



Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 15 December 2011¹

Case C-24/11 P

Kingdom of Spain

v

European Commission

(Appeal — EAGGF — Expenditure excluded from Community financing)

1. By Decision 2008/68/EC (hereafter also ‘the Decision at issue’),² the Commission made financial corrections to Community³ aid for the production of olive oil and arable crops in Spain. On 12 November 2010, the General Court⁴ in Case T-113/08 *Spain v Commission* (‘the judgment under appeal’) rejected Spain’s request for partial annulment of that decision. Spain has appealed certain parts of the judgment.

Legal background

Financing of the Common Agricultural Policy (‘the CAP’)

2. Decision 2008/68 excluded from Community financing, inter alia, expenditure incurred in financial years 2000 to 2004 in connection with olive oil production in Spain. At the relevant time, Regulation No 1258/1999⁵ governed the financing of the CAP. Although that regulation was repealed in 2005, it continued to apply until 15 October 2006 and 31 December 2006 to expenditure incurred by, respectively, Member States and the Commission.⁶ It thus applied to expenditure covered by the Decision at issue.

1 — Original language: English.

2 — Commission Decision of 20 December 2007 excluding from Community financing certain expenditure incurred by the Member States under the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) (2008/68/EC) (OJ 2008 L 18, p. 12).

3 — At the time of lodging the application, Community law governed the conditions for granting aid for the production of olive oil. Since the Lisbon Treaty came into effect, EU law governs these conditions. Because the change was not purely formal, I shall refer to ‘the Community’ and ‘Community law’ throughout this Opinion.

4 — The General Court was, at the time of depositing the application, before the Lisbon Treaty came into effect, designated ‘Court of First Instance’. The judgment under appeal was issued after the Lisbon Treaty came into effect. For the sake of simplicity and because the change was purely formal, I shall use its current name throughout this Opinion.

5 — See the second subparagraph of Article 20 of Council Regulation (EC) No 1258/1999 of 17 May 1999 on the financing of the common agricultural policy (OJ 1999 L 160, p. 103), which provides that the regulation applies to expenditure effected as of 1 January 2000. This regulation repealed Regulation (EEC) No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy (OJ 1970 L 94, p. 13), as modified by Council Regulation (EC) No 1287/95 of 22 May 1995 amending Regulation (EEC) No 729/70 on the financing of the common agricultural policy (OJ 1995 L 125, p. 1).

6 — Second subparagraph of Article 47(1) of Council Regulation (EC) No 1290/2005 of 21 June 2005 on the financing of the common agricultural policy (OJ 2005 L 209, p. 1).

3. Until 2005, the CAP was financed through the European Agricultural Guidance and Guarantee Fund ('EAGGF').⁷ Financing was effected through accredited national paying agencies in accordance with Community and national law, after the Commission had paid advances on the provision for expenditure incurred in a reference period.⁸ The EAGGF funded only expenditure incurred in conformity with Community law.

4. Recital 5 in the preamble to Regulation No 1258/1999 stated that 'the responsibility for checking the Fund's Guarantee Section expenditure [and its compliance with Community law] lies, in the first place, with the Member States'. It further stated that the Commission 'must verify the conditions under which payments and checks have been made', and that expenditure could only be financed 'where those conditions offer all necessary guarantees regarding compliance with Community rules'.

5. Pursuant to Article 7(4) of Regulation No 1258/1999, the Commission could initiate a procedure to verify whether expenditure charged to the EAGGF Guarantee Section was in conformity with Community rules and, if necessary, impose financial corrections and recover expenditure from Member States.

6. The second subparagraph of Article 7(4) provided that:

'Before a decision to refuse financing is taken, the results of the Commission's checks and the replies of the Member State concerned shall be notified in writing, after which the two parties shall endeavour to reach agreement on the action to be taken.'

7. The Commission could not exclude certain expenditure from Community financing. Thus, the fifth subparagraph of Article 7(4) of Regulation No 1258/1999 provided that the Commission could not exclude:

'(a) expenditure referred to in Article 2 effected prior to 24 months preceding the Commission's written communication of the results of those checks to the Member State concerned;

...'.⁹

8. Commission Regulation (EC) No 1663/95 governed the procedures for clearing the accounts of the EAGGF Guarantee Section.¹⁰ It was amended in 1999 with effect as of 30 October 1999 but continued to apply to the clearance of accounts before and for the financial year 2006.¹¹ It thus applied to expenditure covered by the Decision at issue.

9. Article 8 of Regulation No 1663/95 described the procedure to be followed:

'1. If, as a result of an enquiry, the Commission considers that expenditure has not been effected according to Community rules, it shall notify the Member State concerned of the results of its checks and indicate the corrective measures to be taken to ensure future compliance.

7 — Article 1(1) of Regulation No 1258/1999.

8 — Article 5(1) of Regulation No 1258/1999.

9 — The limitation corresponds with that in the fifth subparagraph of Article 5(2)(c) of Council Regulation (EEC) No 729/70, which Regulation No 1258/1999 repealed.

10 — Regulation of 7 July 1995 laying down detailed rules for the application of Council Regulation (EEC) No 729/70 regarding the procedure for the clearance of the accounts of the EAGGF Guarantee Section (OJ 1995 L 158, p. 6), as amended by Commission Regulation (EC) No 2245/1999 of 22 October 1999 (OJ 1999 L 273, p. 5).

11 — See Article 18(1) of Commission Regulation (EC) No 885/2006 of 21 June 2006 laying down detailed rules for the application of Council Regulation (EC) No 1290/2005 as regards the accreditation of paying agencies and other bodies and the clearance of the accounts of the EAGF and of the EAFRD (OJ 2006 L 171, p. 90).

The communication shall refer to this Regulation. The Member State shall reply within two months and the Commission may modify its position in consequence. In justified cases, the Commission may extend the period allowed for reply.

After expiry of the period allowed for reply, the Commission shall invite the Member State to a bilateral discussion and the parties shall endeavour to reach agreement on the measures to be taken and on an evaluation of the gravity of the infringement and the financial loss to the Community. Following that discussion and any deadline after the discussion fixed by the Commission, after consultation of the Member States, for the provision of further information or, where the Member State does not accept the invitation to a meeting before the deadline set by the Commission, after that deadline has passed, the Commission shall formally communicate its conclusions to the Member State, referring to Commission Decision 94/442/EC. Without prejudice to the fourth subparagraph of this paragraph, that communication shall include an evaluation of any expenditure the Commission intends to exclude under [Article 7(4) of Regulation No 1258/1999].

The Member State shall inform the Commission as soon as possible of the corrective measures adopted to ensure compliance with Community rules and the date of their entry into force. The Commission shall, as appropriate, adopt one or more Decisions under [Article 7(4) of Regulation No 1258/1999] to exclude expenditure affected by non-compliance with Community rules up to the date of entry into force of the corrective measure.

2. The decisions referred to in [Article 7(4) of Regulation No 1258/1999] shall be taken after an examination of any report drawn up by the Conciliation Body according to the provisions laid down in [Decision] 94/442/EC.

...'

Aid for the production of olive oil

10. At the relevant time, Council Regulation (EEC) No 2261/84¹² laid down the general rules for granting aid for olive oil production. Paragraphs 1 and 2 of Article 14 of that regulation provided that producer Member States 'shall apply a system of checks to ensure that the product in respect of which aid is granted is eligible for such aid' and 'verify the activities of each producer organisation and association and, in particular; that the checking operations have been carried out by these bodies'. For these purposes, Member States were required to use computerised data files.¹³

11. Pursuant to Article 1(1) of Council Regulation (EEC) No 154/75, Member States had also to maintain a register of olive cultivation containing information on all olive-growing holdings in their territory.¹⁴

12. Commission Regulation (EC) No 2366/98¹⁵ set out the conditions for granting aid to olive oil producers for the marketing years 1998/1999, 1999/2000 and 2000/2001.

12 — Regulation of 17 July 1984 laying down general rules on the granting of aid for the production of olive oil and of aid to olive oil producer organisations (OJ 1984 L 208, p. 3) as last amended by Council Regulation (EC) No 1639/98 of 20 July 1998 (OJ 1998 L 210, p. 38).

13 — Article 14(5), first subparagraph and Article 16 of Regulation No 2261/84.

14 — Regulation of 21 January 1975 on the establishment of a register of olive cultivation in the Member States producing olive oil (OJ 1975 L 19, p. 1) as amended by Council Regulation (EEC) No 3788/85 of 20 December 1985 amending, on account of the accession of Spain and Portugal, certain regulations in the oils and fats sector (OJ 1985 L 367, p. 1).

15 — Regulation of 30 October 1998 laying down detailed rules for the application of the system of production aid for olive oil for the 1998/99, 1999/2000 and 2000/01 marketing years (OJ 1998 L 293, p. 50).

13. Aid was based on the quantity of actual production of virgin olive oil.¹⁶ Pursuant to Article 14(3) of Regulation No 2366/98, this quantity had to be determined taking account of information collected from the register of olive cultivation, the geographical information system for olive cultivation or crop declarations; computerised files; evidence of pressing provided by approved mills; and the results of checks carried out. Articles 22 to 31 of that regulation contained more detailed obligations as to what information had to be collected and what checks were necessary.

14. Regulation No 2366/98 also provided for producers to be paid an advance of the amount due to them, with the balance being paid by the Member State on completion of the relevant checks.¹⁷ Inconsistencies in recorded quantities or other forms of irregularities could result in the aid being refused.

The procedure leading to the Decision at issue

15. Following enquiries in February 2002 and July 2003 into expenditure incurred for aid for Spanish olive oil production, the Commission informed the Spanish authorities by letters of 11 July 2002 (AGR 16844) and 23 March 2004 (AGR 8316) of the results of its investigations.

16. On 24 November 2004, the Commission invited the Spanish authorities to a bilateral meeting, which was held on 21 December 2004.

17. On 10 November 2005, the Commission sent the minutes of that meeting to the Spanish authorities, who responded by letters of 13 and 16 January 2006.

18. On 11 August 2006, the Commission formally notified its conclusions to the Spanish authorities, proposing flat-rate corrections for the financial years in question.

19. The Spanish authorities next requested, pursuant to Article 1(1)(a) of Commission Decision 94/442/EC, ‘conciliation’ — that is, mediation.¹⁸ On 15 March 2007, the Conciliation Body issued its final report.

20. The Commission then prepared a summary report dated 3 September 2007.

21. On 20 December 2007, the Commission adopted the Decision at issue, excluding from Community financing certain expenditure incurred in connection with aid given to Spanish olive oil producers and the arable crops sector.¹⁹

22. The Decision at issue was stated to have been taken in light of ‘the verifications carried out, the outcome of the bilateral discussions and the conciliation procedures’.²⁰ The reasons for the financial corrections were given as ‘[s]hortcomings in checks on crop declarations in checks on yields and in monitoring of checks on mills’ for some expenditure and ‘[n]o checks on crop declarations and shortcomings in checks on yields and in monitoring of checks on mills’ for others.²¹

23. The financial impact of the Decision at issue was close to EUR 184 million.

16 — Article 14(1) of Regulation No 2366/98.

17 — Article 16 of Regulation No 2366/98.

18 — Commission Decision of 1 July 1994 setting up a conciliation procedure in the context of the clearance of the accounts of the European Agricultural Guidance and Guarantee Fund (EAGGF) Guarantee Section (94/442/EC) (OJ 1994 L 182, p. 45).

19 — Article 1 and the Annex to the Decision at issue.

20 — Recital 4 in the preamble to the Decision at issue.

21 — Annex to the Decision at issue.

The judgment under appeal

24. By application lodged with the General Court on 29 February 2008, the Kingdom of Spain sought partial annulment of the Decision at issue in so far as (i) it applied a flat-rate 5% correction to aid for olive oil production during the marketing years 1998/1999, 1999/2000 and 2000/2001, excluding the proportion relating to the marketing year 1999/2000 in Andalusia; and (ii) it applied a flat-rate 2% correction to aid for the arable crops sector in Andalusia requested in the years 2003 and 2004.

25. The General Court dismissed the application in its entirety and ordered the Kingdom of Spain to pay the costs.

26. The Spanish Government puts forward three grounds of appeal. These concern the General Court's consideration of whether the Commission infringed Article 8 of Regulation No 1663/95 (paragraphs 61 to 70 of the judgment under appeal) and whether the Commission failed to observe the 24-month time-limit laid down in Article 7(4) of Regulation No 1258/1999 (paragraphs 118 to 125 of the judgment under appeal).

Basis for the Commission's final decision in respect of the marketing years 1998/1999 and 1999/2000

27. At paragraph 64 of the judgment under appeal, the General Court observed that it was common ground that the Decision at issue was based on insufficient implementation by the Spanish authorities of the recommendations of the Agencia para el Aceite de Oliva ('AAO') following its checks of mills (the first irregularity) and the non-operational character of computerised databases and the register of olive cultivation (the second irregularity).

28. The General Court noted (paragraph 65) that the Commission had accepted that the first irregularity was not specifically mentioned in letter AGR 16844. In that letter, the Commission had indeed expressed satisfaction with the AAO's work.

29. The General Court held, at paragraph 66, that those facts did not preclude the Commission from deciding that there had been insufficient follow-up to the AAO's recommendations and, accordingly, from excluding expenditure from Community financing 'taking account of the information and figures provided by the Spanish authorities, notably in the context of the bilateral meeting of 21 December 2004'.

30. With regard to the second irregularity, the General Court noted, at paragraph 67, that Spain accepted that letter AGR 16844 referred to deficiencies in the use of computerised databases and the register of olive cultivation, albeit in slightly different terms to those subsequently used in the summary report. The General Court also cited, at paragraph 68, paragraph 1 of Annex A1 to the letter, which included a statement to the effect that it was already known that the resources in question were not always operational. The letter convening the bilateral meeting had made it clear that the issues to be discussed formed part of an ongoing saga of known shortcomings (paragraph 69).

31. At paragraph 70 of the judgment under appeal, the General Court therefore rejected the plea put forward by Spain that the Commission had infringed Article 8 of Regulation No 1663/95 by basing its final decision for the marketing years 1998/1999 and 1999/2000 on an extrapolation of observations made in other enquiries, instead of the results of the enquiry of February 2002 notified in letter AGR 16844.

Relevant date for calculating the 24-month time-limit referred to in Article 7(4) of Regulation No 1258/1999

32. The General Court found, at paragraph 119, that it was undisputed that the Commission had notified the results of the enquiry in letter AGR 16844 of 11 July 2002, pursuant to the first subparagraph of Article 8(1) of Regulation No 1663/95 and consistently with the case-law.²² The General Court noted, at paragraph 120, that this letter was notified on 15 July 2002.

22 — Case T-243/05 *Greece v Commission* [2007] ECR II-3475, paragraph 43, and the judgment of 14 February 2008 in Case T-266/04 *Spain v Commission*, paragraph 41.

33. The General Court went on to examine, at paragraphs 121 to 124, the date of the expenditure to which the Decision at issue applied. Recalling that none of the relevant regulations defined that date, it applied the Court's interpretation in Case C-329/00 *Spain v Commission*²³ of the fifth subparagraph of Article 5(2)(c) of Regulation No 729/70 (which was repealed by, and had the same normative content as, the fifth subparagraph of Article 7(4) of Regulation No 1258/1999). In that case, the Court stated that the relevant date is that on which the definitive amount of the aid was established and (the balance) paid.

34. Like the banana producers whose aid was at issue in Case C-329/00, the olive oil producers in this case received an advance on the aid requested. Unlike the banana producers, they did not need to lodge a security to receive that advance. They received the balance after the results of the checks carried out by the Member State were taken into account. In those circumstances, the General Court found that the relevant date was that on which the balance was paid.

35. In the case of aid for olive oil production relating to the 1998/1999 marketing year, those payments were made between 21 September 2000 and 14 October 2000 and thus within 24 months of the date on which letter AGR 16844 was notified (15 July 2002).

36. Accordingly, the General Court rejected, at paragraph 125, the plea that the Commission had infringed Article 7(4) of Regulation No 1258/1999 insofar as the Decision at issue affected expenditure incurred more than 24 months before the written notification of the results of the enquiry.

The appeal

37. The Kingdom of Spain asks the Court to annul the judgment under appeal and itself give final judgment by:

- annulling all the financial corrections concerning aid for olive oil production covered by the judgment under appeal;
- in the alternative, annulling the financial corrections concerning expenditure for which the advances were paid prior to 24 November 2002; or,
- in the further alternative, annulling the financial corrections concerning expenditure for which the advances were paid prior to 15 July 2000.

38. The Commission asks the Court to dismiss Spain's grounds of appeal as unfounded. In the alternative, the Commission contends that, even if the Court were to find the grounds of appeal well founded, that could not lead to the annulment of the financial corrections because Spain has not contested the other grounds on which they were based.

First ground of appeal

Arguments of the parties

39. The Spanish Government contends that the General Court infringed Article 8 of Regulation No 1663/95 by accepting (paragraph 66) that the Commission's financial corrections could be based on irregularities not mentioned in its first written communication (letter AGR 16844 by which the results of the February 2002 enquiry were communicated), despite stating (paragraph 63) that the written

23 — [2003] ECR I-6103, paragraph 43.

communication must adequately identify the results of the enquiry and hence the irregularities forming the basis for the financial corrections. It considers that the General Court's reasoning in paragraphs 63 and 66 is internally inconsistent. The General Court should have found that the final decision could not be based on insufficient implementation by the Spanish authorities of the AAO's recommendations, because that irregularity was not specified in letter AGR 16844.

40. The Spanish Government adds that the fact that the Commission mentioned the irregularity in question for the first time in a letter of 24 November 2004 convening the bilateral meeting does not undermine its argument that the General Court's reasoning failed to respect Article 8 of Regulation No 1663/95. The brief reference to this complaint in the letter offered an insufficient basis for concluding that the Spanish authorities could exercise their rights of defence adequately at the bilateral meeting. At the hearing, Spain argued that the initial written communication can be compared with the Commission's reasoned opinion in an infringement proceeding based on Article 258 TFEU (formerly Article 226 EC). Just as an infringement action cannot be based on a ground not set out in the reasoned opinion, a financial correction to agricultural expenditure cannot be based on an irregularity not included in that first written communication.

41. The Commission accepts that the written communication referred to in the first subparagraph of Article 8(1) of Regulation No 1663/95 must inform the Member State of the complaints in a manner that generates a dialogue and enables the Member State to exercise its rights of defence. However, the Member State cannot insist that that written communication should already contain the maximum level of details regarding these complaints, because the communication merely initiates the administrative phase of the procedure. Indeed, the Commission was unable to produce details about the first irregularity because, as letter AGR 16844 shows, it was waiting to receive information from Spain with regard to the implementation by the national authorities of the sanctions recommended by the AAO.²⁴

42. In the present case, Spain was given every opportunity to put forward its position. In the light of the information provided during the procedure, the Commission was entitled to conclude that there was insufficient follow-up of the AAO's recommendations.

43. The Commission further submits that the written communication and a reasoned opinion serve different purposes. The latter completes the administrative phase of the proceeding leading to an infringement action, whereas the former initiates the procedure that may eventually result in a decision to apply financial corrections.

Assessment

44. The first ground of appeal raises two questions.

45. The first question is whether the reasoning of the General Court was inconsistent in accepting that the Commission could base its final decision on an irregularity pertaining to the Spanish authorities' failure to implement the AAO's recommendations, even though letter AGR 16844 stated that the AAO had performed satisfactorily.

46. I find no error in the General Court's reasoning.

47. At paragraph 66 of the judgment under appeal, the General Court correctly states that the observation in letter AGR 16844 relates to the AAO's own work. The irregularity on which the Commission based its final decision was different. It concerned the failure of Spanish authorities to *implement* the work done by the AAO.

²⁴ — At the hearing, the agent for the Commission quoted from section 2.2.1 of Annex I to letter AGR 16844 in which the Commission had requested information on the sanctions applied.

48. In my view, the position the General Court adopted in relation to letter AGR 16844 is not inconsistent with its conclusion that the Commission could base the final decision on insufficient implementation by the Spanish authorities of the AAO's recommendations (the first irregularity).

49. The second is whether the General Court erred in interpreting and applying Article 8(1) of Regulation No 1663/95 to mean that the Commission's final decision refusing to finance expenditure could be based on an irregularity not included in letter AGR 16844.

50. I do not think so.

51. In essence, the General Court took the view that a written communication that did not specifically identify an irregularity — and hence did not indicate the measures to be taken to correct that irregularity — could still satisfy the requirements of the first subparagraph of Article 8(1) of Regulation No 1663/95.

52. In my view, that is a correct reading of that provision.

53. Article 8 of Regulation No 1663/95 and Article 7(4) of Regulation No 1258/1999 together set out the procedure for clearing the accounts of the EAGGF's Guarantee Section.

54. To establish whether and in what circumstances the Commission's final decision could be based on an irregularity not included in the written communication under the first subparagraph of Article 8(1), it is necessary to consider the function of this communication and the procedure it initiated.

55. In my view, the written communication was an intermediate step between the investigative and administrative phases of the procedure for clearing the accounts of the EAGGF's Guarantee Section at that time.

56. That procedure started with the Commission's enquiry into whether expenditure was effected according to Community rules. To prove that that was not the case, the Commission had to 'adduce evidence of serious and reasonable doubt on its part regarding the checks or data'.²⁵ It was not incumbent on the Commission, however, to demonstrate exhaustively that the checks carried out by the national authorities were inadequate or that the data submitted by them were incorrect.²⁶ The reason for this mitigation of the evidentiary burden borne by the Commission was that 'it is the Member State which is best placed to collect and verify the data required for the clearance of EAGGF accounts and, consequently, it is for that State to adduce the most detailed and comprehensive evidence that its enquiries or figures are accurate and, if appropriate, that the Commission's statements are incorrect'.²⁷

57. If, after completing the enquiry, the Commission considered that expenditure was not effected in conformity with Community rules, it had to 'notify the Member State concerned of the results of its checks and indicate the corrective measures to be taken to ensure future compliance'.²⁸

58. The written communication thus marked the start of the administrative phase of the procedure that had to 'giv[e] effect to the *audi alteram partem* rule'.²⁹ During that procedure, the Member States concerned had to be given 'all the guarantees necessary for them to present their point of view'.³⁰

25 — Case C-329/00 *Spain v Commission*, cited in footnote 23 above, paragraph 68.

26 — Case C-54/95 *Germany v Commission* [1999] ECR I-35, paragraph 35.

27 — Case C-329/00 *Spain v Commission*, cited in footnote 23 above, paragraph 68 and case-law cited.

28 — First subparagraph of Article 8(1) of Regulation No 1663/95.

29 — Case C-61/95 *Greece v Commission* [1998] ECR I-207, paragraph 39 and case-law cited.

30 — Case C-61/95 *Greece v Commission*, cited in footnote 29 above, paragraph 39 and case-law cited.

59. The Court has stated that the written communication served its warning function if it informed the Member State concerned 'fully about the Commission's reservations and the adjustments which will probably be made in relation to the sector in question'.³¹

60. The second subparagraph of Article 7(4) of Regulation No 1258/1999 also provided that, following the notification of the results of the Commission's enquiry and the Member State's replies, the action to be taken was to be agreed upon by both parties. Hence, it would appear that the initial written communication did not need to set out definitively and exhaustively the measures to be taken to ensure that expenditure was effected in accordance with Community law.

61. Following the notification of the written communication, the Member State concerned was given an opportunity to respond.³² It could be asked by the Commission to produce additional information. The Member State could not rebut the Commission's findings by mere assertions. It had to demonstrate that the Commission's assertions were incorrect.³³ If it was unable to do so, the Commission's findings could legitimately give rise to serious doubts as to the existence of adequate and effective supervisory measures and enquiry procedures.³⁴ The second subparagraph of Article 8(1) provided that 'the Commission [could] modify its position' in reaction to the Member State's response.³⁵

62. Next, 'the Commission ... invite[d] the Member State to a bilateral discussion'.³⁶ The purpose of this meeting was 'to reach agreement on the measures to be taken and on an evaluation of the gravity of the infringement and the financial loss to the Community'.³⁷ Following that meeting, the Member State could ask a Conciliation Body to reconcile the parties' differing positions.³⁸ In taking its final decision on whether to refuse financing expenditure, the Commission had to consider the report of the Conciliation Body.³⁹

63. In my view, this procedure was designed to create a dialogue between the Commission and the Member State, to exchange information, and to offer the Member State concerned an opportunity to exercise its rights of defence and demonstrate that the Commission's findings were inaccurate.

64. Hence, the Commission was required to identify in the written communication, read as a whole, its concerns about irregularities based on its knowledge of the facts available at the time of issuing the communication. The information in the communication could then be contradicted by the Member State concerned and complemented with additional information submitted during the administrative phase of the procedure.

65. I therefore do not exclude the possibility for the Commission to communicate, at subsequent stages of the administrative phase of the procedure, new irregularities relating to the expenditure under investigation, provided it did so in a timely manner, enabling the Member State to fully exercise its rights of defence and to be aware of the measures to be taken. At the hearing, Spain appeared to concede this point. It admitted that the listing of a concern as an agenda point for the bilateral meeting could enable a Member State to exercise its rights of defence even if that concern had not been listed in the initial written communication.

31 — Case C-153/01 *Spain v Commission* [2004] ECR I-9009, paragraph 93.

32 — Second subparagraph of Article 8(1) of Regulation No 1663/95.

33 — *Germany v Commission*, cited in footnote 26 above, paragraph 35.

34 — Case C-253/97 *Italy v Commission* [1999] ECR I-7529, paragraph 7 and case-law cited.

35 — Second subparagraph of Article 8(1) of Regulation No 1663/95.

36 — Third subparagraph of Article 8(1) of Regulation No 1663/95.

37 — Third subparagraph of Article 8(1) of Regulation No 1663/95 and second subparagraph of Article 7(4) of Regulation No 1258/1999.

38 — Article 1(1)(a) of Decision 94/442.

39 — Article 8(2) of Regulation No 1663/95.

66. I agree with the Commission that the initial written communication cannot be compared with a reasoned opinion in an infringement action under Article 258 TFEU. By issuing a reasoned opinion, the Commission completes the final step in the pre-litigation administrative procedure before lodging an infringement action. The initial written communication under Article 8(1) of Regulation No 1663/95, by contrast, constituted the first step in the administrative phase of the procedure which was completed here by the Commission's final decision to refuse expenditure and apply financial corrections.

67. If the Court is nevertheless disposed to entertain the analogy with the administrative phase in an infringement proceeding, I consider that the initial written communication more closely resembles a letter of formal notice. A letter of formal notice, just like the initial written communication, 'cannot, of necessity, contain anything more than an initial brief summary of the complaints', but is required to be 'sufficiently clear to enable the [Member State concerned] to deploy its defence, as is shown by the course which [the pre-litigation and administrative] part of the procedure took'.⁴⁰

68. As regards the basis for the Commission's final decision, I add that the Court has stated that 'the grounds for a decision must be considered adequate if the Member State to which the decision is addressed was closely involved in the decision-making process and was aware of the reasons why the Commission considered that it was not required to charge the sum in dispute to the EAGGF'.⁴¹

69. I therefore consider that Article 8 of Regulation No 1663/95 did not preclude the Commission from basing its final decision on an irregularity that was communicated not in the initial written communication but at a later stage, provided that the Member State's rights of defence were safeguarded. It seems to me that that test was amply satisfied in the present case.

70. It is common ground that the Commission did expressly communicate the first irregularity in its letter of 24 November 2004 convening the bilateral meeting. That letter followed directly from letter AGR 16844 and Spain's response to that letter. It confirmed the Commission's ongoing concerns about the Spanish authorities' follow-up of the AAO's recommendations.

71. It is also not disputed that (as stated at paragraph 66 of the judgment under appeal) the Commission's conclusion on this irregularity was reached during the administrative phase of the procedure initiated by the written communication; and that it was based on information and figures submitted by the Spanish authorities, particularly in the context of the bilateral meeting of 21 December 2004.

72. I add that Spain does not appear to contest the General Court's assessment (paragraph 66) that the statement about the AAO in the written communication revealed the importance to be attached to implementing the AAO's recommendations. In fact, at the hearing, Spain did not contest that the Commission had previously requested proof, including in letter AGR 16844, that the national authorities had implemented the AAO's recommended sanctions.

73. Following the notification of letter AGR 16844, Spain had the opportunity to rebut the Commission's concerns by adducing evidence proving the contrary on three occasions: during the bilateral meeting, in its letters responding to the Commission's account of that meeting and during the conciliation procedure. I therefore consider that, looking at the procedure as a whole, Spain was guaranteed sufficient opportunity to exercise its rights of defence and to show that its authorities had implemented the AAO's recommendations.

40 — Case C-337/05 *Commission v Italy* [2008] ECR I-2173, paragraphs 23 and 24 and case-law cited.

41 — Case C-329/00 *Spain v Commission*, cited in footnote 23 above, paragraph 83 and case-law cited.

74. Spain also does not allege that the Commission in this case communicated the concern about the implementation of the AAO's recommendations late or in vague terms, as part of a strategy aimed at postponing the date on which the 24-month time-period described in the fifth subparagraph of Article 7(4) of Regulation No 1258/1999 starts to run. At the hearing, Spain suggested that the Commission's interpretation of Article 8 could lead to such a situation. It has not, however, argued that the Commission acted in this manner in the present case.

75. It follows that letter AGR 16844 satisfied the requirements for a written communication within the meaning of the first subparagraph of Article 8(1) of Regulation No 1663/95.

76. Accordingly, I take the view that the General Court did not err in accepting that the Commission's final decision refusing to finance expenditure could be based on an irregularity not included in letter AGR 16844 and in considering the procedure as a whole.

77. I therefore reject the first ground of appeal.

Second ground of appeal

Arguments of the parties

78. The Spanish Government argues that the General Court infringed Articles 36 and 53 of the Statute of the Court of Justice,⁴² by failing to state sufficient reasons for its judgment, in as much as it made no mention of, and accordingly failed to rule on, an essential head of claim formulated by Spain during the hearing concerning the 24-month time-limit in Article 7(4) of Regulation No 1258/1999.

79. At the hearing before the General Court, Spain advanced three arguments with regard to the consequences of the alleged shortcomings of letter AGR 16844. It submitted that those shortcomings should result in: (i) declaring invalid the financial corrections regarding the marketing years 1998/1999 and 1999/2000 covered by letter AGR 16844, (ii) in the alternative, declaring invalid the financial correction regarding the marketing year 1998/1999, if that marketing year were considered to be covered by an enquiry that was the subject of another written communication or (iii) in the further alternative, declaring invalid the financial corrections regarding expenditure incurred prior to 24 November 2000, that is, 24 months prior to the letter of 24 November 2002 convening the bilateral meeting.

80. Spain complains that the General Court failed to address, implicitly or explicitly, those arguments in the parts of the judgment dealing with the alleged infringement of Article 8(1) of Regulation No 1663/95 and the failure to respect the 24-month time-limit in Article 7(4) of Regulation 1258/99. It adds that the arguments were recorded in a note, setting out the submissions made by its agent, which was handed to the interpreters before the hearing.

81. The Commission maintains that the General Court's reasoning may be implicit rather than explicit, provided that it allows those concerned to know the basis on which their arguments were rejected.

42 — Article 53 renders the requirement for the Court to state reasons (contained in Article 36) applicable to the General Court.

Assessment

82. It is settled case-law that a judgment must disclose in a clear and unequivocal fashion the reasoning followed by the General Court, in such a way as to enable the persons concerned to ascertain the reasons for the decision adopted and this Court to exercise its power of review.⁴³ The General Court is not obliged to respond in detail to every single argument advanced by the appellant, particularly if the argument was not sufficiently clear and precise and was not adequately supported by evidence.⁴⁴ The reasoning may be implicit provided it enables those concerned to know why the General Court has not upheld their arguments and provides the Court with sufficient material for it to exercise its power of review.⁴⁵

83. I consider that the judgment under appeal addresses adequately the three arguments put forward by Spain.

84. I start with the General Court's treatment of the third argument, namely that the financial corrections regarding expenditure incurred prior to 24 November 2000 should be declared invalid.

85. At paragraph 120, the General Court found that the 24-month time-limit should be calculated as of 15 July 2002, the date on which the Commission notified the results of the enquiry to Spain. This is consistent with the fifth subparagraph of Article 7(4) of Regulation No 1258/1999 and the General Court's rejection of the plea that the Commission infringed Article 8 of Regulation No 1663/95 by making financial corrections based on irregularities not mentioned in letter AGR 16844. In reaching that conclusion, the General Court necessarily rejected Spain's contention that the 24-month time-limit should be calculated from a different starting point, such as the date of the letter convening the bilateral meeting (24 November 2002).

86. The ground of appeal in relation to the first and second arguments made at the hearing must also fail.

87. The General Court found (paragraph 119) that letter AGR 16844 constituted the written communication for the purposes of the first subparagraph of Article 8(1) of Regulation No 1663/95. It accepted (paragraph 66) that the Commission was entitled to make a financial correction based on an irregularity not mentioned in that letter but which took into account information and figures subsequently submitted by the Spanish authorities, notably in the context of the bilateral meeting of 21 December 2004. It follows that the General Court did not consider that the financial corrections for the marketing years 1998/1999 and 1999/2000 covered by the Decision at issue lacked an appropriate legal base in the enquiry covered by letter AGR 16844 and should therefore be annulled. The General Court's reasoning thus allowed Spain to ascertain why its first and second arguments were not entertained.

88. I therefore reject the second ground of appeal.

43 — See, inter alia, Case C-280/08 P *Deutsche Telekom v Commission* [2010] ECR I-9555, paragraph 136 and case-law cited.

44 — Case C-274/99 P *Connolly v Commission* [2001] ECR I-1611, paragraph 121.

45 — Case C-583/08 P *Gogos v Commission* [2010] ECR I-4469, paragraph 30 and case-law cited.

Third ground of appeal

Arguments of the parties

89. The Spanish Government complains that the General Court infringed the fifth subparagraph of Article 7(4) of Regulation No 1258/1999 by (i) calculating the 24-month time-limit from the date of notification of letter AGR 16844, although that letter did not specify all the grounds on which the financial corrections were based and (ii) relying on a judgment of the Court which was inapplicable to a sector such as the olive oil production sector, in order to find that the date of payment of the balance (rather than payment of the advance) be used to determine when expenditure is effected.

90. The first part of this ground of appeal is conditional: if the Court upholds the General Court's ruling that the final decision could be based on irregularities not included in letter AGR 16844, the Spanish Government considers that the General Court nevertheless erred, at paragraph 120, by failing to calculate the 24-month time-limit as of 24 November 2002 (the date on which the irregularities were first communicated).

91. The second part concerns the meaning of the phrase 'expenditure ... effected' in the fifth subparagraph of Article 7(4) of Regulation No 1258/1999. The Spanish Government submits that the General Court erred, at paragraph 122, by using the date of payment of the outstanding balance, rather than that of the advance, as the date on which expenditure was effected (and thus as the start date for the 24-month time-limit).

92. Spain argues that the General Court was wrong to apply the reasoning in Case C-329/00.⁴⁶ Advances paid subject to the lodging of a security cannot properly be compared with advances paid on the aid forming the subject-matter of the present dispute. Aid for bananas is destined for marketing. It is therefore granted subject to the lodging of a security. Any advance payments of such aid are thus provisional and subject to checks of whether the bananas were duly marketed in conformity with Community law. Advance payments to olive oil producers are different. They are a type of deposit and these advance payments are made only after all relevant controls are completed. In other words, the final amount of aid due is set at that time.

93. The Commission contests both parts of this ground of appeal.

94. With respect to the first, it argues that all outstanding balances paid before 15 July 2000 could be subject to the contested financial corrections; and relies on its arguments as regards the first ground of appeal.

95. With regard to the second, the Commission finds nothing in the judgment to suggest that the General Court considered the olive oil and banana sectors to be comparable. Rather, the General Court was correct in interpreting the applicable regulatory framework against the background of the ruling in Case C-329/00 that the relevant date under (what became) the fifth subparagraph of Article 7(4) of Regulation No 1258/1999 is that on which the final amount of the aid is fixed and the balance is paid. Checks of whether expenditure was in conformity with Community law could be performed before and after payment of the advance. If the results of the checks are negative, the balance remains outstanding and will not necessarily be paid in full. The Commission considers that the General Court's reasoning in that regard is coherent.

⁴⁶ — Case C-329/00 *Spain v Commission*, cited in footnote 23 above, paragraphs 40 to 45.

Assessment

96. Under the fifth subparagraph of Article 7(4) of Regulation No 1258/1999, the Commission could not refuse to finance expenditure effected prior to 24 months preceding the ‘Commission’s written communication of the results of those checks to the Member State concerned’. The Commission’s written communication is the document described in the first subparagraph of Article 8(1) of Regulation No 1663/95.⁴⁷

97. The purpose of that limitation was ‘to protect Member States against the absence of legal certainty which would exist if the Commission were able to call into question expenditure incurred several years before the adoption of a compliance decision’.⁴⁸ It offered an assurance that the Commission would investigate expenditure in a timely manner and that the burden of the aid paid to producers before a certain date would not subsequently be borne by the Member State because the Commission decided that it could not be charged to the EAGGF.

98. Two dates determine whether the Commission excluded expenditure from Community finance in a manner consistent with Article 7(4): the date of notification of the written communication within the meaning of Article 8(1) of Regulation No 1663/95 and the date on which the expenditure was effected.

99. I do not agree with the Spanish Government that the General Court erred in defining each date.

100. With regard to the first date, I have explained why I consider that the General Court did not err in finding that a written communication within the meaning of Article 8(1) need not set out all the irregularities forming the basis for the Commission’s financial corrections.⁴⁹ On that basis, I find that the General Court did not err in concluding, at paragraph 120, that the starting date was the date of notification of letter AGR 16844 (15 July 2002). Hence, the Decision could apply to expenditure incurred starting from 15 July 2000.

101. With regard to the second date, I consider that the General Court did not err by relying, at paragraphs 122 to 124, on the Court’s interpretation in Case C-329/00 of Article 7(4). In that case, the Court ruled that the relevant date was that on which the final amount due is fixed and the balance is paid.

102. In the olive oil production sector, aid was determined based on the actual quantity of output.⁵⁰ At the start of each season, Member States paid producers an advance.⁵¹ The advances paid did not determine the final amount of the aid due by the Member State. This could be less or more than the total of the advances. Olive oil producers merely did not need to lodge a security to cover the possibility that the final amount of aid would be less than the advance paid. As the General Court correctly observed, at paragraph 123, they received the balance of the aid, none the less, only after the Member State had ‘carr[ied] all the requisite checks and subject to the results thereof’.⁵² The final amount due was known only at that time.

47 — Case C-170/00 *Finland v Commission* [2002] ECR I-1007, paragraphs 26 to 28.

48 — Case C-130/99 *Spain v Commission* [2002] ECR I-3005, paragraph 133.

49 — See points 44 to 77 above.

50 — Article 14(1) of Regulation No 2366/98.

51 — Article 16 of Regulation No 2366/98.

52 — Article 16(2) of Regulation No 2366/98.

103. In these circumstances, I consider that the General Court properly found that expenditure was incurred when the definitive amount of aid was established and any balance was paid. This was the point in time at which the liability of the Member State and the corresponding claim of the producer were definitively established. The fact that no security had to be lodged to receive the advance did not render the payment of the advance more or less provisional.

104. For these reasons, I reject the third ground of appeal.

Conclusion

105. Having regard to all the foregoing considerations, I am of the opinion that the Court should:

- dismiss the appeal; and
- order the Kingdom of Spain to pay the costs.