



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

7 May 2019*

(EAGF and EAFRD – Expenditure excluded from financing – Expenditure incurred by Germany – Flat-rate financial correction applied due to insufficient frequency of key controls – Obligation to calculate interest and record it in the accounts annually – Articles 31 and 32 of Regulation (EC) No 1290/2005 – Article 6(h) of Regulation (EC) No 885/2006 – Obligation to state reasons – Proportionality)

In Case T-239/17,

Federal Republic of Germany, represented initially by D. Klebs and T. Henze, and subsequently by D. Klebs, acting as Agent,

applicant,

v

European Commission, represented by D. Triantafyllou and M. Zalewski, acting as Agents,

defendant,

APPLICATION on the basis of Article 263 TFEU for the partial annulment of Commission Implementing Decision (EU) 2017/264 of 14 February 2017 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 2017 L 39, p. 12), in so far as it concerns the Federal Republic of Germany,

THE GENERAL COURT (Eighth Chamber),

composed of A.M. Collins, President, M. Kancheva (Rapporteur) and G. De Baere, Judges,

Registrar: N. Schall, Administrator,

having regard to the written part of the procedure and further to the hearing on 13 November 2018,

gives the following

Judgment¹

...

* Language of the case: German.

¹ Only the paragraphs of the present judgment which the Court considers it appropriate to publish are reproduced here.

Law

...

The first plea, alleging the lack of any wrongful calculation or presentation of interest

- 29 The Federal Republic of Germany submits that the contested decision infringes the combined provisions of Articles 31(1) and 32(5) of Regulation No 1290/2005 as well as Article 6(h) of and Annex III to Regulation No 885/2006. In that regard, the Federal Republic of Germany submits that neither Article 32 of Regulation No 1290/2005, nor the case-law of the Court, nor the sector-specific legal provisions on export refunds, nor working document AGRI-2007-62817-03-00, nor Guidance Document No 1 on the presentation to the Commission of the tables in Annex III and Annex IIIA to Regulation No 885/2006 until 1 February 2009 ('Guidance Document No 1') contains any obligation for interest to be calculated and recorded in the accounts on an annual basis so that it can be charged under the 50/50 rule. Therefore, in the absence of any infringement by the German authorities of the provisions of EU law relating to the calculation and presentation of interest, the 5% financial correction applied by the Commission in the contested decision cannot be justified.
- 30 In particular, the Federal Republic of Germany submits, primarily, that Article 32 of Regulation No 1290/2005 merely provides in a general way for losses to be split according to the 50/50 rule, so that interest and sanctions are shared equally between the European Union and the Member States and are not deemed to be payable by the Member States merely because of the share of the principal debt. The Federal Republic of Germany also considers that the only requirement under EU law is to indicate separately the various amounts to be recovered so that, where necessary, a separate breakdown can be made of individual sums not yet recovered.
- 31 In the alternative, the Federal Republic of Germany submits, first, that recording interest in the accounts on an annual basis only became legally binding on the entry into force of Regulation No 1306/2013 and Implementing Regulation No 908/2014, which are not applicable in the present case. Secondly, it submits that the Commission failed to comply with Guidance Document No 1 by requiring interest to be updated at the end of each financial year.
- 32 The Commission disputes all of those arguments, claiming that the first plea is based on a misinterpretation of Articles 31(1) and 32(5) of Regulation No 1290/2005, read in conjunction with Article 6(h) of Regulation No 885/2006. In essence, the Commission submits that, even if there is no provision of EU law governing the particular obligation to record interest in the accounts, it is nonetheless the case that the table in Annex III to Regulation No 885/2006 makes clear reference to the requirements of Article 6(h) of that regulation, under which information about the amounts stated in that table must be notified annually to the Commission. According to the Commission, the effect of that provision, when read in conjunction with Article 32 of Regulation No 1290/2005, is that there is an obligation to record in the accounts on an annual basis the amounts declared in the table in Annex III to Regulation No 885/2006.
- 33 As a preliminary point, it should be noted that, in its first plea, the Federal Republic of Germany is seeking to show, under its first head of claim, that the contested decision should be annulled on the basis that the Commission infringed Articles 31 and 32(5) of Regulation No 1290/2005, read in conjunction with Article 6(h) of and Annex III to Regulation No 885/2006, by applying a financial correction for an insufficiency of key controls as a result of the breach of the obligation to record in the accounts and calculate on an annual basis the interest borne by the Federal Republic of Germany.
- 34 When examining the first plea, it is therefore necessary to determine whether there was an obligation on the Federal Republic of Germany to calculate and present on an annual basis the interest payable in order to establish whether there was an infringement of EU law. The question of whether the

application of a financial correction was justified in the present case and whether the financial correction was proportional will be dealt with in the context of the fifth plea, which alleges an infringement of the principle of proportionality.

- 35 It should, moreover, be noted that the table in Annex III to Regulation No 885/2006 is an instrument for calculating the amounts charged to Member States under the 50/50 rule. It follows that the obligation to calculate interest on an annual basis necessarily presupposes the prior adoption of an accounting entry system based on a financial year established in accordance with the model in Annex III to Regulation No 885/2006, so that the obligation to calculate interest and record it in the accounts on an annual basis is, logically, one and the same obligation.
- 36 Furthermore, Article 32 of Regulation No 1290/2005, concerning the obligations on Member States, in relation to the recovery of sums from beneficiaries who have committed irregularities or on whose part there has been a finding of negligence, refers, in its paragraph 5, to the particular situations where the Member State has not recovered the sums either within four years of the primary administrative or judicial finding or within eight years where recovery action is taken in the national courts. In such situations, the said paragraph 5 provides that ‘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’.
- 37 According to the case-law, the division, in equal parts, of the financial responsibility between the Member State concerned and the Union budget, as laid down in Article 32(5) of Regulation No 1290/2005, applies to all the effects of a financial nature linked to non-recovery of sums irregularly paid, which include inter alia the principal sums and interest thereon which should have been paid pursuant to Article 32(1) of that regulation (judgment of 24 November 2015, *Netherlands v Commission*, T-126/14, EU:T:2015:875, paragraph 76; see also, to that effect, judgment of 22 April 2010, *Italy v Commission*, T-274/08 and T-275/08, EU:T:2010:154, paragraphs 39, 41 and 44).
- 38 In that regard, it should be noted that ‘amounts not recovered’, for the purposes of Article 32(3) and (5) of Regulation No 1290/2005, include the principal sum, interest and sanctions.
- 39 Furthermore, Article 6 of Regulation No 885/2006 provides that the annual accounts referred to in Article 8(1)(c)(iii) of Regulation (EC) No 1290/2005 and which must be supplied to the Commission shall include, inter alia, the table of the undue payments to be recovered at the end of the financial year as a consequence of irregularities within the meaning of Article 1(2) of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests (OJ 1995 L 312, p. 1), ‘including any sanctions and interests thereon’, following the model set out in Annex III to Regulation No 885/2006.
- 40 It is settled case-law that, in interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part (see judgments of 7 June 2005, *VEMW and Others*, C-17/03, EU:C:2005:362, paragraph 41 and the case-law cited, and of 6 October 2005, *Sumitomo Chemical and Sumika Fine Chemicals v Commission*, T-22/02 and T-23/02, EU:T:2005:349, paragraph 47 and the case-law cited).
- 41 It is in the light of those principles that it is necessary to consider whether Article 6(h) of Regulation No 885/2006 must be interpreted as requiring Member States to calculate and record in the accounts the ‘undue payments to be recovered’ in the table set out in Annex III to that regulation on an annual basis.
- 42 It should be noted, first of all, that Article 6 of Regulation No 885/2006 appears in Chapter 2, entitled ‘Clearance of accounts’, in the same way as Article 32(5) of Regulation No 1290/2005 appears in Title IV entitled ‘Clearance of accounts and Commission monitoring’.

- 43 In the first place, it appears that the answer to the question of the annual calculation and recording of interest in the accounts can be deduced from a literal interpretation of Article 6(h) of Regulation No 885/2006. It should be noted, first, that the expression ‘undue payments to be recovered at the end of the financial year’ means that, when the annual accounts are notified to the Commission, all amounts must be included that have not yet been recovered at the end of a financial year, in other words, at the end of a year. Secondly, it is clear from the words ‘including any sanctions and interests thereon’ that those amounts include not only the undue payments but also interest. Thirdly, as the said amounts are included in the annual accounts, they are, necessarily, recorded in the accounts on an annual basis.
- 44 In the second place, that literal interpretation is consistent with the general scheme of the accounts clearance procedure, which, as the Commission pointed out in its pleadings, is an annual exercise. Article 32(5) of Regulation No 1290/2005 and Article 6(h) of Regulation No 885/2006 must be read in the light of recital 23 of Regulation No 1290/2005, according to which ‘the Commission should clear the accounts [of the accredited paying agencies] annually’ and ‘the clearance of accounts decision should cover the completeness, accuracy and veracity of the accounts’. During the clearance procedure, the Commission must therefore ensure that none of the amounts appearing in the annual accounts is omitted from clearance. For that purpose, the information concerning the balance of debts and amounts recovered in the Member States entered in the tables in Annex III to Regulation No 885/2006 and attached to the annual accounts of the paying agencies must necessarily be updated annually, so that the accounts of those agencies are accurate and up to date at the end of the financial year, for clearance purposes.
- 45 In the third place, it is apparent from the preamble to Regulation No 1290/2005, and in particular from recitals 25 and 26 in that preamble, that the system of shared financial responsibility established by Article 32(5) of that regulation is designed to protect the financial interests of the EU budget by a partial charging to the Member State concerned of sums payable as a result of irregularities and not recovered within reasonable deadlines. As the Commission rightly observes, the failure to calculate and update on an annual basis the default interest in the table in Annex III to Regulation No 885/2006, the purpose of which is to calculate the amounts chargeable to Member States in accordance with the 50/50 rule, meant that it was not possible to determine the exact amount of default interest to be charged to the Federal Republic of Germany. Therefore, the inaccuracy of data entered in the table in Annex III of Regulation No 885/2006 is, according to the Commission, incompatible with the protection of the financial interests of the EU budget, which is then exposed to the risk of bearing the cost of default interest which should have been charged to the Member State in question under the 50/50 rule.
- 46 Furthermore, it should be noted that even if, as the Federal Republic of Germany maintains, the model table appearing in Annex III to Regulation No 885/2006 does not, *prima facie*, impose any explicit obligation to record interest in the column for the correction of the principal amount, it is apparent from the case-law that, when interest is due on principal claims, at the end of a financial year, under EU sector-specific regulations, such claims for interest must be regarded as resulting from the same irregularity, within the meaning of Article 1(1) of Regulation No 2988/95, as that giving rise to the recovery of the aid and amounts wrongly received, constituting the principal claims (judgment of 2 March 2017, *Glencore Céréales France*, C-584/15, EU:C:2017:160, paragraph 42). Since the amount of the initial debt must be adjusted each year depending on the partial or total recovery of interest due on that debt, the interest must be updated at the end of every financial year by way of a corrected amount and, therefore, must be recorded with the principal debt in the table of irregularities. Accordingly, interest must necessarily be recorded in the column of the table in Annex III to Regulation No 885/2006 for the correction of the principal claim.
- 47 Finally, as regards the argument advanced by the Federal Republic of Germany that point 2(E) of Annex I to Regulation No 885/2006 and Article 5 of Commission Regulation (EC) No 883/2006 of 21 June 2006 laying down detailed rules for the application of Council Regulation (EC) No 1290/2005

as regards the keeping of accounts by the paying agencies, declarations of expenditure and revenue and the conditions for reimbursing expenditure under the EAGF and the EAFRD (OJ 2006 L 171, p. 1), relied on by the Commission in the 2015 Communication, do not contain any requirements in relation to the presentation of the data in Annex III to Regulation No 885/2006, it should be noted, on the one hand, that the said point 2(E), concerning procedures for debts, provides that ‘all the criteria provided for in points A) to D) shall apply, *mutatis mutandis*, to levies, forfeited guarantees, reimbursed payments, assigned revenues etc. which the agency is required to collect on behalf of the EAGF and of the EAFRD’. Point 2(C) of Annex I to Regulation No 885/2006 provides that the paying agency shall adopt procedures to ensure that ‘monthly, quarterly (for the EAFRD) and annual declarations are complete, accurate and timely, and that any errors or omissions are detected and corrected, in particular through checks and reconciliations performed at intervals’. Accordingly, point 2(E) of Annex I to Regulation No 885/2006 provides that procedures for debts must comply with the requirements under point 2(C). It is therefore clear that that annex contains a requirement concerning the presentation of data in the context of the clearance of EAGF accounts, even though it does not refer expressly to Annex III.

- 48 On the other hand, it should be noted, as the Federal Republic of Germany observes, that Article 5 of Regulation No 883/2006, which contains the general rules on the declaration of expenditure and on assigned revenue, does not actually include any requirement relating to the presentation of the data in Annex III to Regulation No 885/2006. However, given that Article 32(5) of Regulation No 1290/2005, read in conjunction with Article 6(h) of and Annex III to Regulation No 885/2006, makes it compulsory for interest to be recorded in the accounts and calculated on an annual basis, the argument that Article 5 of Regulation No 883/2006 does not include any requirement as to the presentation of the data in the table in Annex III is irrelevant.
- 49 In the light of the foregoing, it must therefore be held that the Federal Republic of Germany is wrong to maintain that the Commission misinterpreted Article 32(5) of Regulation No 1290/2005, read in conjunction with Article 6(h) of and Annex III to Regulation No 885/2006.
- 50 The conclusion established in paragraph 49 above cannot be called into question by the other arguments raised by the Federal Republic of Germany.
- 51 First, the argument that the Commission failed to comply with Guidance Document No 1 in requiring interest to be calculated on an annual basis rests on a misinterpretation of that document by the Federal Republic of Germany. In fact, it is clear from Guidance Document No 1 that the data entered in the table in Annex III to Regulation No 885/2006 include all amounts relating to undue payments, including interest and sanctions thereon, which must be updated at the end of the current year in order to identify the amounts due for the following year.
- 52 Secondly, the argument that the express introduction in Regulation No 1306/2013 and Implementing Regulation No 908/2014 of an obligation to calculate interest and record it in the accounts on an annual basis shows that, before those regulations came into force, the Commission did not consider it necessary for interest to be calculated and presented on an annual basis must also be rejected. Regulation No 1306/2013 and Implementing Regulation No 908/2014 did not, in fact, substantially alter the legal situation with regard to the reporting of interest to be recovered, since the obligation to calculate interest and present it on an annual basis existed under Regulation No 1290/2005 and Regulation No 885/2006.
- 53 In particular, it should be noted that the relevant provisions of Regulation No 1290/2005 and Regulation No 885/2006 were not altered significantly as a result of Regulation No 1306/2013 and Implementing Regulation No 908/2014 coming into force. Article 6(h) of Regulation No 885/2006 and Article 29(f) of Implementing Regulation No 908/2014 essentially impose the same obligation to notify the Commission of all amounts not yet recovered at the end of a financial year, under Annex III in the case of Regulation 885/2006 and under Annex II in the case of Implementing Regulation No 908/2014.

The mere addition in the latter annex of column ‘Z’ for the annual declaration of the amount of interest remaining to be recovered for irregularities identified from 16 October 2014 is irrelevant in that regard.

- 54 Furthermore, despite the Federal Republic of Germany’s assertions to the contrary, the distinction drawn by Guidance Document No 5 on notification to the Commission of the tables set out in Annexes II and III of Implementing Regulation No 908/2014 for financial year N between ‘old’ and ‘new’ cases of irregularities in the model table referred to in Article 29(f) of Implementing Regulation No 908/2014 does not support the conclusion that there was a substantial alteration to the legal situation in relation to declaring interest not recovered. In fact, it should be noted, as the Commission observes, that such a distinction only applies in the context of the transitional provision of Article 41(5) of Commission Delegated Regulation (EU) No 907/2014 of 11 March 2014 supplementing Regulation No 1306/2013 of the European Parliament and of the Council with regard to paying agencies and other bodies, financial management, clearance of accounts, securities and use of euro (OJ 2014 L 255, p. 18), since that provision distinguishes between, on the one hand, cases in which a primary administrative or judicial finding of irregularity was established before 16 October 2014, in other words, old cases, and, on the other hand, cases in which such a finding occurred after 16 October 2014, in other words, new cases.
- 55 In addition, the Federal Republic of Germany cannot claim that the Commission adopted contradictory arguments in its letter of 29 November 2016 setting out its final position since, even though the requirement for interest to be calculated and recorded in the accounts on an annual basis does not appear explicitly either in Article 6(h) of Regulation No 885/2006 or in Article 29(f) of Implementing Regulation No 908/2014, it is still the case that there is such a requirement resulting from the wording of Article 6(h) of Regulation No 885/2006, read in the light of the general scheme of the accounts clearance procedure and the objectives of the legislation which, in essence, provides for the same obligation as Article 29(f) of Implementing Regulation No 908/2014.
- 56 In the light of the foregoing, it must be held that the Commission did not infringe Articles 31 and 32(5) of Regulation No 1290/2005, read in conjunction with Article 6(h) and Annex III to Regulation No 885/2006, and that the Commission was therefore correct to find that there was an obligation to calculate and record in the accounts on an annual basis interest on sums not recovered following the occurrence of irregularities or negligence, in the table in Annex III to Regulation No 885/2006, in view of the application of the 50/50 rule.

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On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

- 1. Dismisses the action;**
- 2. Orders the Federal Republic of Germany to bear its own costs and to pay those incurred by the European Commission.**

Collins

Kancheva

De Baere

Delivered in open court in Luxembourg on 7 May 2019.

[Signatures]