



Reports of Cases

JUDGMENT OF THE GENERAL COURT (First Chamber)

19 April 2013 *

(ERDF — Campania Regional Operational Programme (ROP) 2000-2006 — Regulation (EC) No 1260/1999 — Article 32(3)(f) — Decision not to make interim payments in connection with the ROP measure concerning waste management and disposal — Infringement procedure in respect of Italy)

In Joined Cases T-99/09 and T-308/09,

Italian Republic, represented by P. Gentili and, additionally, in Case T-99/09, by G. Palmieri, avvocati dello Stato,

applicant,

v

European Commission, represented by D. Recchia and A. Steiblytė, acting as Agents,

defendant,

APPLICATIONS for annulment of the decisions contained in the Commission's letters of 22 December 2008, and of 2 and 6 February 2009 (Nos 012480, 000841 and 001059 – Case T-99/09) and of 20 May 2009 (No 004263 – Case T-308/09) declaring that the interim payment applications submitted by the Italian Authorities for the reimbursement of expenditure incurred after 29 June 2007 in connection with Measure 1.7 of the 'Campania' Operational Programme are 'unacceptable' under Article 32(3)(f) of Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds (OJ 1999 L 161, p. 1),

THE GENERAL COURT (First Chamber),

composed of J. Azizi (Rapporteur), President, F. Dehousse and S. Frimodt Nielsen, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 12 September 2012,

gives the following

* * Language of the case: Italian.

Judgment

Background to the dispute

Procedure for approving support for the ‘Campania’ Operational Programme

- 1 By Decision C(2000) 2347 of 8 August 2000, the Commission of the European Communities approved the inclusion of the ‘Campania’ Operational Programme (‘the Campania OP’) in the support framework for Community structural assistance for the Italian regions concerned by Objective 1. Article 5 of that decision specifies the start and end dates of the eligible expenditure period as 5 October 1999 and 31 December 2008 respectively. The decision was subsequently amended on several occasions.
- 2 By letter of 20 March 2001, the President of the Campania Region notified the Commission of a ‘Complemento di Programmazione definitivo’ (final Programme Complement).
- 3 On 23 May 2006, the Commission adopted Decision C(2006) 2165 amending Decision C(2000) 2347, to which it appended an amended version of the Campania OP describing Measure 1.7 thereof (‘Measure 1.7’).
- 4 On 22 April 2008, the Italian authorities notified the Commission of an amended version of the Programme Complement including an amended description of Measure 1.7, which the Commission approved by letter of 30 May 2008.
- 5 The Commission made its final amendment to Decision C(2000) 2347 by Commission Decision C(2009) 1112 final of 18 February 2009, which extended the eligible expenditure period until 30 June 2009.
- 6 The version of the Campania OP as notified to the Commission on 22 April 2008 described the forms of assistance covered by Measure 1.7, including the following:

‘(a) Construction of quality composting facilities and ecological zones

...

- (b) Assistance in connection with the creation of landfills for the disposal, following differentiated collection, of residual waste in compliance with safety conditions under Legislative Decree No 36/03, and in connection with the final implementation and/or environmental restoration of authorised landfills which are no longer active, focussing in particular on adapting those landfills in accordance with Legislative Decree No 36/03

In the context of that action, the following shall be financed: assistance in connection with the creation of landfills for the disposal, following differentiated collection, of residual waste in compliance with safety conditions under Legislative Decree No 36/03; assistance in connection with the final implementation and/or environmental restoration of authorised landfills which are no longer active, as provided for in sectorial planning, favouring existing landfills in accordance with the priorities of the waste management plan; and assistance in connection with the environmental upgrading of landfills for specified types of residual waste ... The landfills must be treated as exclusively dedicated to the integrated waste management system.

...

- (c) Implementation of optimum territorial zones and related plans for waste management and treatment (technical assistance in drawing up plans and programmes, purchasing technical equipment and assistance in overseeing the systems and developing knowledge of the sector; staff refresher seminars; communication and information activities)

...

- (d) Support for affiliated municipalities for the purposes of managing the differentiated municipal waste collection system

This action will facilitate financing the purchase, by affiliated municipalities and, under any legally binding commitments entered into prior to 31 December 2004, by the [representative commission], in the form and manner provided for in Legislative Decree No 267/2000, of the technical equipment necessary for the differentiated collection of municipal and related waste and of the equipment relating to the collection areas and points connected with that collection (recycling banks, compost bins, bins, waste collection vehicles, and so on), with a view to ensuring effective cooperation between the local authorities situated within a single optimum zone, in the form and under the conditions provided for under the legislation currently in force.

...

- (e) Aid scheme for undertakings for the purpose of adapting facilities designed for the recovery of materials derived from waste (processing inert waste, motor vehicles, durable goods, bulky items; quality composting; recovery of plastics) on the basis of public strategies designed to implement recovery activities and to improve quality standards

...

- (f) At regional level, coordination, logistical and support activity for undertakings collecting and recovering waste from special categories of productive activity

This action shall promote activities supporting undertakings which produce special categories of waste and which, without that support, would be unable to achieve economies of scale which would enable or facilitate recovering those goods instead of simply disposing of them.

...

In addition, this action shall involve creating a land research institute to monitor the quality and quantity of waste, in conjunction with the assistance co-financed by Measure 1.1, as provided for in the feasibility study referred to in DGR (Delibera della Giunta Regionale – Regional Council Decision) No 1508 of 12 April 2002 and any amendments or additions thereto, and measures to promote and to raise awareness of differentiated collection, recovery and recycling. This action shall involve carrying out awareness-raising campaigns in connection with differentiated collection, recovery and recycling. Those campaigns shall also be used to facilitate the process of implementing plans at regional level.

...

- (g) Aid schemes for undertakings for the purpose of constructing facilities for recovering materials from waste in special productive categories and for the purpose of constructing facilities for energy recovery in respect of waste which, without those aid schemes, would not be recoverable

The purpose of this action shall be to promote the development of industrial activities downstream from differentiated collection for the purposes of the efficient recovery of the parts selected.

This action shall provide for the financing of the construction of facilities for the waste recovery activities referred to in Articles 31 and 33 of Legislative Decree No 22/97. More specifically, it will finance the recovery activities referred to in Sub-Annex 1 of Annex 1 to the Ministerial Decree of 5 February 1998 – with the exception of Category 14 (recoverable waste from municipal waste and related special non-hazardous waste for the production of [quality fuels derived from waste]), Category 16 (compostable waste) and Category 17 (waste which is recoverable through pyrolysis and gasification processes) – and in Sub-Annex 1 of Annex 1 to Ministerial Decree No 161 of 12 June 2002.

...'

- 7 The assistance given, which was intended to improve and promote the waste collection and disposal system in accordance with Measure 1.7, gave rise to expenditure in the amount of EUR 93 268 731.59, 50% of which – EUR 46 634 365.80 – was co-financed by the Structural Funds.

Infringement procedure in respect of the Italian Republic

- 8 On 29 June 2007, as part of infringement procedure 2007/2195 opened in respect of the Italian Republic, the Commission sent the Italian authorities a letter of formal notice claiming that they had infringed Articles 4 and 5 of Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste (OJ 2006 L 114, p. 9) as they had not adopted, in respect of the Campania region, all the necessary measures to ensure that waste is disposed of without endangering human health and without harming the environment and, in particular, they had not created an adequate integrated network of waste disposal facilities.
- 9 On 23 October 2007, the Commission sent the Italian authorities an additional letter of formal notice, dated 17 October 2007, extending the grounds of complaint to which the infringement procedure related. The grounds of complaint were extended to cover the alleged inefficiency of the waste management plan for the Campania region, which was adopted in 1997, in achieving the objectives listed in Articles 3, 4, 5 and 7 of Directive 2006/12.
- 10 Following the approval, on 28 December 2007, of a new waste management plan for the Campania region, the Commission issued a reasoned opinion on 1 February 2008 concerning alleged infringements of Articles 4 and 5 alone of Directive 2006/12.
- 11 By application lodged at the Court Registry on 4 July 2008 and registered as Case C-297/08, the Commission brought an action under Article 226 EC, claiming that the Court should declare that, in failing to adopt, in respect of the Campania region, all the measures necessary to ensure that waste is recovered and disposed of without endangering human health and without harming the environment and, in particular, in failing to establish an adequate integrated network of waste disposal facilities, the Italian Republic had failed to fulfil its obligations under Articles 4 and 5 of Directive 2006/12.
- 12 By its judgment in Case C-297/08 *Commission v Italy* [2010] ECR I-1749, the Court upheld that action and declared – as the Commission had requested – that the Italian Republic had failed to fulfil its obligations.

Impact of the infringement procedure regarding the implementation of the Campania OP

- 13 By letter of 31 March 2008 (Reference No 002477), the Commission informed the Italian authorities of the inferences that it intended to draw from infringement procedure 2007/2195, mentioned in paragraph 8 above, by way of consequences for the financing of Measure 1.7 in the context of implementing the Campania OP. In view of the initiation of that procedure and the content of the reasoned opinion, the Commission took the view that it was no longer able to ‘make interim payments to cover the repayment of expenditure incurred in connection with Measure 1.7 of the Campania OP ...’ under Article 32(3) of Council Regulation No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds (OJ 1999 L 161, p. 1). It stated that ‘Measure 1.7 of the Campania OP ... concern[ed] the “Regional waste management and disposal system” referred to in the infringement procedure identifying inefficiency in implementing an adequate integrated network of waste disposal facilities’. According to the Commission, it had been found that ‘waste management as a whole [was] unsatisfactory, given the need to ensure proper waste collection and disposal and, accordingly, to ensure also the actions listed in Measure 1.7, such as those connected with facilities for waste storage, treatment and disposal, facilities for the recovery of the wet and dry parts, the final implementation of landfills, in addition to differentiated collection ..., and the sectorial plans and programmes’. The Commission concluded from this, in essence, that any payment application in respect of expenditure incurred in connection with Measure 1.7 submitted after the date when the Campania region failed to fulfil its obligations under Directive 2006/12, which came into force on 17 May 2006, would be unacceptable. The Commission therefore asked the Italian authorities to deduct, with effect from the next payment application, all expenditure incurred after 17 May 2006 in connection with Measure 1.7, unless the Italian Republic were to adopt the necessary legislation to rectify ‘the situation’.
- 14 By letter of 9 June 2008 (Reference No 0012819), the Italian authorities contested the Commission’s assessment as set out in its letter of 31 March 2008. According to those authorities, there was no legal basis for the declaration that payment applications in respect of expenditure incurred in connection with Measure 1.7 were unacceptable, and the criteria listed in the second subparagraph of Article 32(3) of Regulation No 1260/1999 are not met in the present case. The Commission had not, it was claimed, ‘indicated any specific operation which is contrary to Community law, but [had] confined itself to an entirely generic request for an infringement procedure to be initiated regarding waste management, without providing any explanation as to how the implementation of Measure 1.7 under the Campania OP could contribute to such a breach of Community law’. The Commission’s position thus amounts to punishing the Italian Republic ‘prematurely and automatically’, before the infringement procedure has run its course in full compliance with the rights of the defence and the principle that both parties must be heard. In addition, the Italian authorities argue that the Commission’s assessment is illogical, as the assistance financed under Measure 1.7 was specifically intended to resolve problems connected with waste collection and disposal in Campania, and suspending the financing of that assistance would only delay resolving the current crisis. The Italian authorities therefore asked the Commission to reconsider its position as expressed in its letter of 31 March 2008.
- 15 By letter of 20 October 2008 concerning the ‘Strategic Environmental Assessment (SEA) of the waste management plan for the Campania region’, the Commission informed the Italian authorities of its concerns in connection with the waste management plan for the Campania region as adopted on 28 December 2007. In essence, the Commission asked those authorities to update that plan in the light of both the recently adopted legislation and the completion of the Strategic Environmental Assessment. Regarding updating the plan in question, the Commission asked that measures be included to enable the putting in place of ordinary sustained waste management capable of replacing the current emergency waste management. Lastly, the Commission pointed out that, by reason of the ongoing infringement procedure 2007/2195, the interim payment applications relating to Measure 1.7 were no longer acceptable.

- 16 By letter of 22 December 2008 (Reference No 012480) on the subject of ‘Campania ROP 2000-2006 (CCI No 1999 IT 16 1 PO 007) Effects of infringement procedure 2007/2195 on waste management in Campania’, the Commission replied to the Italian authorities’ letter of 9 June 2008 and re-stated its position as set out in its letter of 31 March 2008. According to the Commission, Article 32(3) of Regulation No 1260/1999 is the relevant legal basis in the present case, as the acceptability of interim payments is subject to a number of conditions, one of which being that ‘no decision [has] been taken by the Commission to embark on an infringement procedure pursuant to Article 226 [EC]’. The Commission also observed that infringement procedure 2007/2195 called in question the entirety of the waste management system in Campania in the light of Articles 4 and 5 of Directive 2006/12. It also reiterated its concerns and reservations as expressed in its letter of 20 October 2008. The Commission concluded that there were not ‘sufficient guarantees that the operations co-financed by the ERDF under Measure 1.7, which, according to the wording of that measure, concern[ed] the entirety of the regional waste management and disposal system, the effectiveness and adequacy of which [were] at issue in the infringement procedure [in question], [would] be properly carried out’. Lastly, the Commission stated that the date from which it would consider expenditure incurred in connection with Measure 1.7 as being ineligible was 29 June 2007 and not 17 May 2006.
- 17 By letter of 2 February 2009 (Reference No 000841) on the subject of ‘[p]ayments by the Commission of sums other than the sum applied for’, the Commission – referring to its letters of 31 March and 22 December 2008 – declared a payment application made by the Italian authorities on 18 November 2008 to be unacceptable, in so far as that application related to expenditure totalling EUR 12 700 931.62 incurred in connection with Measure 1.7 after 17 May 2006, on the ground that the activities concerned were connected with infringement procedure 2007/2195. The Commission stated, however, that it had notified the Italian Republic of the decision to initiate that infringement procedure on 29 June 2007. Accordingly, as indicated in its letter of 22 December 2008, the date from which the Commission would consider expenditure incurred in connection with Measure 1.7 as being ineligible would be 29 June 2007 and not 17 May 2006. Lastly, if there were to remain ‘a positive balance in relation to the sum of EUR 12 700 931.62’, the Commission asked the Italian authorities to take that balance into account in the next payment application.
- 18 On 14 January 2009, the Italian authorities submitted a new payment application concerning, inter alia, a total of EUR 18 544 968.76 in respect of expenditure incurred in connection with Measure 1.7.
- 19 By letter of 6 February 2009 (Reference No 001059) on the subject of ‘[i]nterruption of the payment application and requests for information concerning financial corrections pursuant to Article 39 of Regulation No 1260/1999’, the Commission reiterated – as has been stated in paragraphs 16 and 17 above – that the date from which it would consider expenses incurred in connection with Measure 1.7 as being ineligible would be 29 June 2007 and not 17 May 2006. If, as a result, there should be an ‘amendment concerning the total of EUR 18 544 968.76’, the Commission asked the Italian authorities to correct the payment application in question.
- 20 By letter of 20 May 2009 (Reference No 004263) to the Italian authorities on the subject of ‘[p]ayments by the Commission of sums other than the sum applied for’, the Commission again stated – referring to its letters of 31 March and 22 December 2008 – that the total of EUR 18 544 968.76 relating to expenditure incurred after 17 May 2006 in connection with Measure 1.7 concerning the regional waste management and disposal system was ineligible. Pending the outcome of Case T-99/09 (ongoing before the General Court), the Commission had deducted that total from the present payment application. However, as had already been indicated in the letter of 6 February 2009, the date from which the Commission would consider expenditure incurred in connection with Measure 1.7 as being ineligible would be 29 June 2007 and not 17 May 2006. If, as a result, there should be an ‘amendment concerning the total of EUR 18 544 968.76’, the Commission asked the Italian authorities to indicate this in the next interim payment application.

- 21 The Commission's letters of 22 December 2008, 2 and 6 February 2009 and 20 May 2009 (see paragraphs 16 to 20 above) will hereinafter be collectively referred to as 'the contested measures'.

Procedure and forms of order sought

- 22 By application lodged at the Court Registry on 4 March 2009, the Italian Republic brought the action registered as Case T-99/09 contesting the decisions set out in the letters of 22 December 2008 and 2 and 6 February 2009.
- 23 By application lodged at the Court Registry on 30 June 2009, the Italian Republic brought the action registered as Case T-308/09 contesting the decision set out in the letter of 20 May 2009.
- 24 By letter lodged at the Court Registry on 25 August 2009, the Commission requested that the proceedings in Case T-308/09 be stayed, pursuant to Article 77(d) of the Rules of Procedure of the Court of First Instance, pending a decision from that Court bringing the proceedings in Case T-99/09 to an end, as the majority of the pleas raised in that case were identical to those raised in Case T-308/09. In the alternative, the Commission requested that Cases T-99/09 and T-308/09 be joined for the purposes of the oral procedure, pursuant to Article 50(1) of the Rules of Procedure.
- 25 By letter lodged at the Court Registry on 17 September 2009, the Italian Republic opposed the request for a stay of proceedings, but agreed to the two cases being joined for the purposes of the oral procedure.
- 26 In Cases T-99/09 and T-308/09, the Italian Republic claims that the Court should annul the contested measures.
- 27 In Cases T-99/09 and T-308/09, the Commission contends that the Court should:
- dismiss the actions;
 - order the Italian Republic to pay the costs.
- 28 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (First Chamber) decided to open the oral procedure.
- 29 As a member of the Chamber was unable to sit, the President of the Court of First Instance designated another Judge to complete the Chamber pursuant to Article 32(3) of the Rules of Procedure.
- 30 By way of measures of organisation of procedure under Article 64 of the Rules of Procedure, the Court asked the parties to produce certain documents and to reply to questions in writing. The parties complied with those measures of organisation of procedure within the prescribed period.
- 31 At the hearing on 12 September 2012, the parties presented oral argument and answered the questions put to them orally by the Court. Pursuant to Article 50(1) of the Rules of Procedure, after the parties had presented their arguments at that hearing, the President of the Chamber ordered that Cases T-99/09 and T-308/09 be joined for the purposes of the final judgment; that order was formally noted in the record of the hearing.

Law

Summary of the pleas in law raised in Cases T-99/09 and T-308/09

- 32 By its first plea in law, raised in Cases T-99/09 and T-308/09, the Italian Republic claims that the Commission infringed point (f) of the first subparagraph of Article 32(3) of Regulation No 1260/1999. By its second plea in law, raised in Cases T-99/09 and T-308/09, the Italian Republic claims that the Commission disregarded point (f) of the first subparagraph, and the second subparagraph, of Article 32(3) of Regulation No 1260/1999 and that it had distorted the facts. By its third plea in law, raised in Cases T-99/09 and T-308/09, the Italian Republic alleges infringement of point (f) of the first subparagraph, and the second subparagraph, of Article 32(3) of Regulation No 1260/1999, and misuse of powers. By its fourth plea in law, raised in Cases T-99/09 and T-308/09, the Italian Republic alleges infringement of point (f) of the first subparagraph, and the second subparagraph, of Article 32(3) and of Article 39(2) and (3) of Regulation No 1260/1999, breach of the *audi alteram partem* rule, and misuse of powers. By its fifth plea in law, raised in Cases T-99/09 and T-308/09, the Italian Republic alleges failure to state adequate reasons in accordance with Article 253 EC. By its sixth plea in law, raised in Case T-308/09, the Italian Republic claims that the Commission had infringed Articles 32 and 39 of Regulation No 1260/1999. By its seventh plea in law, raised in Case T-308/09, the Italian Republic alleges infringement of Article 230 EC.
- 33 Given that the first four pleas in law largely overlap in that they are based on the claim that the Commission had acted in disregard of point (f) of the first subparagraph of Article 32(3) of Regulation No 1260/1999, that claim should be assessed first.

Alleged breach of the second condition laid down in point (f) of the first subparagraph of Article 32(3) of Regulation No 1260/1999

Preliminary observations

- 34 By its first plea, the Italian Republic claims that the Commission infringed point (f) of the first subparagraph of Article 32(3) of Regulation No 1260/1999, on which it based its approach in the contested measures. Under that provision, a payment application can be declared unacceptable only in two situations, one being where the Commission has taken a decision to embark on an infringement procedure ‘concerning the measure(s) that is or are the subject of the application in question’ (‘the second situation’). Accordingly, the specific matter with which the infringement procedure is concerned must coincide precisely with the activities to which the payment application relates. According to the Italian Republic, in view of the definitions of ‘measure’ and ‘operation’ given in Article 9(j) and (k) of Regulation No 1260/1999, an infringement procedure can be said to ‘concern’ a ‘measure’ where the infringement of EU law alleged by the Commission consists in the adoption of a given measure in a manner viewed as contrary to EU law or in the implementation of such a measure by means of operations which are inconsistent with that measure or with EU law. Accordingly, a proper application of point (f) of the first subparagraph of Article 32(3) of Regulation No 1260/1999, the aim of which is to prevent the Structural Funds from being used to finance activities which are carried out in breach of EU law, presupposes prior identification of the measures and the operations to which the payment application relates and, subsequently, verification as to whether their implementation is a matter with which an infringement procedure initiated by the Commission is concerned. However, in the present case, the Commission reversed the logic of that approach.
- 35 According to the Italian Republic, contrary to the requirements set out above, the Commission did not, in the contested measures, address the question of the specific relationship between, on the one hand, the activities to which the payment application related and, on the other, the nature of the alleged failure to fulfil obligations, still less the question whether they were identical. That view is confirmed

by the general reference, in those measures, to the matter covered by the reasoned opinion (the ‘entirety of the waste management system’) and to the activities to which the payment applications related (the ‘operations co-financed by the ERDF ... which ... concern the entirety of the regional waste management and disposal system’). The interim payments applied for were specifically intended to improve differentiated waste collection and recovery, that is to say, stages which are completely separate – both objectively and functionally – from the general disposal of unsorted waste using landfills with which the infringement procedure was concerned.

- 36 By the second plea, the Italian Republic submits that the action registered as Case C-297/08 concerned, in essence, a failure to fulfil obligations in connection with the waste disposal network. In paragraphs 86, 87 and 90 of its application initiating proceedings for failure to fulfil obligations, the Commission criticised the situation regarding the final disposal of waste which cannot be otherwise recovered or recycled, on the ground that there was a shortage of the structures (incinerators, landfills) which were needed in order to implement that stage of the waste ‘procedure’ in accordance with Directive 2006/12. By contrast, other stages of that ‘procedure’ and other waste management procedures which are separate from the final disposal of waste, such as the various procedures for recovering waste following sorting by means of differentiated collection, and for organising that collection, were clearly unrelated to the specific matter concerned by the infringement procedure in accordance with paragraphs 48 and 49 of that application. In view of the adoption on 28 December 2007 of a new waste management plan for the Campania region, the Commission did not consider it necessary to maintain the objections raised in that regard. However, Measure 1.7 and the operations, in the form of projects, included therein were specifically linked to the waste recovery stage and the preceding differentiated waste collection stage. In particular, the Italian authorities state that the letter of 22 December 2008 erred in making reference to the reasoned opinion of 1 February 2008 and in alleging that the Italian Republic had acted in breach of Directive 2006/12 ‘by not having established an adequate integrated network of waste disposal facilities and by not having created an adequate and effective waste management plan designed to attain the objectives listed in Articles 4 and 5 of [that] directive’, given that the Commission had itself withdrawn the complaint relating to the lack of a general waste management plan and had confined itself to criticising the inadequate supply of final waste disposal facilities.
- 37 In the reply, the Italian Republic contests the idea that, objectively speaking, the matter concerned by the infringement procedure and the matter to which the payment applications related coincide, as that purported coincidence at best concerns recovery alone and not differentiated waste collection, which is the main subject of Measure 1.7. It follows that the contested measures are at the very least ‘excessive’ in declaring the payment applications based on that measure to be entirely unacceptable. In that regard, the Italian Republic invokes, in the alternative, a new plea, alleging breach of the principle of proportionality: it claims that it is manifestly disproportionate to declare payments applied for in connection with a measure concerning the differentiated collection, composting and recovery of waste as being entirely ineligible by reason of the initiation of infringement procedure linked – at most and even then only marginally so – to recovery alone. Above all, according to the Italian Republic, the infringement procedure did not, in fact, concern even the recovery of waste, since that process was not mentioned except in the ‘concluding remarks’ of the reasoned opinion and those of the application initiating proceedings for failure to fulfil obligations under Article 226 EC. By contrast, there was no mention of the recovery of waste in the grounds of that reasoned opinion or in the body of that application and it is clear that the infringement procedure concerned solely the disposal of unsorted waste in general landfills. Tellingly, after having been initially covered by the infringement procedure, the recovery of waste had been definitively excluded from that procedure on the Commission’s own initiative.
- 38 By its third plea, the Italian Republic submits, in essence, that, in its letter of 22 December 2008, the Commission attempted to supplement its original heads of claim and to strengthen the arguments by which it sought to establish the purported link between the matters covered by the action for failure to fulfil obligations and the matters to which the payment applications related, by referring to the

‘concerns’ expressed in its letter of 20 October 2008 regarding the waste management plan for the Campania region of 28 December 2007 and by stating, inter alia, that, in the absence of an adequate waste management plan at regional level, there were not sufficient guarantees that the operations co-financed by the ERDF under Measure 1.7 would be properly carried out. However, none of those criticisms of the waste management plan for the Campania region of 28 December 2007 formed any part of the matters covered by the infringement procedure, which was based on the situation on 1 March 2008, whereas the legislative provisions in question were adopted on 23 May 2008. On the contrary, the adoption of that plan led the Commission to abandon, in its action for failure to fulfil obligations, all complaints relating to waste management planning, in particular regarding differentiated collection, recycling and recovery. The Italian Republic concludes from this that the Commission was not entitled to declare payment applications unacceptable on the grounds relied on or on the basis of point (f) of the first subparagraph, and the second subparagraph, of Article 32(3) of Regulation No 1260/1999, given that they did not trigger an infringement procedure.

- 39 By the fourth plea, the Italian Republic claims, in essence, that the declaration that the payment applications were unacceptable on the ground that ‘there [were] not sufficient guarantees that the operations co-financed by the ERDF under Measure 1.7 would be properly carried out’ is contrary to the second condition laid down in point (f) of the first subparagraph of Article 32(3) of Regulation No 1260/1999 and that it could only, at best, have been based on the first condition envisaged by that provision, namely the suspension of payments under Article 39(2) of that regulation. In the circumstances, the Commission circumvented the *audi alteram partem* procedure provided for in Article 39(2) of Regulation No 1260/1999 in order to obtain a result corresponding to a suspension as referred to in the first condition under point (f) of the first subparagraph of Article 32(3) of that regulation. In doing so, the Commission not only acted in breach of those provisions and of the *audi alteram partem* rule, to the detriment of the Italian Republic – which has not been given an opportunity to submit its observations on the reasons for that suspension and to arrive at an agreement enabling it to overcome those difficulties in whole or in part – but has also circumvented the procedure provided for under Article 39(3) of Regulation No 1260/1999, which would have obliged it to take a final reasoned decision within three months, failing which the payments would have automatically ceased to be suspended.
- 40 The Commission contests the reasoning put forward by the Italian Republic in support of all of those pleas.
- 41 The General Court finds that those pleas are based, in the main, on the premiss that, in the present case, the Commission disregarded the criteria for applying the second condition under point (f) of the first subparagraph of Article 32(3) of Regulation No 1260/1999. Accordingly, it must be ascertained, first, whether or not the contested measures are based on a proper interpretation of those criteria and, second, whether or not the Commission properly applied those criteria in the circumstances.

Scope of the criteria for applying the second condition under point (f) of the first subparagraph of Article 32(3) of Regulation No 1260/1999

- 42 In order to determine whether the objections raised by the Italian Republic in its first to fourth pleas are well founded, it is necessary to undertake a literal, contextual, teleological and historical interpretation of the second condition under point (f) of the first subparagraph of Article 32(3) of Regulation No 1260/1999. That approach has been upheld by settled case-law (see, by analogy,

Case T-251/00 *Lagardère and Canal+ v Commission* [2002] ECR II-4825, paragraphs 72 to 83, and Joined Cases T-22/02 and T-23/02 *Sumitomo Chemical and Sumika Fine Chemicals v Commission* [2005] ECR II-4065, paragraphs 41 to 60). That provision states, inter alia:

‘Interim payments shall be made by the Commission to reimburse expenditure actually paid under the Funds as certified by the paying authority. Such payments shall be made at the level of each assistance and calculated at the level of measures contained in the financing plan of the programme complement. They shall be subject to the following conditions:

...

(f) no suspension of payments under the first subparagraph of Article 39(2) has been decided, and no decision has been taken by the Commission to embark on an infringement procedure within the meaning of Article 226 [EC] concerning the measure(s) that is or are the subject of the application in question.

The Member State and the paying authority shall be informed immediately by the Commission if one of these conditions is not fulfilled and the payment application is therefore not acceptable and they shall take the necessary steps to remedy the situation.’

- 43 The first subparagraph of Article 32(3) of Regulation No 1260/1999 thus authorises the Commission to make interim payments for the purpose of reimbursing expenditure incurred under the Funds which satisfies the positive and negative eligibility criteria laid down therein. Under the second sentence of that provision, such payments ‘shall be made at the level of each assistance and calculated at the level of measures contained in the financing plan of the programme complement’. In addition, the second condition under point (f) of the first subparagraph of Article 32(3) of that regulation specifies the following as a negative criterion for eligibility: ‘no decision has been taken by the Commission to embark on an infringement procedure within the meaning of Article 226 [EC] concerning the measure(s) that is or are the subject of the [reimbursement/payment] application in question’.
- 44 As regards the legislative context of those provisions, it should be noted that the scope of the concept of a ‘measure’ is clarified further by the legal definition set out in Article 9(j) of Regulation No 1260/1999, a ‘measure’ being the ‘means by which a priority is implemented over several years which enable operations to be financed’. In turn, the concept of an ‘operation’ is defined in Article 9(k) as being ‘any project or action carried out by the final beneficiaries of assistance’. Lastly, the concept of ‘assistance’, defined in Article 9(e), covers ‘the [various] forms of assistance provided by the Funds’.
- 45 It follows that the concept of a ‘measure’ is of general application, linked to a prioritising strategy defined by a ‘priority’ which it is the means of implementing over a period of several years, enabling ‘operations’ to be financed. As a number of ‘operations’ may be covered by such a ‘measure’, a measure accordingly has a much wider ambit than an ‘operation’, a term which connotes projects or actions which may receive assistance from the Funds. This understanding of the scope of the term ‘measure’ corresponds to that which falls to be attributed to the content of Measure 1.7, which also covers a number of operations and forms of assistance intended to achieve certain objectives or sub-objectives while implementing a waste management system in Campania (see, inter alia, paragraph 6 above).
- 46 Consequently, in order to arrive at a finding that a payment application is unacceptable, the second condition under point (f) of the first subparagraph of Article 32(3) of Regulation No 1260/1999 requires that the matters covered by the infringement procedure initiated by the Commission be compared with the matters covered by ‘the measure(s)’ – not by the ‘operations’ – ‘that is or are the subject of [that] application’. Accordingly, the Italian Republic’s argument – to the effect that the matters concerned by the infringement procedure, namely, the various complaints raised therein,

should be compared with the ‘operations’ to which the payment applications declared unacceptable relate – cannot succeed. By the same token, its argument that, in view of the legal definition of a ‘measure’, the Commission must, when making that comparison, be aware of and address in its assessment the specific ‘operations’ covered by the ‘measure’ in question is ineffective. The mere fact that a payment application may refer to a number of specific operations implemented under a single measure (over a period of several years) – in the present case, Measure 1.7 – does not permit a *contra legem* interpretation of the clear and precise wording of the second condition laid down in point (f) of the first subparagraph of Article 32(3) of Regulation No 1260/1999, to the effect that it is necessary to carry out that comparison in relation to the matters covered by each of the various operations, rather than in relation to the ‘measure(s)’ in question. Lastly, contrary to the assertions of the Italian Republic, the expression ‘concerning the [measure] [forming] the subject of the [payment] application’, to which the other language versions of that provision also correspond, does not express a requirement for there to be a specific link or a perfect coincidence, but simply requires that there be either a connection with or a general reference to the measure(s).

47 The assessment made above is also borne out, from a contextual point of view, by the second sentence of the first subparagraph of Article 32(3) and by Article 18(2)(b) and (c) of Regulation No 1260/1999. Under the second sentence of the first subparagraph of Article 32(3) of that regulation, interim payments – which must be made in response to a specific reimbursement application – are to be ‘calculated at the level of measures contained in the financing plan of the programme complement’ and not at the level of ‘operations’ covered by those measures. That interpretation is consistent with the principle that the indicative financing plan as mentioned in Article 18(2)(c) of that regulation, which refers to ‘priorities’, can only be based on the description of the measures in question, whereas ‘operations’ are not subject to such a requirement. Under Article 18(2)(b) of Regulation No 1260/1999, ‘[e]ach operational programme shall contain: ... a summary description of the measures planned to implement the priorities’. It follows that, if the legislature did not require a more precise definition of the scope of those ‘measures’, which are all that must be compared with the matters concerned by the infringement procedure under the second condition laid down in point (f) of the first subparagraph of Article 32(3) of Regulation No 1260/1999, *a fortiori* there is no such precision requirement as regards the various ‘operations’ covered by such a ‘measure’. Lastly, that assessment is not undermined by the second subparagraph of Article 31(2) of Regulation No 1260/1999, as the Community budget commitment is not linked to ‘operations’, but rather to ‘assistance’, as is evident from the first subparagraph of Article 31(2) of that regulation.

48 In that context, Article 86(1)(d) of Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation No 1260/1999 (OJ 2006 L 210, p. 25) is irrelevant. That new provision, which replaces the second condition under point (f) of the first subparagraph of Article 32(3) of Regulation No 1260/1999, does not have retroactive effect and, accordingly, is neither applicable to the present case nor relevant for the purposes of a decision in the present dispute. Thus, the negative eligibility condition for payments which is laid down therein, under which ‘[e]ach interim payment made by the Commission shall be subject to the [condition that] there is no reasoned opinion by the Commission in respect of an infringement under Article 226 [EC] as regards the operation(s) for which the expenditure is declared in the application for payment in question’, cannot influence the interpretation of the earlier provision. In addition, it should be noted for the sake of completeness that, first, the new provision adds a detail which is not present in the earlier provision – in respect of which the Commission provided no statement of reasons in its initial proposal of 14 July 2004 (COM(2004) 492 final) – which was incorporated, in essence, in the regulation as finally enacted and, second, Regulation No 1083/2006 has completely abandoned the concept of a ‘measure’: Article 2 of that regulation merely defines a ‘priority axis’ (‘one of the priorities of the strategy in an operational programme comprising a group of operations which are related and have specific measurable goals’), an ‘operation’ (‘a project or group of projects ... allowing achievement of the goals of the priority axis to which it relates’) and the connection between those two concepts. Within this new regulatory framework, an ‘operation’ thus replaces both a ‘measure’ and an ‘operation’ as defined by the earlier

Regulation No 1260/1999 and is directly related to a ‘priority axis’. In those circumstances, the Italian Republic cannot use an argument based on Regulation No 1083/2006 to substantiate its main argument concerning the requirement that there be a coincidence between the matters concerned by the infringement procedure and the operations to which the payment applications which were declared unacceptable relate.

- 49 Accordingly, the Italian Republic’s argument regarding the existence of a specific link between the matters covered by the infringement procedure and the operation to which the payment application relates must be rejected. *A fortiori*, its argument that the second condition under point (f) of the first subparagraph of Article 32(3) of Regulation No 1260/1999 requires that the operations – whether projects or actions – covered by the payment applications declared unacceptable coincide perfectly with, or be identical to, the complaints invoked by the Commission in infringement procedure 2007/2195 cannot succeed. Nonetheless, the Commission must establish a sufficiently direct link between the ‘measure’ in question (Measure 1.7 in the present case), on the one hand, and the matter covered by infringement procedure 2007/2195, on the other – a requirement which both parties acknowledged to be relevant during the hearing.
- 50 Those considerations are consistent with the aims of the relevant provisions of Regulation No 1260/1999. Although it is true, as asserted by the Italian Republic, that the second condition under point (f) of the first subparagraph of Article 32(3) of Regulation No 1260/1999 is designed to prevent the Structural Funds from being used to finance Member State operations which are contrary to EU law, it in no way follows that the attendant risk of an unacceptable loss of Community funds must be specifically attributed to the inherent unlawfulness or the unlawful implementation of specific operations (projects or actions) to which the payment application relates; nor does it follow that the Commission is obliged to show that that risk is a direct and specific result of such unlawful operations, contested in an infringement procedure. A restrictive interpretation of that kind would diminish the useful effect of the provisions in question, which confer upon the Commission, on a purely provisional basis, the power to suspend payments under financial commitments of the Structural Funds made in the context of an operational programme, where it is faced with what is presumed to be an infringement of EU law by the recipient Member State which has a sufficiently direct link to the measure to which the envisaged financing relates, pending a judgment of the Court of Justice of the European Union confirming or rejecting the finding that the infringement took place.
- 51 Furthermore, contrary to the submissions of the Italian Republic, that assessment is not undermined by the first condition under point (f) of the first subparagraph of Article 32(3) of Regulation No 1260/1999, which makes it possible, in a similar manner, for the Commission to trigger the suspension of interim payments using the suspension procedure provided for in Article 39(2) of that regulation, that is to say, outside the framework of an infringement procedure. Apart from the fact that Article 39(2) of Regulation No 1260/1999, too, does not refer to an ‘operation’, the first condition under point (f) of the first subparagraph of Article 32(3) of Regulation No 1260/1999, like the second condition, provides that ‘no suspension of payments’ must concern ‘the measure(s) that is or are the subject of the [payment] application’. Accordingly, the first condition must be construed in the manner set out in paragraph 43 et seq. above and does not, as a matter of fact, show that a specific link to certain ‘operations’ must be established. Lastly, it clearly follows from the wording of the two conditions under point (f) of the first subparagraph of Article 32(3) of Regulation No 1260/1999 that it is sufficient for the Commission to rely on a single one of those conditions in order to be able provisionally to refuse an interim payment.
- 52 As regards the stages by which point (f) of the first subparagraph of Article 32(3) of Regulation No 1260/1999 came into being, it should be noted that the legislative proposal submitted by the Commission, laying down general provisions on the Structural Funds (OJ 1998 C 176, p. 1), contained a point (f) of the first subparagraph of Article 31(3), which referred to two conditions: the wording of the second of those conditions required that ‘no decision to launch an infringement procedure under Article 169 of the Treaty ha[d] been taken by the Commission, concerning the measure within the

assistance in question'. The subsequent deletion, during the decision-making process, of the reference to the more practical concept of 'assistance' shows *a contrario* that, ultimately, the legislature simply required that there be a sufficiently direct link between the matter covered by the infringement procedure, on the one hand, and the 'measure(s) that is or are the subject' of the payment application in question, on the other; the proposed legal definitions thereof were consistent with those finally used in Article 9 of Regulation No 1260/1999.

- 53 It is clear, therefore, from the wording, the regulatory context, the objective and the history of the provisions in question that, in order to justify declaring interim payments unacceptable in the light of an ongoing infringement procedure, it is sufficient for the Commission to establish that the matter covered by that procedure has a sufficiently direct link with the 'measure' governing the 'operations' to which the payment applications concerned relate.
- 54 Accordingly, the Commission was entitled to base the contested measures on the second condition under point (f) of the first subparagraph of Article 32(3) of Regulation No 1260/1999 and, in view of the power thus conferred upon the Commission provisionally to refuse interim payments, it was not obliged to follow the procedure referred to in the first condition under that provision, read in conjunction with Article 39(2) and (3) of Regulation No 1260/1999. As a result, it cannot be said that the Commission circumvented that procedure.
- 55 It must therefore be considered whether, in the present case, the Commission properly assessed whether there was a sufficiently direct link between the matters concerned by infringement procedure 2007/2195 and the matters covered by Measure 1.7, on which the payment applications declared unacceptable were dependent.

Application to the present case of the second condition under point (f) of the first subparagraph of Article 32(3) of Regulation No 1260/1999

- 56 First, it is common ground in the present case that, during infringement procedure 2007/2195, the Commission sent the Italian authorities a letter of formal notice on 29 June 2007 and a reasoned opinion on 1 February 2008 claiming that they had acted in breach of Articles 4 and 5 of Directive 2006/12 as they had not adopted, in respect of the Campania region, all the necessary measures to ensure that waste was recovered and disposed of without endangering human health and without harming the environment and, in particular, they had not created an adequate integrated network of waste disposal facilities, subsequent to which, on 4 July 2008, it brought an action before the Court for failure to fulfil obligations (see paragraphs 8 to 11 above and *Commission v Italy*, paragraph 12 above, paragraph 20 et seq.).
- 57 It must be stated that the Italian Republic does not dispute that, in the present case, the second application condition under point (f) of the first subparagraph of Article 32(3) of Regulation No 1260/1999 – relating to whether a 'decision has been taken by the Commission to embark on an infringement procedure pursuant to Article 226 [EC]' – has been met; nor does it dispute the relevance of the date, namely 29 June 2007, from which the Commission declared the payment applications in question to be unacceptable, a formal note of which was made in the record of the hearing. In any event, since the contested measures were all adopted after the action for failure to fulfil obligations was brought, there is no need to ascertain which of the measures referred to in paragraph 56 above constitutes a 'decision ... taken by the Commission' for the purpose of the above provision.
- 58 Secondly, as regards the alleged infringement of Articles 4 and 5 of Directive 2006/12, which is the matter covered by infringement procedure 2007/2195, it is clear both from *Commission v Italy* (in particular, from paragraphs 35, 36, 41, 76, 100 and 113 of that judgment, and from paragraph 1 of the operative part thereof) and from the Commission's application initiating proceedings for failure to fulfil

obligations (paragraph 58, fourth and fifth indents, and paragraphs 82, 84, 86, 87 and 102) that that procedure concerned the entirety of the system governing waste management and disposal in the Campania region, including (i) waste recovery and (ii) the inefficiency of differentiated collection – procedures which the Italian Republic is claiming were not covered by the infringement procedure (see paragraphs 36 and 37 above). As regards, more specifically, the alleged infringement of Article 4 of Directive 2006/12, it should be noted that, in paragraph 76 of *Commission v Italy*, the Court explicitly stated that the low rate of sorted waste collection in the region, as compared with the national and Community averages, had merely served to exacerbate the situation, and it concluded in particular from that finding, in paragraph 78 of the judgment, that the installations then existing and operational in Campania fell a long way short of being able to meet the actual needs of the region in terms of waste disposal. It follows that, contrary to the Italian Republic's assertions, the matters covered by infringement procedure 2007/2195 did indeed include the inadequacy of differentiated collection as being an upstream element exacerbating the failings of the waste management system as a whole. In the same way, in paragraph 1 of the operative part of the judgment in *Commission v Italy*, the Court expressly ruled, in accordance with the first head of claim made in the Commission's application, that the Italian Republic had failed to fulfil its obligations, inter alia, because it had not adopted all the measures necessary to ensure that waste was recovered and disposed of without endangering human health and without harming the environment. The Italian Republic is therefore wrong to claim that reclamation or recovery and differentiated collection were not among the matters covered by infringement procedure 2007/2195 and that there was no sufficiently direct link between those matters and the matters to which the payment applications declared unacceptable related. In that regard, it should be noted that the Italian Republic has itself acknowledged in its reply that the matters covered by the infringement procedure and the matters to which the provisional payment applications in question related overlap – at the very least – with regard to waste recovery – that being the reason which led it to invoke, in the alternative, a new plea, alleging breach of the principle of proportionality (see paragraph 37 above and paragraph 63 below).

59 Thirdly, it should be noted that the assistance provided for under Measure 1.7, as set out in the description of that measure in the amended version of the Campania OP, in addition to a series of forms of assistance in connection with the recovery of waste downstream from differentiated collection (paragraph 5(e) and (f) of the description of Measure 1.7), also included assistance relating to the establishment of a differentiated municipal waste collection system (paragraph 5(d) of the description of Measure 1.7) and concerning the establishment of landfills for the disposal of waste following differentiated collection (paragraph 5(b) of the description of Measure 1.7). As was recalled in paragraph 56 above, infringement procedure 2007/2195 expressly referred to failings relating both to recovery and to the inefficiency of the differentiated collection. That being so, there is no basis for the Italian Republic's complaint against the Commission to the effect that the matters concerned by Measure 1.7, hence the payment applications which were declared unacceptable, were not sufficiently connected with the matters covered by the infringement procedure. Moreover, while the Italian Republic has not succeeded in explaining sufficiently whether – and, if so, to what extent – the operations to which those payment applications related were specifically connected with the assistance mentioned in paragraph 5(b) to (g) of the description of Measure 1.7, it has nonetheless acknowledged that the interim payments applied for were specifically intended to improve, inter alia, the differentiated collection under paragraph 5(d) of the description of Measure 1.7.

60 Thus, the Italian Republic cannot claim that the operations to which the payment applications declared unacceptable relate were neither specifically covered by infringement procedure 2007/2195 nor, as such, contrary to Articles 4 and 5 of Directive 2006/12 and that the contested measures could compromise the objective of financing Measure 1.7, since the payments applied for were specifically intended to rectify the failing complained of. Indeed, as has been stated in paragraphs 43 to 54 above, under the second condition laid down in point (f) of the first subparagraph of Article 32(3) of Regulation No 1260/1999, it is sufficient for the Commission to establish a sufficiently direct link between, on the one hand, the matters covered by the infringement procedure and, on the other, the matters to which the payment applications declared unacceptable related, which it has done in the

present case by indicating, in essence, that the actions or operations to which those payment applications related were intended to attain certain objectives or sub-objectives provided for in Measure 1.7 and that the implementation of that measure was referred to in infringement procedure 2007/2195. In particular, in that regard, the Commission was not obliged to show that the financing of the operations under Measure 1.7 to which those payment applications relate could pose a concrete threat to the Union budget (see paragraph 50 above).

Findings concerning the first four pleas in law

- 61 In the light of all of the foregoing, the first plea in law must be rejected as unfounded.
- 62 As regards the second and third pleas in law, alleging, on the one hand, infringement of point (f) of the first subparagraph, and the second subparagraph, of Article 32(3) of Regulation No 1260/1999 and, on the other, distortion of the facts and misuse of powers, it is sufficient to state that, in the light of the considerations set out in paragraphs 56 to 60 above, the Italian Republic has not shown that the Commission misinterpreted or distorted the facts or that it used the procedure laid down in the above provision for a purpose other than that envisaged by the relevant criteria referred to therein, in particular those under the second condition under point (f) of the first subparagraph of Article 32(3) of Regulation No 1260/1999. In that regard, the Italian Republic's allegation that, in the assessment on which the contested measures are based, the Commission wrongly examined the lack of a general waste management plan is ineffective (see paragraph 38 above). In any event, the Commission has accepted the lack of a general waste management plan and emphasises that it is not significant for the purposes of resolving the present dispute. That complaint is not capable of invalidating the Commission's evidence that there is a sufficiently direct link between the matters covered by infringement procedure 2007/2195 and the matter to which the payment applications declared unacceptable related, as that link in itself justifies the application of point (f) of the first subparagraph, and the second subparagraph, of Article 32(3) of Regulation No 1260/1999. In those circumstances, it cannot be said that, in the present case, the Commission sought to achieve a result which it was unable to obtain without initiating either an infringement procedure or the suspension procedure referred to in Article 39(2) and (3) of that regulation.
- 63 In addition, in that context – as the Commission rightly contends – the Italian Republic is not entitled to invoke, in its reply, a new plea in law, alleging breach of the principle of proportionality (see paragraph 37 above), as the exceptional conditions laid down in the first subparagraph of Article 48(2) of the Rules of Procedure are clearly not met in the present case. Indeed, the Italian Republic puts forward no relevant matters of law or of fact which would have come to light only in the course of the proceedings, as all the elements on which the Commission based its defence were already present and known to it during the administrative procedure. In that regard, contrary to the Italian Republic's arguments at the hearing, the mere manner of presentation used by the Commission to set out those matters of law and of fact in its defence cannot justify a derogation from the provision referred to above and, in consequence, the new plea in law must be set aside as being inadmissible (see, to that effect, Case C-104/97 P *Atlanta v European Community* [1999] ECR I-6983, paragraph 29).
- 64 Accordingly, the second and third pleas in law must also be rejected, as must the new plea raised in the alternative, alleging breach of the principle of proportionality.
- 65 As regards the fourth plea in law, alleging infringement of point (f) of the first subparagraph, and the second subparagraph, of Article 32(3) and of Article 39(2) and (3) of Regulation No 1260/1999, breach of the *audi alteram partem* rule and misuse of powers, it follows from the considerations set out in paragraphs 43 to 60 above that the first of those provisions constituted a suitable legal basis for the adoption of the contested measures. Accordingly, the Italian Republic cannot maintain that the Commission misused the suspension procedure provided for in Article 39(2) and (3) of that regulation; nor can it be said that the Commission had no regard for the Italian Republic's rights of

defence in relation to the disputed grounds stated for the unacceptability of the interim payment applications, as initially set out in the letter of 31 March 2008 and subsequently reiterated in the contested measures. As the Commission contends, it is clear from that letter, read in conjunction with the contested measures, that some of the concerns and reservations connected with the waste management plan for the Campania Region of 28 December 2007, as set out in the letter of 20 October 2008 and briefly reiterated in the letter of 22 December 2008, were not – by contrast with the disputed grounds for unacceptability – the subject of any formal objection, whether during infringement procedure 2007/2195 or during the implementation of the Campania OP which led to the adoption of the contested measures. Accordingly, the contested measures cannot be regarded as flawed by a breach of the Italian Republic's rights of defence or any other defect, whether procedural or substantive, vitiating the legality of those measures in so far as they express those concerns and reservations.

66 Accordingly, the fourth plea in law must also be rejected.

Fifth plea in law: failure to state adequate reasons in accordance with Article 253 EC

67 By this plea, the Italian Republic argues, in essence, that the letter of 22 December 2008 is vitiated by a failure to state adequate reasons in respect of essential points of fact, given that the Commission failed to give an adequate response to the observations submitted by the Italian authorities in their letter of 9 June 2008. Thus, the letter of 22 December 2008 did not take into account the fact that the projects connected with Measure 1.7 have contributed, and could have contributed in the future, to solving the problem of waste disposal, in so far as they were projects designed to extend differentiated collection and the recovery of materials and of energy from waste thus processed. However, according to the Italian Republic, that aspect provided essential evidence of a link, or even a perfect match, between, on the one hand, the matters covered by, and the aims of, the infringement procedure and, on the other, the matters covered by, and the aims of, the projects under Measure 1.7. Moreover, given that both the aims and the projects under Measure 1.7 are defined in detail in the Campania OP, the Commission should have based its decision on an adequate examination of that OP and should have explained why it took the view that the situation triggering the infringement procedure would hinder the smooth implementation of that measure.

68 The Commission contends that this plea should be rejected.

69 As a preliminary point, it should be borne in mind that, by its letter of 31 March 2008 – which is not contested in the present actions – the Commission informed the Italian authorities of the inferences that it intended to draw from infringement procedure 2007/2195 by way of consequences for the financing of Measure 1.7 in the context of implementing the Campania OP (see paragraph 13 above). In that letter, the Commission stated that it could no longer make, pursuant to Article 32(3) of Regulation No 1260/1999, 'interim payments to cover the repayment of expenditure incurred in connection with Measure 1.7 [concerning] the "Regional waste management and disposal system" referred to in the infringement procedure [in question]'. In that regard, the Commission stated that 'waste management as a whole [was] unsatisfactory, given the need to ensure proper waste collection and disposal and, accordingly, to ensure also the actions listed in Measure 1.7, such as those connected with facilities for waste storage, treatment and disposal, facilities for the recovery of the wet and dry parts, the final implementation of landfills, in addition to differentiated collection ..., and the sectorial plans and programmes'. The Commission therefore concluded, in essence, that any payment application in respect of expenditure incurred in connection with Measure 1.7 submitted after the date when the Campania region failed to fulfil its obligations under Directive 2006/12 would be unacceptable.

- 70 The Commission referred to that statement of reasons (see paragraphs 13 to 21 above) in all the contested measures, which means that it must be considered an integral part of the grounds for those measures for the purposes of the review of their legality, a point that the parties acknowledged at the hearing (a formal note of that acknowledgment was made in the record of that hearing). Furthermore, in its letter of 22 December 2008, the Commission observed that infringement procedure 2007/2195 called in question the entirety of the waste management system in Campania in the light of Articles 4 and 5 of Directive 2006/12 in order to conclude that there were not 'sufficient guarantees that the operations co-financed by the ERDF under Measure 1.7, which, according to the wording of that measure, concern[ed] the entirety of the regional waste management and disposal system, the effectiveness and adequacy of which [were] at issue in the infringement procedure [in question], [would] be properly carried out'.
- 71 As has been acknowledged by settled case-law, the purpose of the obligation to state the reasons for an individual decision is to provide the person concerned with sufficient information to make it possible to determine whether the decision is well founded or whether it is vitiated by an error which may make it possible for its validity to be contested, and to enable the Courts of the European Union to review its lawfulness. The extent of that obligation depends on the nature of the measure at issue and the context in which it was adopted. Given that a Commission decision, adopted in the context of implementing the ERDF and concerning the provisional unacceptability of interim payment applications, will have negative financial consequences both for the applicant Member State and for the final recipients of those payments, that decision must show clearly the grounds justifying the declaration of unacceptability (see, to that effect, the judgment of the General Court of 13 July 2011 in Case T-81/09 *Greece v Commission*, not published in the ECR, paragraph 41; and see, to that effect and by analogy, Case T-137/01 *Stadtsportverband Neuss v Commission* [2003] ECR II-3103, paragraphs 52 to 54). However, it is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements under Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (Case C-89/08 P *Commission v Ireland and Others* [2009] ECR I-11245, paragraph 77).
- 72 In view of the fact that the statement of reasons for the contested measures encompasses the statement of reasons provided in the letter of 31 March 2008, it is sufficient to state that, with regard to that statement of reasons and the account of all the relevant factors justifying the application of point (f) of the first subparagraph of Article 32(3) of Regulation No 1260/1999, not only was the Italian Republic able to mount an effective challenge in respect of the substantive legality of the contested measures, but also the General Court is in a position to exercise in full its jurisdiction to review legality (see paragraphs 42 to 66 above). Furthermore, in light of the case-law cited in paragraph 71 above, the Commission was not obliged to respond explicitly in the contested measures to all the arguments put forward in the Italian Republic's letter of 9 June 2008, since the essential evidence to support those measures was sufficiently set out therein. As regards the context in which the contested measures were adopted, it must be stated that the Italian authorities, as the addressees of infringement procedure 2007/2195, were aware of the matters addressed through the challenge made by the Commission and were accordingly in a position to make a comparison between the matters covered by Measure 1.7, the matters to which the payment applications declared unacceptable related, and the matters covered by the declarations of unacceptability made in the contested measures; and, in consequence, a statement of reasons more detailed than the one set out in those measures was unnecessary. In that regard, it must be stated that the mere fact that the Italian Republic wrongly considered certain elements to be essential – such as the perfect coincidence allegedly required between the matters to which the payment applications declared unacceptable related and the matters covered by the infringement procedure (see paragraphs 42 to 54 above), which forms part of a substantive assessment – is not capable of altering the scope of the Commission's formal duty to state reasons.
- 73 Accordingly, the fifth plea in law must be rejected as unfounded.

Sixth and seventh pleas in law, raised in Case T-308/09: respectively, infringement of Articles 32 and 39 of Regulation No 1260/1999 and infringement of Article 230 EC

- 74 By the sixth plea in law, the Italian Republic submits that the additional ground of unacceptability put forward by the Commission in its letter of 20 May 2009 in respect of the payment application in question, which was based on a situation of *lis pendens* as Case T-99/09 was then pending, is contrary to Articles 32 and 39 of Regulation No 1260/1999, which provide a limited list of situations in which the Commission is permitted to suspend an interim payment and to declare the payment application unacceptable. The existence of an action based on Article 230 EC and contesting similar measures already taken by the Commission is not, however, included in that list of situations.
- 75 By the seventh plea in law, the Italian Republic asserts that, in so far as the Commission is refusing the interim payment by reason of the fact that an action based on Article 230 EC is pending, the letter of 20 May 2009 is also vitiated by infringement of that provision, in that Article 230 EC is an expression of the fundamental right to effective judicial protection from the Courts of the European Union. According to the Italian Republic, the Commission's approach would deter Member States from bringing actions contesting decisions refusing payment applications, given the risk that interim payments could be suspended pending a final decision in such actions; and, accordingly, it would constitute an unacceptable restriction of the exercise of their right to judicial protection.
- 76 The Commission contends that those pleas should be rejected.
- 77 As regards the sixth plea in law, alleging infringement of Articles 32 and 39 of Regulation No 1260/1999, it is sufficient to state that that plea is based on a misinterpretation of the letter of 20 May 2009, contested in Case T-308/09, which relies on the same grounds of unacceptability as those set out in the letters of 31 March and 22 December 2008. As the Commission points out, the reference to the situation of *lis pendens* in related Case T-99/09 is merely a description of the legal situation at that stage in the proceedings and cannot be deemed an additional ground of unacceptability which is not provided for under Articles 32 and 39 of Regulation No 1260/1999. In making that reference, the Commission merely drew the Italian Republic's attention to the fact that the outcome of the proceedings in Case T-99/09, which concerns the legality of the same grounds of unacceptability, would necessarily influence the outcome of the proceedings in Case T-308/09, and that the Commission will continue to regard the interim payment applications in question as unacceptable pending a definitive ruling in that regard from the Courts of the European Union.
- 78 By the same token, as regards the seventh plea in law, alleging infringement of Article 230 EC, it is sufficient to note that the Commission did not refer to Article 230 EC in order to invoke an additional ground of unacceptability under Articles 32 and 39 of Regulation No 1260/1999 or to deter the Italian Republic from bringing legal proceedings, but simply to take account of the existence of related Case T-99/09 and of the fact that its outcome was likely to influence the outcome of Case T-308/09.
- 79 Consequently, the sixth and seventh pleas in law must be rejected as manifestly unfounded.
- 80 In the light of all of the foregoing, the present actions must be dismissed in their entirety.

Costs

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

⁸² Since the Italian Republic has been unsuccessful in all of its pleas in law and the Commission has applied for costs, the Italian Republic must be ordered to bear its own costs and to pay those incurred by the Commission.

On those grounds,

THE GENERAL COURT (First Chamber)

hereby:

- 1. Dismisses the actions;**
- 2. Orders the Italian Republic to bear its own costs and to pay those incurred by the European Commission.**

Azizi

Dehousse

Frimodt Nielsen

Delivered in open court in Luxembourg on 19 April 2013.

[Signatures]

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