Reports of Cases

JUDGMENT OF THE GENERAL COURT (Seventh Chamber)

19 December 2019*

(EAGF and EAFRD – Expenditure excluded from financing – Applicable time periods between multiple visits by the national control authorities – Announcement of on-the-spot checks – Implied notice – Articles 25 and 26 of Implementing Regulation (EU) No 809/2014 – Flat-rate financial correction)

In Case T-509/18,

Czech Republic, represented by M. Smolek, J. Pavliš, O. Serdula and J. Vláčil, acting as Agents,

applicant,

v

European Commission, represented by A. Lewis, A. Sauka and K. Walkerová, acting as Agents,

defendant,

APPLICATION under Article 263 TFEU seeking the annulment of Commission Implementing Decision (EU) 2018/873 of 13 June 2018 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 2018 L 152, p. 29), in so far as it excludes expenditure in the amount of EUR 151 116.65 incurred by the Czech Republic under the EAFRD.

THE GENERAL COURT (Seventh Chamber),

composed of V. Tomljenović, President, A. Marcoulli and A. Kornezov (Rapporteur), Judges,

Registrar: R. Ūkelytė, Administrator,

having regard to the written part of the procedure and further to the hearing on 3 October 2019,

gives the following

* Language of the case: Czech.

Judgment

Background to the dispute

1 The investigation which gave rise to this dispute was carried out by the European Commission between 23 and 27 November 2015 under reference RD 2/2015/023/CZ. It concerned the implementation by the Czech Republic of the Rural Development Programme EAFRD Axis 2 (2007-2013, area related measures) with regard to the administration and control system used in the Czech Republic, in the context of agri-environmental rural development measures or measures to compensate for natural handicaps. It followed a previous Commission investigation carried out in the Czech Republic in 2011 under reference RD 2/2011/013/CZ.

2 Pursuant to Regulation (EU) No 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EEC) No 352/78, (EC) No 165/94, (EC) No 2799/98, (EC) No 814/2000, (EC) No 1290/2005 and (EC) No 485/2008 (OJ 2013 L 347, p. 549, and corrigendum OJ 2016 L 130, p. 6), and Commission Implementing Regulation (EU) No 809/2014 of 17 July 2014 laying down rules for the application of Regulation (EU) No 1306/2013 with regard to the integrated administration and control system, rural development measures and cross compliance (OJ 2014 L 227, p. 69), as amended, the Commission informed the Czech Republic, by letter of 16 February 2016, of its observations relating to the investigation carried out in 2015. In that letter, the Commission stated, inter alia, that on-the-spot checks carried out by various departments of the Member State at the premises of one beneficiary were to be coordinated so that the intervals between the various site visits to one beneficiary would be reduced and would not, in any event, exceed 14 days, or 48 hours in respect of, in particular, on-the-spot checks concerning livestock aid applications or payment claims for animal-related support measures ('livestock aid applications'), as provided for in Article 4(7) of Commission Regulation (EU) No 65/2011 of 27 January 2011 laying down detailed rules for the implementation of Council Regulation (EC) No 1698/2005, as regards the implementation of control procedures as well as cross-compliance in respect of rural development support measures (OJ 2011 L 25, p. 8), in force at that time. The Czech Republic replied on 14 April 2016, and the Commission sent comments to the Czech Republic again on 18 May 2016.

3 A bilateral meeting was held on 21 June 2016, the minutes of which were sent by the Commission to the Czech Republic on 22 July 2016. The Czech Republic submitted observations in that regard, which it sent to the Commission on 22 September 2016, in which it stated that despite disagreeing with the Commission, it had adopted, with effect from 8 August 2016 a new set of methodological instructions, as required by the Commission.

4 The Commission and the Czech Republic then exchanged a considerable amount of correspondence, following which the Commission decided to conduct an additional investigation ('the additional investigation'), of which it informed the Czech Republic on 13 October 2017. The additional investigation was carried out between 30 October and 3 November 2017.

5 Following the additional investigation, by letter of 14 March 2018, the Commission sent the Czech Republic its formal communication, as provided for in the third subparagraph of Article 34(3) and in Article 40(1) of Commission Implementing Regulation (EU) No 908/2014 of 6 August 2014 laying down rules for the application of Regulation (EU) No 1306/2013 of the European Parliament and of the Council with regard to paying agencies and other bodies, financial management, clearance of accounts, rules on checks, securities and transparency (OJ 2014 L 255, p. 59, and corrigendum OJ 2015 L 114, p. 25) ('the formal communication'). It confirmed the position it had previously expressed, which was that, where the Czech authorities carried out several on-the-spot checks at the premises of one beneficiary, the first check was to be regarded as 'implied notice' of the subsequent checks, so the latter had to take place within 14 days of the first check, or even within 48 hours of the first check in

the case of livestock aid applications, as provided for in Article 4(7) of Regulation No 65/2011 and Article 25 of Implementing Regulation No 809/2014. Failure to comply with that rule constituted a weakness in a key control. However, the Commission did not propose any financial correction for 2014 and 2015 because, during that period, the Czech authorities could have entertained legitimate expectations that the national system complied with EU law. By contrast, for 2016, the Commission had evaluated the risk to the EU Fund at EUR 151 116.65, and applied a flat-rate financial correction of 5% for a weakness in a key control (see page 2 of the formal communication).

6 On 24 April 2018, the Czech Republic made a request for conciliation, which was rejected as inadmissible by the Conciliation Body on the grounds that the amount at issue did not exceed EUR 1 million and that the Czech Republic had not demonstrated that the matter was one of principle relating to the application of EU rules.

7 On 13 June 2018, the Commission adopted Implementing Decision (EU) 2018/873 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 2018 L 152 p. 29; 'the contested decision')

8 The contested decision, inter alia, excluded from EU financing, in the case of the Czech Republic, a total amount of EUR 151 116.65 for measures under the integrated administration and control system (IACS), in the context of the EAFRD programme (2014-2020), which gave rise to payments in financial years 2017 and 2018.

Procedure and forms of order sought

9 By application lodged at the Court Registry on 24 August 2018 the Czech Republic brought the present action.

10 The statement in defence was lodged at the Court Registry on 29 November 2018. A corrigendum was submitted on 23 January 2019.

11 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 3 October 2019.

12 The Czech Republic claims that the Court should:

– annul the contested decision in so far as the Commission excluded from EU financing expenditure in the amount of EUR 151 116.65 incurred by the Czech Republic;

– order the Commission to pay the costs.

13 The Commission contends that the Court should:

– dismiss the action;

– order the Czech Republic to pay the costs.

Law

14 In support of its action, the Czech Republic puts forward three pleas in law, alleging, first, infringement of Article 52(1) of Regulation No 1306/2013, secondly, infringement of the principle of the protection of legitimate expectations and, thirdly, infringement of Article 52(1) and (2) of Regulation No 1306/2013 as concerns the amount of the financial correction set by the Commission.

15 As regards the first plea in law, the Czech Republic recalls that, under Article 52(1) of Regulation No 1306/2013, the Commission may exclude amounts from EU financing only if the corresponding expenditure has not been effected in conformity with EU law. In essence, it considers that the Commission was wrong to find that a first on-the-spot check constituted 'implied notice' of future checks and that, consequently, the latter should always be carried out within the periods of notice provided for in Article 25 of Implementing Regulation No 809/2014, namely 14 days or 48 hours, as appropriate.

16 The Commission contends that that plea should be rejected.

17 As a preliminary point, it should be stated, as the Commission recalled in its statement in defence, and as it had noted in the formal communication, that Regulation No 65/2011 was repealed with effect from 1 January 2015. Consequently, Implementing Regulation No 809/2014 was applicable with effect from claim year 2015. In that regard, it should be stated that, in this case, only claim year 2016 is in dispute, since, the Commission did not apply financial corrections in respect of claim years 2014 and 2015 (see paragraph 5 above). The present dispute must therefore be examined in the light of the relevant provisions of Implementing Regulation No 809/2014.

18 It should also be noted that, in the context of the clearance of the accounts of the agricultural funds, decisions are made on the basis of a summary report and correspondence between the Commission and the Member State concerned. In those circumstances, the reasons given for such decisions must be regarded as sufficient if the Member State to which the decision in question was addressed was closely involved in the process by which it came about and was aware of the reasons why the Commission considered that the disputed amount should not be charged to the EU Fund (see judgments of 21 March 2002, *Spain* v *Commission*, C-130/99, EU:C:2002:192, paragraph 126 and the case-law cited, and of 14 April 2005, *Portugal* v *Commission*, C-335/03, EU:C:2005:231, paragraph 84). The legality of the contested decision must therefore be examined in the light of, in particular, the content of the formal communication.

19 In this case, it is apparent from that communication that, according to the Commission, the Czech Republic's expenditure under the European Agricultural Fund for Rural Development (EAFRD) for claim year 2016 was not incurred in accordance with Article 25 of Implementing Regulation No 809/2014, which is why the Commission, on the basis of Article 52(1) of Regulation No 1306/2013, imposed the flat-rate financial correction which is the subject matter of the present dispute.

20 In that regard, it should be recalled that Article 52(1) of Regulation No 1306/2013 provides, inter alia, that, where expenditure under the EAFRD has not been effected in conformity with EU law, the Commission is to adopt implementing acts determining the amounts to be excluded from EU financing.

21 Entitled 'Announcement of on-the-spot checks', Article 25 of Implementing Regulation No 809/2014, which the Czech authorities are accused of infringing in this case, provides that 'on-the-spot checks may be announced provided that it does not interfere with their purpose or effectiveness' and that 'any announcement shall be strictly limited to the minimum time period necessary and shall not exceed 14 days', or, as regards the announcement of on-the-spot checks concerning livestock aid applications, 48 hours, except in duly justified cases.

22 The timing of on-the-spot checks is governed by Article 26 of Implementing Regulation No 809/2014, paragraph 2 of which states that 'for the purpose of rural development measures in the scope of the integrated system, the on-the-spot checks shall be spread over the year on the basis of an analysis of the risks presented by the different commitments under each measure'. According to paragraph 4 of that article, where certain eligibility criteria, commitments and other obligations can only be checked during a specific time period, the on-the-spot checks may require additional visits at a later date. In those cases, the on-the-spot checks are to be coordinated in such a way as to limit the number and the duration of such visits to one beneficiary to the minimum required. The last subparagraph of Article 26(4) of that regulation states that 'where additional visits are required, Article 25 shall apply to each additional visit'.

23 In the present case, first, it is not disputed that the checks carried out by the Czech authorities, taken separately, were all carried out either without notice, or with notice having been given in accordance with the time periods provided for in Article 25 of Implementing Regulation No 809/2014.

24 Secondly, it is apparent from the documents before the Court that the Czech Republic decided to implement a 'horizontal' control system, allowing the simultaneous checking by several control authorities of several types of aid and several eligibility or cross-compliance conditions, rather than the 'vertical' control of one particular measure. However, the Commission does not dispute the conformity of such a control system with EU law and therefore acknowledges, as it confirmed at the hearing, that delegating control tasks to multiple bodies is not contrary to EU law.

25 Thirdly, and consequently, the Commission does not dispute the fact that, in such a control system, one beneficiary may be subject to several checks carried out by various national authorities.

26 Nevertheless, according to the Commission, in such a control system, the first visit to a beneficiary must be regarded as 'implied notice' of subsequent visits to that same beneficiary, so all subsequent visits must be carried out within the periods of notice provided for in Article 25 of Implementing Regulation No 809/2014. Indeed, as it stated at the hearing, the Commission considers that a first visit 'has the same consequences' as an announcement, within the meaning of that article, so the time periods provided for therein must be regarded as the maxima applicable, even in the absence of an announcement. According to the Commission, as it stated in response to a question from the Court, Article 25 of that regulation is therefore applicable by analogy even in the absence of an announcement. Consequently, according to the Commission, in the case of multiple checks, by not carrying these out within the periods of notice provided for in Article 25 of that regulation, that is to say, by allowing the period of time between the first check and the final check to exceed 14 days, or 48 hours in the case of on-the-spot checks relating to livestock aid applications, the Czech Republic infringed that provision.

27 In that regard, the Court recalls that, according to settled case-law, 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 (judgments of 9 March 2017, *Poland* v *Commission*, C-105/16 P, not published, EU:C:2017:191, paragraph 38; of 7 August 2018, *Ministru kabinets*, C-120/17, EU:C:2018:638, paragraph 35; and of 15 May 2019, *Greece* v *Commission*, C-341/17 P, EU:C:2019:409, paragraph 46).

28 In the first place, as regards the wording of Article 25 of Implementing Regulation No 809/2014, that article does not provide that a first on-the-spot check must be regarded as an 'announcement' of future checks. Neither does it provide that, in the case of multiple checks, all of those checks must be carried out within 14 days of the first check or, where appropriate, within 48 hours for livestock aid applications. No other provision of Implementing Regulation No 809/2014 contains such a rule, as the Czech Republic rightly points out.

29 As regards the Commission's argument concerning the possibility of applying Article 25 of Implementing Regulation No 809/2014 by analogy, it should be noted that that article governs the possibility of making an 'announcement' before carrying out an on-the-spot check. As argued by the Czech Republic, the term 'announcement' means that the beneficiary subject to the check is notified in advance of the check. An announcement is therefore made prior to the actual date of the check, as is clearly indicated by the wording of that provision, according to which 'on-the-spot checks may be announced'. Moreover, the announcement must normally indicate to the beneficiary the date of the check and the elements that will be subject to that check in order to secure the prior assistance of that beneficiary, where such assistance is necessary in order to guarantee the effectiveness of the check (see also paragraphs 37 and 38 below). However, the mere fact of having been subject to a first check does not, as such, inform that beneficiary that he will necessarily be subject to additional checks (since, depending on the circumstances, a single check may be sufficient), nor does it inform him of the exact date of the subsequent checks or of the elements to be verified when those checks are carried out. Therefore, even assuming that notice could be 'implied', a first check cannot automatically be treated as 'implied notice' capable of triggering the start of one of the periods of notice provided for in Article 25.

30 Moreover, the application by analogy of Article 25 of Implementing Regulation No 809/2014, which would mean that all subsequent checks had to be carried out within 14 days, or 48 hours in the case of livestock aid applications, as advocated by the Commission, is expressly dismissed at the end of Article 26(4) of that regulation, according to which, where additional visits are required, Article 25 'shall apply to each additional visit'. Even assuming, therefore, that a first on-the-spot check constitutes 'implied notice', such notice, including the time limit applicable to it, concerns only each additional visit, and not, as the Commission states, all such visits, which would result in all the checks having to be carried out within the time periods provided for in Article 25 of Implementing Regulation No 809/2014. The application by analogy of that article, proposed by the Commission, is therefore not justified.

31 In the second place, as regards the context of Article 25 of Implementing Regulation No 809/2014 and the scheme of that regulation, it should be noted that the provision governing the timing of on-the-spot checks is Article 26 of Implementing Regulation No 809/2014, paragraph 2 of which provides that, for the purpose of rural development measures in the scope of the integrated system, the on-the-spot checks are to be spread over the year on the basis of an analysis of the risks presented by the different commitments under each measure. The national control authorities are thus authorised to determine the best time or times of year to carry out those controls and establish when they will be most effective. Indeed, depending on the nature of the elements to be checked or the agricultural cycle in question, an on-site visit may be possible or effective only during a particular period of the year. It is precisely for that reason that Article 26(4) of that regulation expressly authorises additional visits at a later date.

32 In that regard, it should be noted that the Czech Republic has presented, as Annex A.9 to the application, a detailed table indicating the optimal periods for on-the-spot checks to be carried out, depending on the nature of the elements to be checked and the agricultural cycle in question. That table does show that the effectiveness of several checks can be guaranteed only if they are carried out during a specific period of the year, sometimes several months after the optimal period for checking another element which may be subject to checks at the premises of the same beneficiary. When questioned on this point at the hearing, the Commission confirmed that it does not dispute the accuracy of that information.

33 It must be concluded that the Commission's argument, according to which the various checks must all be carried out within the periods of notice provided for in Article 25 of Implementing Regulation No 809/2014 – namely 14 days and 48 hours, respectively – since the first check constitutes 'implied notice' of future checks, also fails to take into account the context in which Article 25 occurs and the scheme of that regulation.

34 In the third place, the underlying objective of Article 25 of Implementing Regulation No 809/2014 supports that conclusion. Indeed, it should be stated in that regard that, in accordance with Article 24(1) of that regulation, on-the-spot checks are to be made in such a way as to ensure effective verification of the elements subject to the check. Accordingly, the announcement of on-the-spot checks may be made only when such announcement would not jeopardise the checks (recital 27 of that regulation) and 'provided that it does not interfere with [the] purpose or effectiveness [of the checks]' (first paragraph of Article 25 of that regulation). The purpose of those provisions is therefore to ensure that checks are effective by maintaining the element of surprise inherent in making unannounced checks (without notice) or, where an announcement is necessary, allowing only a relatively short period of notice (14 days, or 48 hours for livestock aid applications).

35 However, it is important to note, as the Czech Republic has done, that the mere fact that one beneficiary is subject to several checks by various authorities at various times of the year, and is therefore not necessarily having all the checks carried out within the periods of notice provided for in Article 25 of Implementing Regulation No 809/2014, cannot call into question, as such, the effectiveness of the checks.

36 Indeed, first, a beneficiary who is subject to a first check cannot be sure, in the absence of express notice, that he will necessarily be subject to further checks by the authorities concerned, nor can he know, a fortiori, the exact date of the subsequent checks or the elements to be verified during those checks. Carrying out a first check does not, therefore, necessarily eliminate the element of surprise sought by the provisions cited in paragraph 34 above. In reality, as stated by the Czech Republic, the interpretation advocated by the Commission could have the perverse effect of removing any element of surprise in respect of future checks, in so far as, if the first check must always be regarded as implied notice, the beneficiary could then be certain that additional visits would be made over the next 14 days (or within 48 hours, as the case may be) and would be able to prepare for that eventuality.

37 Secondly, the interpretation advocated by the Commission does not guarantee the effectiveness of the announcement provided for in Article 25 of Implementing Regulation No 809/2014. In that regard, the parties agree that an announcement may be necessary, inter alia, where the beneficiary's prior assistance (for example, in assembling the animals prior to the on-site visit) is essential in order to ensure that the checks can be carried out effectively. However, if a first check constituted 'implied notice', as the Commission contends, it would not secure the beneficiary's prior assistance, in so far as, with that supposed 'notice' being 'implied', the beneficiary would not know the exact date of future checks or which elements would be subject to those checks in order to be able provide prior assistance, if needed, to the competent authorities.

38 Admittedly, it cannot be ruled out that, based on the experience he has acquired, a beneficiary may, after a first check, be able to predict when a further check might take place and what might be covered by such a check. However, in this case, the Commission does not allege that the Czech Republic carried out on-the-spot checks, in certain specific cases, in such a way as to enable the beneficiaries to predict, with certainty, the timing and scope of subsequent checks and to prepare themselves accordingly, thereby undermining the effectiveness of the checks, and, a fortiori, does not provide any evidence of it doing so. Indeed, the only non-compliance with EU law, for the purposes of Article 52(1) of Regulation No 1306/2013, in respect of which the flat-rate correction at issue in the present case was imposed, as is apparent from the formal communication and as the Commission confirmed at the hearing, arises from the fact that the Czech Republic did not carry out all the checks within the periods of notice provided for in Article 25 of Implementing Regulation No 809/2014.

39 More generally, as stated in paragraph 31 above, and as the Commission itself acknowledges, it may not be possible for all the necessary checks to be carried out simultaneously or within a short period of time, in so far as certain checks can be carried out only during a particular period of the year, depending on the nature of the elements to be checked or the agricultural cycle concerned, in accordance with Article 26(2) and (4) of Implementing Regulation No 809/2014. If, as advocated by the

Commission, it were obligatory for such checks to be carried out within the periods of notice provided for in Article 25 of that regulation, this would constitute a risk to their effectiveness, in so far as a control period determined in that way may not be suitable for carrying out such checks.

40 In the fourth place, it is important to state that where an obligation imposed on Member States may have financial consequences for them, that obligation must be sufficiently clear and precise, in order to enable them to understand its scope and comply with it. In accordance with settled case-law, the principle of legal certainty, which forms part of the general principles of EU law, requires that rules of law be clear, precise and predictable in their effect, so that interested parties can ascertain their position in situations and legal relationships governed by EU law (see judgment of 5 May 2015, *Spain* v *Commission*, C-147/13, EU:C:2015:299, paragraph 79 and the case-law cited).

41 However, in the present case, it does not appear from the applicable legal framework that the obligation which the Commission seeks to impose on the Member States, namely to carry out all the relevant checks within the periods of notice provided for in Article 25 of Implementing Regulation No 809/2014, meets the need for clarity, precision and predictability required by the principle of legal certainty to enable the Member States to understand its scope and comply with it. That is all the more true as regards a provision laying down periods of notice, as those periods must, by definition, be clearly defined in advance so that both the Member States and the beneficiaries of agricultural funds may ascertain unequivocally the scope of that provision.

42 Accordingly, the Commission's argument that a first check constitutes 'implied notice' and, therefore, all subsequent checks must be carried out within 14 days, or within 48 hours in the case of livestock aid applications, is contrary both to the wording and objective of Article 25 of Implementing Regulation No 809/2014, and to the context of that provision, the scheme of that regulation and the principle of legal certainty.

43 It follows that the infringement of Article 25 of Implementing Regulation No 809/2014, which is the only infringement of EU law, for the purposes of Article 52(1) of Regulation No 1306/2013, relied on by the Commission as a ground for the financial correction in respect of claim year 2016, which is the subject matter of the present dispute, has not been established.

44 Therefore, without it being necessary to examine the second and third pleas, the first plea should be upheld and, accordingly, the contested decision annulled, in so far as the Commission excluded under that decision expenditure in the amount of EUR 151 116.65 incurred by the Czech Republic under the EAFRD.

Costs

45 Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

46 Since the Commission has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Czech Republic.

On those grounds,

THE GENERAL COURT (Seventh Chamber),

hereby:

1. **Annuls Commission Implementing Decision (EU) 2018/873 of 13 June 2018 excluding from European Union financing certain expenditure incurred by the Member States under the European Agricultural Guarantee Fund (EAGF) and under the European Agricultural Fund for Rural Development (EAFRD), in so far as the European Commission excluded under that decision expenditure in the amount of EUR 151 116.65 incurred by the Czech Republic under the EAFRD;**

2. **Orders the Commission to pay the costs.**

Tomljenović Marcoulli Kornezov

Delivered in open court in Luxembourg on 19 December 2019.

[Signatures]