. [23]

69. Contrary to what is implied by the Commission's argument of inadmissibility, there is no requirement that each argument put forward on appeal must previously have been discussed at first instance. Instead, the Court has emphasised in that regard that such a restriction regarding the arguments that an appellant may put forward on appeal cannot be accepted. That is because the appeal procedure would otherwise be deprived of a significant part of its purpose. [24]

70. The first part of the single ground of appeal does not change the subject matter of the proceedings before the General Court. Rather, the argument regarding the relevance of the case-law of the ECtHR seeks to contest the manner in which the General Court interpreted and applied Article 32(8)(a) of Regulation No 1290/2005.

21 Paragraph 56 of the judgment under appeal.

22 Article 127(1) of the Rules of Procedure of the Court provides that new pleas in law may not be introduced in the course of proceedings unless those pleas are based on matters of law or of fact which come to light in the course of the procedure. See also judgment of 21 September 2010, *Sweden and Others v API and Commission*, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraph 126 and the case-law cited.

23 Judgment of 18 January 2007, *PKK and KNK v Council*, C-229/05 P, EU:C:2007:32, paragraph 66.

24 Idem.

71. Thus, the Commission's argument concerning the inadmissibility of the first part of the single ground of appeal should be rejected.

(b) Substance: the case-law of the ECtHR regarding admissibility is not relevant in the context of the present case

72. The case-law of the ECtHR to which the Kingdom of Belgium refers concerns the admissibility of cases brought before the ECtHR. In accordance with Article 35(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR'), the ECtHR may only deal with a case provided that the applicant has exhausted all (ordinary) domestic remedies first.[25]

73. It is of course true that, as pointed out by the Kingdom of Belgium, fundamental rights, as guaranteed by the ECHR, constitute general principles of EU law.[26] It is equally true that, in accordance with Article 52(3) of the Charter of Fundamental Rights of the European Union ('the Charter'), rights contained in the Charter that correspond to rights guaranteed by the ECHR are to have the same meaning and scope as those laid down by that convention. Accordingly, where relevant, the case-law of the ECtHR must be taken into account in interpreting provisions of EU law, and in particular, the corresponding provisions of the Charter.

74. Nevertheless, as already indicated, the case-law mentioned by the Kingdom of Belgium does not relate to rights contained in the Charter, or, more broadly to the protection of the rights and freedoms laid down in the ECHR: it relates to the requirement that an applicant must have exhausted all domestic remedies before bringing the case to the ECtHR.

75. That requirement has nothing to do with the requirement set out in Article 9(1)(a) of Regulation No 1290/2005 that Member States are to take all necessary measures to ensure recovery of sums lost due to irregularities. Nor does that requirement have anything to do with how the concept of negligence ought to be construed for the purposes of interpreting Article 32(8)(a) of Regulation No 1290/2005.

76. The requirement that an applicant must have exhausted all domestic remedies aims to ensure that domestic jurisdiction can remedy any violation before the case is brought before the ECtHR.[27] By contrast, the requirement of taking all necessary measures to recover lost sums aims to ensure that EU funds are adequately protected and no undue payments are made.

77. Therefore, it is difficult to accept that the General Court could be taken to have erred in law by not having regard to the case-law of the ECtHR in interpreting Article 32(8)(a) of Regulation No 1290/2005, a provision essentially seeking to protect the financial interests of the European Union.

78. What is more, even assuming that Article 32(8)(a) of Regulation No 1290/2005 ought to be interpreted in the light of that case-law, the guidance that could be inferred therefrom is limited.

25 For the rationale of that rule, see for example judgment of the ECtHR of 26 October 2000, *Kudła v. Poland* [GC], CE:ECHR:2000:1026JUD003021096, paragraph 152.

26 See Article 6(3) TEU. See also Opinion 2/13 (*Accession of the European Union to the ECHR*) of 18 December 2014, EU:C:2014:2454, point 179 and the case-law cited.

27 Judgment of the ECtHR of 28 July 1999, *Selmouni v. France*, CE:ECHR:1999:0728JUD002580394, § 74 and the case-law cited.

79. There is nothing in that case-law to suggest that applicants are not generally required to bring an appeal before the Cour de cassation on a point of law. That is so despite the fact that, in some particular factual circumstances, the ECtHR has not declared an application inadmissible despite the fact that no appeal had been brought before the Cour de cassation. [28] Rather, as the ECtHR has itself explained, the 'rule of exhaustion' must be applied with flexibility and without excessive formalism. What is important is that, in determining whether that rule has been observed, the particular circumstances of each individual case must be given due consideration. [29]

80. In the light of those considerations the first part of the single ground of appeal ought to be dismissed as unfounded.

C. The second part of the single ground of appeal: the requirement of diligence in recovering of undue payments

1. Arguments of the parties

81. By the second part of its single ground of appeal, the Kingdom of Belgium contends that, contrary to the assessment of the General Court, [30] it has shown the necessary diligence in recovering the sums in question. According to the Kingdom of Belgium, the General Court had not assessed correctly the conduct of the Belgian authorities as concerns the decision not to appeal the judgment of 3 May 2012 before the Cour de cassation: even though it was theoretically possible to bring an appeal, it was practically impossible for the Belgian authorities to do so successfully. The Kingdom of Belgium also criticises the General Court for failing to properly consider the role in the Belgian legal system of the lawyer authorised to act before the Cour de cassation. The Kingdom of Belgium maintains that the Belgian authorities exercised sufficient diligence even though the authorities did not lodge an appeal since it would be excessive and inefficient to require that appeals are systematically lodged, even though they are bound to fail.

82. For its part, the Commission contends that the Kingdom of Belgium's submissions are contradictory: it was either impossible, or it was possible, to bring an appeal, but it cannot logically be both at the same time. Moreover, the Commission argues that Member States should not be allowed to compromise the effectiveness of the procedure laid down in Article 267 TFEU by relying on domestic procedural rules, and specifically the obligation of the courts of last instance of the Member States to make requests for a preliminary ruling to the Court.

2. Assessment

83. In the judgment under appeal, the General Court observed at the outset that, in order to determine whether the Commission had been right to consider that the absence of recovery of the sums in question was caused by negligence attributable to BIRB within the meaning of Article 32(8)(a) of Regulation No 1290/2005, it was necessary to assess whether, in the light of the circumstances of the case, the decision not to bring an appeal against the judgment of 3 May 2012 constituted an irregularity or negligence attributable to BIRB within the meaning of that provision.

84. In that regard, the General Court made a number of findings.

28 See judgments of the ECtHR of 5 March 2013, *Chapman v. Belgium*, CE:ECHR:2013:0305DEC003961906, § 32 and of 6 November 1980, *Van Oosterwijck v. Belgium*, CE:ECHR:1980:1106JUD000765476, §§ 36 to 40.

29 See, in particular, judgment of the ECtHR of 18 December 1996, *Aksoy v. Turkey*, CE:ECHR:1996:1218JUD002198793, §§ 52 and 53 and the case-law cited.

30 Paragraphs 55 to 57 and 62 of the judgment under appeal.

85. First, it found that even though it is only done exceptionally, it is nevertheless possible to bring an appeal before the Cour de cassation, notwithstanding a negative opinion by a lawyer authorised to act before that court. [31] Second, by not bringing an appeal, the Kingdom of Belgium prevented the Cour de cassation from requesting a preliminary ruling on the interpretation of the relevant provisions of Regulation No 1290/2005, a request refused by the cour d'appel de Bruxelles. [32]

86. On the basis of those considerations, the General Court found that, by not appealing the judgment of 3 May 2012 before the Cour de cassation, the Kingdom of Belgium did not take all measures available to it and that, as a consequence, it did not exercise sufficient diligence in recovering the sums in question. On that basis the General Court concluded that the absence of recovery of the sums in question resulted from the negligence of the Kingdom of Belgium. [33]

87. In the judgment under appeal, the General Court adopted a strict approach to establishing negligence attributable to the Member State concerned under Article 32(8)(a) of Regulation No 1290/2005. That is because, without a proper assessment of the particular circumstances of the case at hand, it inferred from the absence of an appeal to the Cour de cassation (in circumstances where such an appeal was not impossible) that BIRB had acted negligently in attempting to recover the sums in question.

88. In the following, I shall first explain why Member States retain substantial freedom in choosing the measures that should be taken to protect the financial interests of the European Union. In a second step, I shall explain why the determination of negligence attributable to a Member State must be based on an assessment of the particular circumstances of the case at hand.

(a) Member States retain the freedom to choose the most appropriate measures to protect the financial interests of the European Union

89. As explained above, Member States have a far-reaching obligation, based on Regulation No 1290/2005, to safeguard the financial interests of the European Union. That can be seen in particular from Article 9(1)(a) of the regulation, a provision which sets out the requirement that Member States are to take any measures necessary to ensure the effective protection of the financial interests of the European Union. In its case-law, the Court has held that that requirement is a specific expression of the general duty of sincere cooperation incumbent on Member States on the basis of what is now Article 4(3) TFEU. [34]

90. However, as the Court has emphasised, national authorities remain free, in recovering unduly paid sums, to choose among different measures the ones which they consider appropriate in order to safeguard the financial interests of the European Union. [35] That is not only in line with the autonomous role that Member States play in executing tasks under the EAGF. It is also in line with the wording of Article 9(1)(a) of Regulation No 1290/2005: indeed, taking 'necessary' measures implies that an element of judgment is required on the part of the Member State in choosing the most appropriate measures for the situation at hand.

91. The freedom that Member States thus enjoy in the context of recovery is explained, on the one hand, by the fact that the measures that must be taken to recover unduly paid sums may vary greatly. That is certainly why in Regulation No 1290/2005 no detailed rules are laid down regarding the recovery measures Member States are to undertake.

31 Paragraph 56 of the judgment under appeal.

32 Paragraph 57 of the judgment under appeal.

33 Paragraph 62 of the judgment under appeal.

34 Judgments of 11 October 1990, *Italy v Commission*, C-34/89, EU:C:1990:353, paragraph 12; of 21 February 1991, *Germany v Commission*, C-28/89, EU:C:1991:67, paragraph 31; and of 21 January 1999, *Germany v Commission*, C-54/95, EU:C:1999:11, paragraph 66.

35 Judgment of 21 January 1999, *Germany v Commission*, C-54/95, EU:C:1999:11, paragraph 96.

92. On the other hand, and perhaps more importantly, that freedom is explained by the central role that Member States play in the system set up by Regulation No 1290/2005. As alluded to above, in the framework of Regulation No 1290/2005, Member States operate at the frontline of the EU agricultural funding regime. First, accredited payment agencies in the Member States are responsible for making payments to beneficiaries and checking their eligibility. The expenditure thus incurred by the Member States is then subsequently reimbursed by the Commission from the EU budget.[36] Second, Member States are also to check that aid is correctly paid out, to prevent and pursue irregularities and to recover sums lost as a result of irregularities or negligence in their respective territories. In that sense, the supervision of the use of EU funding has been 'down sourced' from EU institutions to national authorities.[37]

93. From the perspective of geographic proximity and sound use of public resources, national authorities are certainly best placed to carry out the necessary checks, pursue irregularities, and as the case may be, take measures to recover sums lost due to irregularities. In the particular context of the recovery of undue payments, those authorities are also arguably best placed to assess which measures are most likely to produce a successful outcome.

94. Nevertheless, it must be emphasised that the freedom retained by Member States is circumscribed by the duty of sincere cooperation which requires that Member States must act diligently throughout the recovery procedure.[38] As the General Court in my view correctly held in the judgment under appeal, that obligation implies that Member States are to make a full and timely attempt to recover the sums in question by having recourse to all available means to achieve the objective of protecting the financial interests of the European Union.[39] Otherwise, a Member State must be considered to have breached its general obligation of diligence.

95. But does it follow from that obligation that there is a general requirement that a Member State must exhaust all domestic remedies when it attempts to recover unduly paid export refunds?

96. That appears to be the General Court's view. In the judgment under appeal, it found, in essence, that because it had decided not to bring an appeal before the Cour de cassation (even though it could have) and because by doing so it had made it impossible for the Cour de cassation to refer questions for a preliminary ruling to this Court, the Kingdom of Belgium had not made use of all the measures available to it in recovering the sums in question and that, as a consequence, the absence of recovery was a result of negligence attributable to that Member State.

97. As shall be seen, the General Court came to that conclusion without properly examining the circumstances of the case at hand. The absence of such an assessment amounts in my view to an error in law that should lead the Court to set aside the judgment under appeal.

36 Recitals 9 and 10 of Regulation No 1290/2005.

37 See https://ec.europa.eu/agriculture/fin/clearance/factsheet_en.pdf (accessed on 4 September 2018).

38 See case-law referred to in footnote 34 above.

39 Paragraph 61 of the judgment under appeal.

(b) The determination of negligence attributable to a Member State must be based on an assessment of the particular circumstances of the case at hand

98. To begin with, it may be useful to draw a parallel between the approach adopted in the judgment under appeal and the approach of the Court regarding the obligation of a Member State to recover unlawful State aid: in that context too, Member States are required to take 'all necessary measures' to recover unlawful State aid from beneficiaries. A failure to recover unlawful State aid can only be justified where recovery was not possible due to 'absolute impossibility', a concept interpreted strictly by the Court.[40]

99. In the context of State aid, the strict approach is explained not only by the fact that it is the Member State itself that has caused the unlawful situation by granting aid contrary to Article 107(1) TFEU. It is also explained by the need to eliminate any distortion to competition that may arise from unlawfully granted aid.

100. In the present context too, such a strict approach regarding the obligation to recover unduly paid sums may have certain advantages. In particular, systematically requiring Member States to exhaust all (ordinary) domestic remedies would certainly enhance foreseeability and thus reduce litigation between the Commission and the Member States.

101. However, as explained, the system set up by Regulation No 1290/2005 grants Member States considerable freedom in choosing the most appropriate measures to recover unduly paid sums. Indeed, the measures to be undertaken to protect the financial interests of the European Union may vary from case to case. In that regard and in particular given that Member States may be confronted with very different situations in the course of recovery proceedings, the disadvantages of a strict approach in my view outweigh the abovementioned advantages.

102. For example, a Member State may have been partly successful at a lower instance. In such circumstances a further appeal may, if it were systematically required, jeopardise (at least partial) recovery. Thus, exhausting all available remedies may not always constitute the most appropriate course of action from the perspective of the financial interests of the European Union.

103. In fact, the absence of recovery caused by negligence attributable to a Member State may arise in a wide variety of situations. That explains why the Commission specifically emphasised at the hearing that, in its view, Article 32(8)(a) of Regulation No 1290/2005 should not be construed as requiring, in general and without due consideration of the specific circumstances of the case, that Member State authorities must systematically exhaust all available domestic remedies. Rather, the Commission emphasised that it is in the very specific circumstances of this case that the decision by BIRB not to appeal the judgment of 3 May 2012 before the Cour de cassation amounts to negligence attributable to the Kingdom of Belgium within the meaning of that provision.

104. I agree with the Commission that it is not possible to determine in the abstract whether an omission amounting to a breach of the obligations of Member States in the context of the EAGF has occurred in the recovery of unduly paid sums under Regulation No 1290/2005. That is why an assessment of all relevant circumstances is in my view necessary to establish negligence within the meaning of Article 32(8)(a) of Regulation No 1290/2005.

105. Such circumstances may include the recovery measures available and those undertaken, the outcome of proceedings at different instances, the costs associated with recovery proceedings, the prospect of succeeding in those proceedings and the magnitude of the sums to be recovered in relation to the costs associated with a further appeal.

40 See, for example, judgment of 26 June 2003, *Commission v Spain*, C-404/00, EU:C:2003:373, paragraph 47 and the case-law cited.

106. In that respect, I observe that, as far as can be understood from the case file, the decision at issue (the annulment of which the Kingdom of Belgium sought before the General Court) was based on the finding made by the Commission that BIRB had acted negligently because it had not brought an appeal before the Cour de cassation in the particular circumstances of this case.

107. Indeed, it seems to me that in circumstances where recovery action has been taken, determining whether a decision not to appeal further may be considered as an omission amounting to negligence is by no means an arithmetic exercise. It requires, instead, consideration of a number of relevant circumstances. That is so, in particular, because of the freedom that Member States retain in choosing the most appropriate measures to recover unduly paid sums under Regulation No 1290/2005, a regulation which does not lay down detailed rules about the recovery of unduly made payments. In other words, negligence cannot be simply assumed because no appeal before the Cour de cassation was brought. In my view, a decision not to appeal further after years of unsuccessful litigation is quite different from, for example, a decision not to take any recovery action at all or a failure to make the checks required by the relevant sectoral regulations as concerns the eligibility of applicants — omissions that would arguably breach the obligations of Member States in the context of the EAGF.

108. However, despite having acknowledged at the outset the need for an assessment of the circumstances of the case,[41] the General Court did not consider several relevant issues.

109. In particular, it did not consider the following circumstances to establish negligence: (1) the fact that Saint-Louis Sucre had successfully contested the claim made by BIRB before two instances; (2) the prospect of BIRB succeeding on further appeal on *a point of law*, in particular in the light of the central role which the lawyer authorised to act before the Cour de cassation plays in proceedings before that court; (3) the relevance of the questions that BIRB asked the cour d'appel de Bruxelles to refer to the Court for a preliminary ruling, the reasons why that court did not make such a referral, and the subsequent analysis of the Court's case-law by the lawyer authorised to act before the Cour de cassation,[42] and lastly (4) the magnitude of the sum to be recovered in relation to the costs associated with a further appeal, including the need to pay interest in case of a negative decision at last instance.

110. That brings me to the effectiveness of the preliminary ruling procedure laid down in Article 267 TFEU, an argument emphatically raised by the Commission and endorsed by the General Court in the judgment under appeal.[43]

111. In the Commission's view, by not bringing an appeal against the judgment of 3 May 2012 before the Cour de cassation, the Kingdom of Belgium made it effectively impossible for that court to request a preliminary ruling from this Court. The behaviour of BIRB thus compromised the effectiveness of the procedure laid down in Article 267 TFEU. I understand that it is the Commission's view that that circumstance alone was sufficient to establish negligence in this case. That view seems to be shared by the General Court.[44]

112. It is of course true that the Cour de cassation cannot request a preliminary ruling on the interpretation of relevant issues of EU law if no appeal is brought before it in the first place. Nonetheless, that circumstance does not in my view do away with the need to assess all relevant circumstances to determine whether the behaviour of the national authorities in question, and here specifically the decision of BIRB not to bring an appeal, following the negative opinion of the lawyer authorised to act before the Cour de cassation it had consulted, amounts to negligence.

41 Paragraph 55 of the judgment under appeal.

42 It can be seen from the case file that the lawyer authorised to act before the Cour de cassation consulted by BIRB had analysed the case-law of the Court in considerable detail in her opinion.

43 Paragraphs 57 and 59 of the judgment under appeal.

44 Paragraphs 57, 59 and 62 of the judgment under appeal.

113. On the basis of the information available to the Court, it is not evident, bearing in mind the particular circumstances of the case, that if BIRB had brought an appeal, the Cour de cassation would have referred questions to the Court. More significantly still, on the basis of that information, it is not possible to assess to what extent such a referral would have had any bearing on the outcome of the case. [45]

114. It is true that the Member States, and, by extension, Member State authorities, undoubtedly have a special responsibility to ensure that their actions do not hamper the proper functioning of the system set up by Article 267 TFEU. Nevertheless, it should be emphasised that the Commission may exclude sums from financing of the European Union on the basis of Article 32(8)(a) of Regulation No 1290/2005 only if an irregularity or negligence attributable to the administrative authorities or another official body of the Member State has occurred.

115. Recourse to that provision thus requires establishing that the administrative authorities of the Member States have acted negligently (or that those authorities are the source of an irregularity). In my view, in spite of the special responsibility of Member States mentioned in the previous point and the fundamental role of Article 267 TFEU for the EU legal system, negligence cannot be established in the abstract, on the basis of an assumption that had an appeal been brought, the Cour de cassation, as the last instance court, would have made a referral to this Court. In other words: while the conclusion of the General Court may or may not be correct, the determination of whether Member State authorities have been *negligent* cannot be made without having due regard to the particular circumstances of the case. Those circumstances include the reasons that led BIRB, a party to the national proceedings, to decide not to appeal.

116. As already indicated, such an assessment is lacking in the judgment under appeal.

117. By way of conclusion, I wish to make a final observation on the interpretation of Article 32(8)(a) of Regulation No 1290/2005 adopted in the judgment under appeal. Although the point was not specifically raised in this appeal, I would observe that after having established that the Kingdom of Belgium had not acted with sufficient diligence, the General Court simply *assumed* that the absence of recovery had resulted from the negligence attributable to the Kingdom of Belgium.

118. It must be emphasised that Article 32(8)(a) of Regulation No 1290/2005 states that the absence of recovery must be the *outcome* of negligent behaviour. It seems to me therefore that the link between the absence of recovery and negligence cannot be assumed, but must instead be appropriately established on the basis of an assessment of the circumstances of the case, an assessment the General Court failed to make.

119. On that basis I conclude that because the assessment undertaken in the judgment under appeal regarding negligence is insufficient, the General Court's finding that the absence of recovery of the sums in question was the outcome of negligence attributable to BIRB and thus to the Kingdom of Belgium within the meaning of Article 32(8) of Regulation No 1290/2005 is vitiated by an error in law. Accordingly, the second part of the single ground of appeal should be upheld.

45 Here, due regard must of course be had to the principle set out in the judgment of 4 June 2002, *Lyckeskog*, C-99/00, EU:C:2002:329, paragraph 18. Accordingly, a national court of last instance may in certain circumstances be under an obligation to request a preliminary ruling already at the stage of the examination of admissibility of the case pending before it.

VI. Consequences of the assessment

120. I have concluded that the General Court erred in law in finding that the absence of recovery resulted from negligence attributable to BIRB and thus the Kingdom of Belgium within the meaning of Article 32(8) of Regulation No 1290/2005. That is because it did not base the finding of negligence on a proper assessment of the particular circumstances of the case at hand.

121. Under the first paragraph of Article 61 of the Statute of the Court of Justice, the Court is to set aside the judgment of the General Court if the appeal is well founded. Where the proceedings so permit, it may itself give final judgment in the matter. It may also refer the case back to the General Court.

122. I have concluded that the second part of the single ground of appeal should be upheld. Therefore, the judgment under appeal should be set aside.

123. In the light of the nature of the error committed by the General Court the state of proceedings does not in my view permit final judgment to be given. That is because a decision on the merits would require the Court to examine all relevant circumstances in order to assess whether the decision not to bring an appeal against the judgment of 3 May 2012 before the Cour de cassation constituted negligence attributable to the Kingdom of Belgium. That would involve an assessment of the facts, which the General Court is better placed to carry out.

124. Consequently, I propose that the Court should refer the case back to the General Court for a fresh review.

VII. Conclusion

125. In the light of the foregoing considerations, I propose that the Court should:

– set aside the judgment of the General Court of the European Union of 20 July 2017, *Belgium* v *Commission*, T-287/16;

– refer the case back to the General Court; and

– order the costs to be reserved.