



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Sixth Chamber)

16 December 2015 *

(EAGGF — Guarantee Section — EAGGF and EAFRD — Expenditure excluded from financing — Beef and veal — Sheepmeat and goatmeat — Tobacco — Article 69 of Regulation (EC) No 1782/2003 — Article 31(2) of Regulation (EC) No 1290/2005 — Article 23(1) of Regulation (EC) No 796/2004)

In Case T-241/13,

Hellenic Republic, represented by I. Chalkias, S. Papaïoannou and A. Vasilopoulou, acting as Agents,
applicant,

v

European Commission, represented by A. Marcoulli and D. Triantafyllou, acting as Agents,
defendant,

APPLICATION for annulment of Commission Implementing Decision 2013/123/EU of 26 February 2013 on excluding from European Union financing certain expenditure incurred by the Member States under the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF), under the European Agricultural Guarantee Fund (EAGF) and under the European Agricultural Fund for Rural Development (EAFRD) (OJ 2013 L 67, p. 20), in so far as it excludes certain expenditure incurred by the Hellenic Republic,

THE GENERAL COURT (Sixth Chamber),

composed of S. Frimodt Nielsen, President, F. Dehousse (Rapporteur) and A. M. Collins, Judges,

Registrar: L. Grzegorzczuk, Administrator,

having regard to the written procedure and further to the hearing on 14 July 2015,

gives the following

* Language of the case: Greek.

Judgment

Background to the dispute

- 1 On 29 November 2010, following an enquiry conducted from 17 to 20 April 2007 under reference NAC/2007/004, the European Commission notified the Hellenic Republic of its intention to exclude from European Union financing certain expenditure incurred by that Member State in connection with the Common Agricultural Policy (CAP) in the financial years 2007, 2008 and 2009 (claim years 2006 and 2007).
- 2 The expenditure at issue had been incurred by the Hellenic Republic under Article 69 of Council Regulation (EC) No 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the CAP and establishing certain support schemes for farmers (OJ 2003 L 270, p. 1).
- 3 On 3 January 2011, the Hellenic Republic requested the opening of a procedure aimed at reconciling the respective positions, in accordance with Article 31(3) of Council Regulation (EC) No 1290/2005 of 21 June 2005 on the financing of the CAP (OJ 2005 L 209, p. 1).
- 4 On 19 April 2011, the Conciliation Body submitted its opinion under reference 11/GR/467.
- 5 On 23 July 2012, the Commission communicated its final position to the Hellenic Republic ('the final position').
- 6 On 15 October 2012, a summary report on the results of the Commission's inspections in the context of the conformity clearance under Article 7(4) of Council Regulation (EC) No 1258/1999 of 17 May 1999 on the financing of the CAP (OJ 1999 L 160, p. 103) and Article 31 of Regulation (EC) No 1290/2005 was drafted by the Commission and communicated to the Member States ('the summary report').
- 7 By Implementing Decision 2013/123/EU of 26 February 2013, adopted following a conformity clearance procedure implemented under Article 7(4) of Regulation (EC) No 1258/1999 and, in the case of expenditure incurred after 16 October 2006, Article 31 of Regulation (EC) No 1290/2005, the Commission excluded from EU financing certain expenditure incurred by the Member States under the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF), under the European Agricultural Guarantee Fund (EAGF) and under the European Agricultural Fund for Rural Development (EAFRD) (OJ 2013 L 67, p. 20, 'the contested decision'), on account of its non-conformity with EU rules.
- 8 In that decision, the Commission excluded from EU financing, in particular, expenditure in the amount of EUR 3686189.20 incurred by the Greek paying agencies for the beef and veal, sheepmeat and goatmeat, and tobacco sectors in the financial years 2007, 2008 and 2009 (claim years 2006 and 2007) and declared under the Guarantee Section of EAGGF or under EAGF (taken together, 'the Fund'), on account of its non-conformity with EU rules.

Procedure and forms of order sought by the parties

- 9 By application lodged at the Court Registry on 25 April 2013, the Hellenic Republic brought the present action.

- 10 By decision of the President of the General Court of 1 July 2013, the case was assigned to the Sixth Chamber. Following a change in the composition of the Chambers of the General Court, the Judge-Rapporteur was assigned to the Eighth Chamber, to which the present case was consequently assigned on 27 September 2013.
- 11 By decision of the President of the General Court of 3 February 2015, the present case was reassigned to the Sixth Chamber and to a new Judge-Rapporteur.
- 12 Upon hearing the report of the Judge-Rapporteur, the General Court (Sixth Chamber) decided to open the oral procedure.
- 13 On 27 May 2015, as a measure of organisation of procedure provided for in Article 64 of the Rules of Procedure of the General Court of 2 May 1991, the parties were invited to reply to a number of questions. They complied with that request within the prescribed time-limits.
- 14 The parties presented oral argument and answered the questions put to them by the General Court at the hearing on 14 July 2015.
- 15 The Hellenic Republic claims that the General Court should:
- annul the contested decision in so far as it relates to the Hellenic Republic, in accordance with the submissions contained in the application;
 - order the Commission to pay the costs.
- 16 The Commission contends that the General Court should:
- dismiss the action as unfounded;
 - order the Hellenic Republic to pay the costs.

Law

- 17 The Hellenic Republic raises two pleas in law in support of its action. The first plea alleges, in essence, infringement of Article 69 of Regulation No 1782/2003 and Article 31 of Regulation No 1290/2005, in the case of the expenditure excluded in the beef and veal and sheepmeat and goatmeat sectors. The second plea alleges, in essence, infringement of Article 23 of Commission Regulation (EC) No 796/2004 of 21 April 2004 laying down detailed rules for the implementation of cross-compliance, modulation and the integrated administration and system of checks provided for in Regulation No 1782/2003 (OJ 2004 L 141, p. 18), incorrect assessment of the facts, insufficient and contradictory reasoning, and an error of fact, in the case of the expenditure excluded in the tobacco sector.
- 18 It should be noted at the outset that, as is clear from the parties' written pleadings, the Hellenic Republic disputes the contested decision only in so far as the Commission excluded from EU financing the expenditure incurred by the Greek paying agencies for the beef and veal, sheepmeat and goatmeat, and tobacco sectors in the financial years 2007, 2008 and 2009 (claim years 2006 and 2007), in the total amount of EUR 3686189.20.

The first plea, alleging infringement of Article 69 of Regulation No 1782/2003 and Article 31 of Regulation No 1290/2005, in the case of the expenditure excluded in the beef and veal and sheepmeat and goatmeat sectors

- 19 The first plea consists, in essence, of two parts. In the first part, the Hellenic Republic claims that Article 69 of Regulation No 1782/2003 has been infringed. In the second part, the Hellenic Republic claims that Article 31 of Regulation No 1290/2005 has been infringed.

The first part of the first plea, relating to an infringement of Article 69 of Regulation No 1782/2003

- 20 The Hellenic Republic submits that Member States have extensive competence to implement the CAP financing measures provided for in Regulation No 1782/2003. Article 69 of that regulation is consistent with that rationale inasmuch as it provides that Member States may retain up to 10% of the total amount of aid corresponding to each product sector in order to grant an additional payment in the same sector for specific types of farming. If the Member State chooses to take up that option, it alone is competent, on the basis of its very extensive discretion, to determine the product producers from specific sectors that will benefit from the aid in question, as well as the particular terms and conditions applicable to the grant of that additional payment. Consequently, any failing on the part of a Member State that is due to formal or procedural irregularities in the implementation of Article 69 of Regulation No 1782/2003, such as those which the Commission claims to have established in the present case, would not be such as to trigger a financial correction. The Hellenic Republic disputes in particular the proposition that the infringements identified by the Commission may have had an impact on the objectives pursued by Article 69 of Regulation No 1782/2003.
- 21 The Commission disputes the arguments put forward by the Hellenic Republic.
- 22 It should be recalled that the procedure for clearing accounts presented by the Member States in connection with expenditure financed by the Fund serves to determine in particular whether the expenditure was actually and properly incurred. Furthermore, in the conformity clearance procedure, the Commission has an obligation to apply a financial correction if the expenditure for which financing has been requested has not been incurred in accordance with EU rules, the purpose of such a financial correction being to ensure that no amounts are charged to the Fund which have not been used to finance an objective pursued by the EU legislation at issue (see judgment of 10 July 2014 in *Greece v Commission*, T-376/12, EU:T:2014:623, paragraph 163 and the case-law cited).
- 23 Furthermore, it should be noted that Regulation No 1782/2003 seeks to facilitate the transition from production aid to producer aid by the gradual reduction of direct payments and the introduction of an income support scheme decoupled from production, namely the scheme for single payments determined on the basis of previous entitlements within a reference period, in order to make farmers in the European Union more competitive. The introduction of the single payment scheme is part of the new CAP, one of the main aims of which is to rationalise and simplify the relevant EU rules, while achieving a greater decentralisation of policy implementation, with a broader margin of discretion being left to Member States and their regions (judgment of 19 September 2013 in *Panellinios Syndesmos Viomichanion Metapoiisis Kapnou*, C-373/11, EU:C:2013:567, paragraphs 17 and 18).
- 24 Title III of Regulation No 1782/2003 contains the basic rules applicable to the single payment scheme. It thus provides that farmers who have benefited, in a reference period, from a payment under at least one of the aid schemes referred to in Annex VI to Regulation No 1782/2003 are entitled to aid calculated on the basis of a reference amount obtained for each farmer from the annual average, for that period, of the total payments granted under those systems. The sum of the reference amounts is not to be higher than the national ceiling fixed for each Member State in Annex VIII to that regulation.

- 25 Chapter 5 of Title III of Regulation No 1782/2003 contains provisions that permit Member States to decide, in particular, to apply the single payment scheme partially. Member States may thus maintain certain direct payments coupled to production.
- 26 Article 69 of Regulation No 1782/2003 is one of the latter provisions. It provides that Member States may retain up to 10% of the component of national ceilings in each sector referred to in Annex VI to that regulation and make, on a yearly basis, an additional payment to farmers in the sector or sectors concerned by the retention. The additional payment is to be granted for specific types of farming which are important for the protection or enhancement of the environment or for improving the quality and marketing of agricultural products.
- 27 The conditions for granting the additional payment provided for in Article 69 of Regulation No 1782/2003 were defined by the Commission in Article 48 of Commission Regulation (EC) No 795/2004 of 21 April 2004 laying down detailed rules for the implementation of the single payment scheme provided for in Regulation No 1782/2003 (OJ 2004 L 141, p. 1).
- 28 In the present case, it follows from the summary report that, in the case of the beef and veal and the sheepmeat and goatmeat sectors, the Commission identified deficiencies in both key and ancillary controls. Furthermore, the Commission found that the eligibility criteria for aid had been modified after the end of claim year 2006, in the case of the beef and veal sector, and established late for claim years 2006 and 2007, in the case of the sheepmeat and goatmeat sectors. Those deficiencies made it necessary to apply flat-rate financial corrections for the financial years 2007, 2008 and 2009, in the case of the beef and veal and sheepmeat and goatmeat sectors, and a one-off financial correction for the 2007 financial year, in the case of the beef and veal sector.
- 29 The Hellenic Republic does not challenge the Commission's factual findings as set out in the summary report. It submits, in essence, first, that it has a margin for manoeuvre in implementing Article 69 of Regulation No 1782/2003 and, secondly, that the deficiencies established had no impact on the objectives pursued by the aforementioned Article 69.
- 30 In the first place, it should be noted that the purpose of the additional payment provided for in Article 69 of Regulation No 1782/2003 is, first, to encourage farmers to comply with the requirements to improve the quality of their products and to protect the environment, by way of recompense for their adapting to the new CAP requirements, and secondly, to mitigate the effects which the transition from the direct payments scheme to the single payment scheme entails in any event for some product sectors (judgment in *Panellinios Syndesmos Viomichanion Metapoiisis Kapnou*, cited in paragraph 23 above, EU:C:2013:567, paragraph 47).
- 31 In that context, Article 69 of Regulation No 1782/2003 grants all Member States a certain discretion for the purpose of making additional payments under the CAP reform. However, the authorisation granted to the Member States is strictly limited in scope and subject to a series of conditions of both a procedural and substantive nature (see, to that effect, judgment in *Panellinios Syndesmos Viomichanion Metapoiisis Kapnou*, cited in paragraph 23 above, EU:C:2013:567, paragraphs 23 and 29).
- 32 In particular, Article 48(6) of Regulation (EC) No 795/2004, which is specifically referred to in the summary report in the case of the beef and veal and sheepmeat and goatmeat sectors (points 11.2.1.2 and 11.2.1.3 of the summary report), provides as follows:

‘Member States concerned shall communicate the details of the payment they intend to grant and, in particular, the eligibility conditions and the sectors concerned by 1 August of the year preceding the first year of application of the single payment scheme at the latest.

Any change to the communication referred to in the first subparagraph shall be done by 1 August of a given year at the latest and shall apply to the following year. It shall be immediately communicated to the Commission accompanied by the objective criteria justifying such changes. However, a Member State may not modify the sectors concerned or the percentage of retention.'

- 33 That obligation enables the Commission to be informed of the eligibility conditions decided upon by the Member States. It also serves to ensure that the operators concerned are aware of the conditions for qualifying for the additional payment provided for in Article 69 of Regulation No 1782/2003 before the beginning of the claim year. It should be recalled, in that regard, that the purpose of the aforementioned additional payment is to encourage farmers to comply with the requirements to improve the quality of their products and to protect the environment, by way of recompense for their adapting to the new CAP requirements. The incentive function performed by the additional payment can be effective only if the eligibility conditions applicable to a claim year are known to the farmers concerned before the start of that year and are not retrospectively modified. However, in the present case, there is nothing to support the view that the farmers concerned in the sheepmeat and goatmeat sectors were made aware of the eligibility conditions for claim years 2006 and 2007 in time, as the Conciliation Body noted in point 6.3 of its report. Furthermore, in the case of the beef and veal sector, the eligibility conditions were modified after the end of claim year 2006.
- 34 It should also be noted that, in addition to that infringement of Article 48(6) of Regulation (EC) No 795/2004, the Commission found deficiencies in both key and ancillary controls, on the basis, in particular, of Article 23(1), Article 25 and Article 28(1)(d) of Regulation (EC) No 796/2004, as well as points 1(C) and 4(A) of the Annex to Commission Regulation (EC) No 885/2006 of 21 June 2006 laying down detailed rules for the application of Regulation No 1290/2005 (OJ 2006 L 171, p. 90), as applicable at the material time.
- 35 In that regard, it should be recalled that Member States are required to set up comprehensive administrative and on-the-spot checks guaranteeing the proper observance of the substantive and formal conditions for the grant of aid. If no comprehensive system of checks exists or if the system introduced by a Member State is defective to the point of giving rise to doubts as to compliance with those conditions, the Commission is entitled to disallow certain expenditure incurred by the Member State in question (judgments of 12 June 1990 in *Germany v Commission*, C-8/88, EU:C:1990:241, paragraphs 20 and 21; of 14 April 2005 in *Spain v Commission*, C-468/02, EU:C:2005:221, paragraph 36; and of 30 September 2009 in *Portugal v Commission*, T-183/06, EU:T:2009:370, paragraph 31).
- 36 With respect to the rules concerning the burden of proof in matters relating to the clearance of accounts, the Commission is obliged to give reasons for its decision finding an absence of, or defects in, inspection procedures operated by the Member State in question. However, the Commission is required not to show exhaustively that the checks carried out by the national authorities are inadequate, or that there are irregularities in the figures submitted by them, but to adduce evidence of serious and reasonable doubt on its part regarding those checks or figures. The Member State, for its part, cannot rebut the Commission's findings by mere assertions which are not substantiated by evidence of a reliable and operational supervisory system. If the Member State is not able to show that they are inaccurate, the Commission's findings can give rise to serious doubts as to the existence of an adequate and effective series of supervisory measures and inspection procedures. The reason for this mitigation of the burden of proof on the Commission is that it is the Member State which is best placed to collect and verify the data required for the clearance of European agricultural fund accounts; consequently, it is for that State to adduce the most detailed and comprehensive evidence that its checks have been carried out and its figures are accurate, and, if appropriate, that the Commission's assertions are incorrect (judgments of 11 January 2001 in *Greece v Commission*, C-247/98, EU:C:2001:4, paragraphs 7 to 9; of 6 March 2001 in *Netherlands v Commission*, C-278/98, EU:C:2001:124, paragraphs 39 to 41; and of 24 February 2005 in *Greece v Commission*, C-300/02, EU:C:2005:103, paragraphs 33 to 36).

- 37 In the present case, it should be noted that the deficiencies found by the Commission in key and ancillary controls in the beef and veal and sheepmeat and goatmeat sectors constitute evidence of the Commission's serious and reasonable doubt with respect to the comprehensive administrative and on-the-spot checks that the Hellenic Republic was required to introduce in order to ensure that the substantive and formal conditions for granting aid were correctly observed. Furthermore, it should be pointed out that the Hellenic Republic does not contest before the General Court the deficiencies found by the Commission in the beef and veal and sheepmeat and goatmeat sectors. Consequently, there is no basis on which to call into question the Commission's decision to disallow certain expenditure incurred by the Hellenic Republic. It should also be noted that, contrary to what the Hellenic Republic submits, in essence, the margin of discretion which it enjoys under Article 69 of Regulation No 1782/2003 is not such as to discharge it from its obligations, in particular the obligation to ensure compliance with the conditions for granting the additional payment at issue, which is charged to the Fund.
- 38 In the second place, it should be noted that, contrary to what the Hellenic Republic submits, in essence, the infringements established by the Commission in the present case necessarily had an impact on the objectives pursued by Article 69 of Regulation No 1782/2003. This follows, in particular, from the fact that the farmers concerned were not informed in good time of the conditions for granting the additional payment, thereby divesting Article 69 of Regulation No 1782/2003 of the incentive function it is intended to perform. Furthermore, the deficiencies identified by the Commission in key and ancillary controls were not such as to provide an assurance that the additional payments charged to the Fund were indeed consistent with the objectives pursued by Article 69 of Regulation No 1782/2003. Finally, and in any event, it should be noted that the deficiencies identified by the Commission consisted in particular in the late communication of the maximum level of microflora for sheep and goat milk and in the retrospective modification of the minimum number of calvings per producer for beef and veal. As the Commission rightly observes, those deficiencies concerned eligibility conditions that were closely linked to the objectives pursued by Article 69 of Regulation No 1782/2003.
- 39 Consequently, in the light of all of the foregoing, the Commission was entitled in the present case to decide that a financial correction had to be applied to the payments made by the Greek paying agencies under Article 69 of Regulation No 1782/2003, in the case of the beef and veal and sheepmeat and goatmeat sectors.
- 40 In the light of the foregoing, the first part of the first plea in law must be dismissed as unfounded.

The second part of the first plea, relating to an infringement of Article 31 of Regulation No 1290/2005

- 41 The Hellenic Republic maintains that one of the conditions which Article 31 of Regulation No 1290/2005 attaches to the right to impose a financial correction is that damage must have been caused to the Fund. However, in the present case, the additional payments made under Article 69 of Regulation No 1782/2003 do not exceed the national ceiling for direct payments, but result from a retention applied to producers in the same sector. Those payments do not therefore cause damage to the Fund, with the result that one of the conditions laid down in Article 31 of Regulation No 1290/2005 is not fulfilled. Indeed, the financial correction imposed in the present case creates an unjust enrichment of the Fund, since the 10% referred to in Article 69 of Regulation No 1782/2003 is withheld from farmers receiving direct aid in the sector concerned.
- 42 The Commission disputes the arguments put forward by the Hellenic Republic.

43 It should be noted that, according to Article 31(2) of Regulation No 1290/2005, which is referred to, in essence, by the Hellenic Republic in its written pleadings:

‘The Commission shall assess the amounts to be excluded on the basis of the gravity of the non-conformity recorded. It shall take due account of the nature and gravity of the infringement and of the financial damage caused to the Community’.

44 In the present case, it is sufficient to state that, contrary to what the Hellenic Republic argues, in essence, Article 31(2) of Regulation No 1290/2005 does not introduce a condition making each correction subject to the demonstration of actual damage suffered by the Fund (see, to that effect, order of 15 July 2014 in *Greece v Commission*, C-71/13 P, EU:C:2014:2119, paragraph 21). The Hellenic Republic’s reliance on that provision is therefore incapable of calling into question the Commission’s conclusions, which are based on the non-conformity of the expenditure incurred with EU rules.

45 Furthermore, the Hellenic Republic’s argument that, in the present case, there is an unjust enrichment of the Fund must be rejected. As the Commission rightly argues in its written pleadings, the additional payment granted under Article 69 of Regulation No 1782/2003 is financed by the Fund. The fact that the 10% retention referred to in Article 69 of Regulation No 1782/2003 is actually made up by reducing the amount of single payments granted to farmers in the sectors concerned does nothing to alter that conclusion. Consequently, the Hellenic Republic’s argument is manifestly unfounded.

46 In the light of the foregoing, the second part of the first plea in law must be dismissed as unfounded.

47 The first plea must therefore be dismissed in its entirety.

The second plea, alleging infringement of Article 23 of Regulation (EC) No 796/2004, incorrect assessment of the facts, insufficient and contradictory reasoning and an error of fact, in the case of the expenditure incurred in the tobacco sector

48 The second plea consists, in essence, of two parts. In the first part, the Hellenic Republic claims infringement of Article 23 of Regulation (EC) No 796/2004, incorrect assessment of the facts, and insufficient and contradictory reasoning. In the second part, the Hellenic Republic submits that there has been an error of fact.

The first part of the second plea, relating to an infringement of Article 23(1) of Regulation (EC) No 796/2004, incorrect assessment of the facts, and insufficient and contradictory reasoning

49 The Hellenic Republic submits that the flat-rate financial correction applied by the Commission in the tobacco sector was based on a lack of controls for a period of approximately two months during crop year 2006. However, Article 23 of Regulation (EC) No 796/2004 does not lay down a specific deadline for on-the-spot checks, but requires only that the checks be effective. In the tobacco sector, on-the-spot checks may take place after September, once the tobacco leaves have been harvested, without any adverse effect on their effectiveness, a fact which the Commission recognised during the procedure. The Commission’s reasoning has no basis in the legislation. It is, moreover, insufficient and imprecise because it does not clarify in what way the checks at issue were ineffective. That reasoning is also at odds with the fact that the Commission recognised, during the procedure, that the checks were effective. In its reply to the measure of organisation of procedure, the Hellenic Republic submits that there is a manifest contradiction between the reasoning adopted in the final position and that adopted in the summary report.

- 50 The Commission states that it accepted the explanations given by the Hellenic Republic for the delay in the completion of the on-the-spot checks. That delay is not a ground for the application of a financial correction in the tobacco sector, as is apparent from the Commission's final decision. The financial correction applied is based on the shortcomings found in the key controls carried out in the processing industries in 2006 and 2007, which form the subject of the second complaint. In its reply to the measure of organisation of procedure, the Commission states that any 'discordance' that might appear to exist between the final position and the summary report is 'manifestly due to error or uncertainty on the part of the author of the report with respect to the "significance" of the shortcoming constituted by the lack of controls'. The Commission contends, however, that that 'divergence' has no bearing on the financial correction applied in the present case. Citing Document No VI/5330/97, entitled 'Guidelines for the calculation of financial consequences when preparing the decision regarding clearance of the accounts of EAGGF Guarantee' ('Document No VI/5330/97'), the Commission maintains that, in the present case, the shortcoming relating to a 'lack of key controls in the processing undertakings in 2006 and 2007', also identified in the summary report, is sufficient in itself to justify a financial correction 'in the order of 5%'. Consequently, it does not make any difference to the level of the financial correction ultimately applied whether another shortcoming is taken into account or not.
- 51 It should be noted at the outset that, as the parties confirmed in their replies to the measure of organisation of procedure, the summary report was sent to the Member States under the auspices of the Fund Committee, now the Agricultural Funds Committee. Recital 6 of the contested decision states in this respect that, 'as regards the cases covered by this decision, the assessment of the amounts to be excluded on grounds of non-conformity with EU rules ... was notified by the Commission to the Member States in a summary report on the subject'. The Commission further states, by way of introduction to the summary report, that 'each decision is accompanied by a summary report on the investigations completed which enables assessment of whether Member States have been treated equally as regards the conclusions drawn'. The summary report therefore constitutes an essential document for understanding the reasoning of the contested decision, since it forms the basis on which that decision was adopted (see, to that effect, judgment of 15 December 2011 in *Luxembourg v Commission*, T-232/08, EU:T:2011:751, paragraph 12).
- 52 In the present case, it should be pointed out that, as is apparent from page 74 of the summary report, the Commission decided to impose on the Hellenic Republic a flat-rate financial correction in the tobacco sector on the ground that it had identified two deficiencies in key controls, namely a 'control-free period (almost two months) in 2006' and a 'lack of key controls in the processing undertakings in 2006 and 2007'.
- 53 However, as is apparent from point 4.3 of the final position, the deficiency relating to a 'control-free period (almost two months) in 2006' no longer formed part of the deficiencies taken into account by the Commission.
- 54 Furthermore, point 2.4 of the final position, entitled 'Control-free period', contains a fourth paragraph which states that, in the case of the tobacco sector, the Commission accepts that the control-free period at issue was due to a managerial weakness which did not have a significant negative impact on the effectiveness of the on-the-spot checks. That fourth paragraph did not appear in the equivalent point of the summary report, namely point 11.2.5.4.
- 55 There is therefore an apparent contradiction between the reasoning relied on in the final position and that relied on in the summary report, which the Commission recognised, in essence, in its reply to the measure of organisation of procedure. The summary report also contradicts the fact that the Commission, as it states in its written pleadings, accepted the explanations provided by the Hellenic Republic during the administrative procedure concerning the deficiency at issue.

- 56 In that connection, it should be borne in mind that a contradiction in the reasoning on which a decision is based constitutes an infringement of the obligation laid down in Article 296 TFEU which is such as to have an adverse effect on the validity of the measure at issue if it is established that, because of that contradiction, the addressee of the measure is unable to know, in full or in part, the real reasons for the decision and, as a result, the operative part of the measure is, in full or in part, devoid of any legal basis (see judgment of 4 March 2009 in *Italy v Commission*, T-424/05, EU:T:2009:49, paragraph 67 and the case-law cited).
- 57 Furthermore, it is settled case-law that, when conducting a review of legality under Article 263 TFEU, the Court of Justice and the General Court have jurisdiction in actions brought on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or of any rule of law relating to its application, or misuse of powers. Article 264 TFEU provides that, if the action is well-founded, the act concerned must be declared void. The Court of Justice and the General Court cannot therefore, under any circumstances, substitute their own reasoning for that of the author of the contested act (see judgment of 28 February 2013 in *Portugal v Commission*, C-246/11 P, EU:C:2013:118, paragraph 85 and the case-law cited).
- 58 First, it should be stated that it is not possible to determine from a reading of the summary report whether the reference in that report to the deficiency relating to the ‘control-free period (almost two months) in 2006’ is the result of a mere material error or an intention on the part of the Commission, ultimately, to take account of that deficiency, even though it appeared to have accepted the Hellenic Republic’s explanations during the administrative procedure. On the one hand, the addition of the reference to that deficiency is concomitant with the withdrawal from the position expressed by the Commission, in its final position, to the effect that the deficiency at issue did not have a significant negative impact on the effectiveness of the on-the-spot checks. On the other hand, the Commission itself recognised in its reply to the measure of organisation of procedure that the contradiction at issue was ‘manifestly due to error or uncertainty on the part of the author of the report as regards the “significance” of the deficiency constituted by the lack of controls’. The Commission therefore considers two distinct possible explanations for the reference, in the summary report, to the ‘control-free period (almost two months) in 2006’. As a result, the Hellenic Republic finds itself in a situation in which it must proceed by way of conjecture in order to try to understand why the deficiency at issue is referred to in the summary report but no longer featured in the final decision, and to determine whether that deficiency was taken into account for the purposes of setting the financial correction and, if so, what impact it had on the level at which that correction was set. It should also be pointed out that, in the course of its action before the General Court, the Hellenic Republic put forward arguments on the substance of the case to demonstrate that the Commission committed an error in taking into account the deficiency at issue.
- 59 Secondly, according to Document No VI/5330/97, cited by the Commission, ‘when several deficiencies are found in the same system, the flat rates of correction are not cumulated, the most serious deficiency being taken as an indication of the risks presented by the control system as a whole’ (Document No VI/5330/97, p. 13). That part of Document No VI/5330/97 is referred to in the summary report. As regards the tobacco sector, the Commission adds: ‘Therefore, for claim year 2007, when one or more key controls weaknesses are identified and the ancillary control weaknesses as well, the risk to the Fund of the latter is consumed by a financial correction corresponding to (one or more) key control deficiencies’.
- 60 In that regard, it should be noted, first of all, that the relevant part of Document No VI/5330/97 was referred to in the summary report only in order to put into context the impact of ancillary control deficiencies on the level of the flat-rate correction imposed, as is demonstrated by the use of the term ‘therefore’.

- 61 Next, it should be noted that the relevant passage of the summary report contains yet another contradiction in reasoning as between itself and the final position, a fact which the Commission recognised at the hearing. While the summary report refers to 'claim year 2007', the final position refers to 'claim years 2006 and 2007'. It should be pointed out here that the contradictory reasoning raised by the Hellenic Republic concerns claim year 2006. It should also be noted that the title of the summary report concerning the tobacco sector contains the following phrase: 'Modification of the financial correction proposed for claim year 2006'. However, claim year 2006 is not mentioned in the reasons which the summary report gives for the financial correction. Those factors make what is already a contradictory line of reasoning positively confusing.
- 62 Finally, even assuming that the deficiency relating to the 'lack of key controls in the processing undertakings in 2006 and 2007' is capable of justifying a financial correction 'in the order of 5%', as the Commission maintains, it is not possible to determine, from a reading of the summary report, whether that deficiency was taken into account by the Commission in the present case in order to determine the level of the financial correction for claim year 2006 or whether the Commission took into account, rather, the deficiency relating to the 'control-free period (almost two months) in 2006', or indeed both deficiencies. In the first place, the summary report states, ambiguously, that the financial correction corresponds to 'one or more' key control deficiencies (summary report, p. 74). In the second place, it should be noted that the summary report, in the parts relating to 'Main findings' (section 11.2.1 of the summary report) and 'General' (section 11.2.1.1 of the summary report), contains a title relating to the deficiencies detected in the 'planning of on-the-spot controls' in the beef and veal, sheepmeat, 'and tobacco' sectors. Under that title, the Commission states that 'the late start of on-the-spot checks in 2006 (almost two months after the application deadline) has involved a control-free period and has weakened the efficiency of the whole control system'. That finding is reiterated in the part of the summary report entitled 'Final Commission position' (section 11.2.5 of the summary report), which states that the Commission 'maintains that the late start of on-the-spot checks (almost two months after the application deadline) has involved a control-free period and has weakened the efficiency of the whole control system and created a risk to the Fund'. It follows from that information that, contrary to what the Commission has submitted, in particular at the hearing, the deficiency relating to the 'control-free period (almost two months) in 2006' cannot be regarded as having been perceived as secondary, or even negligible, and that the level of the financial correction for claim year 2006 was based exclusively on the deficiency relating to the 'lack of key controls in the processing undertakings in 2006 and 2007'.
- 63 It follows from those considerations that the contradiction in reasoning as between the summary report and the other relevant documents from the administrative procedure, combined with other imprecisions or contradictions in the reasoning supporting that report, does not enable the Hellenic Republic to know the real reasoning on which the contested decision is based from the point of view of the financial correction imposed for the payments relating to claim year 2006 in the tobacco sector.
- 64 It is therefore appropriate to uphold the first part of the second plea and to annul the contested decision in so far as it excludes certain expenditure incurred by the Hellenic Republic in the tobacco sector for claim year 2006.

The second part of the second plea, relating to an error of fact

- 65 The Hellenic Republic notes that the flat-rate financial correction imposed by the Commission in the tobacco sector was also based on the lack of key controls in tobacco processing undertakings. In particular, the Commission considered that the control system established in Greece was not fully compliant with Article 38 of Regulation (EC) No 796/2004 or with the control provisions in Article 33(3) of that regulation. However, the control procedure applicable to additional payments in the tobacco sector is exhaustively regulated by several national provisions, which the Hellenic Republic sets out in its written pleadings. Those provisions, which are scrupulously observed,

demonstrate that the system established in Greece complies with the EU legislation. The Commission's assessment is therefore based on an error of fact. The Hellenic Republic goes on to say that Article 33c(2) of Regulation (EC) No 796/2004, cited by the Commission, does not concern payments mentioned in Article 69 of Regulation No 1782/2003. Furthermore, with reference to two other Commission decisions excluding from EU financing certain expenditure incurred by the Member States, the Hellenic Republic submits, in its reply, that the contested decision breaches the principle *non bis in idem*. Finally, the Hellenic Republic refutes the Commission's arguments to the effect that the national control measures were not in force in the period in question.

- 66 The Commission disputes the arguments put forward by the Hellenic Republic.
- 67 It should be noted at the outset that the deficiency relating to the 'lack of key controls in tobacco processing undertakings' concerns the payments made in the tobacco sector in claim years 2006 and 2007. It should also be recalled that the first part of the second plea has been upheld and that the contested decision is to be annulled in so far as it excludes certain expenditure incurred by the Hellenic Republic in the tobacco sector in claim year 2006. However, in so far as that annulment concerns only claim year 2006, the Hellenic Republic retains an interest in having those arguments examined by the Court in the context of the payments made in claim year 2007, for which the financial correction is based exclusively on the deficiency relating to the 'lack of key controls in tobacco processing undertakings'.
- 68 According to Article 33c(2) of Regulation (EC) No 796/2004, applicable to additional payments under Article 38 of the same regulation, checks 'during first processing and market preparation of the tobacco' are to include, in particular, 'checks of the processing undertaking's stocks'. Paragraph 3 of the same provision states that 'checks pursuant to this Article shall be undertaken in the place where the raw tobacco is processed'.
- 69 In the present case, it is apparent from the summary report that, according to the Commission, additional verifications should have been carried out over and above those already undertaken during the controls on tobacco deliveries, such as 'checking of the processing undertaking's stocks' (point 11.2.1.4(3) of the summary report).
- 70 The Hellenic Republic confirmed to the Commission that it does not perform 'any [of the] checks' at issue because they are not cost-effective (point 11.2.2.4(2) of the summary report).
- 71 In that regard, it is sufficient to note that, as the Hellenic Republic recognised during the administrative procedure, the on-the-spot checks of the tobacco processing undertakings' stocks were not carried out, in breach, therefore, of the relevant provisions of Regulation (EC) No 796/2004. Consequently, the Commission was entitled to apply a financial correction on that basis.
- 72 The other arguments put forward by the Hellenic Republic do not call that conclusion into question.
- 73 The fact, put forward by the Hellenic Republic, that the control procedure applicable to additional payments in the tobacco sector is exhaustively regulated by several national provisions, is not such as to demonstrate that the on-the-spot checks of the tobacco processing undertakings' stocks were actually carried out.
- 74 The documents provided in Annex 7 to the application, assuming that they were produced during the administrative procedure, are not capable of demonstrating that the on-the-spot checks of the tobacco processing undertakings' stocks were actually carried out, as the Commission rightly submits in its written pleadings. Indeed, as the Hellenic Republic states, those documents comprise: three approved tobacco certification applications, together with the corresponding inventories of the tobaccos approved and the processing control certificates issued by the Department of Agriculture of the prefecture of Kavala (Greece); an application made by a processing undertaking to the Greek Payment

and Control Agency for Guidance and Guarantee Community Aid (Organismos pliromon kai elenchou koinotikon enischyseon prosanatolismou kai engyiseon) in connection with the receipt of purchased tobaccos, together with the corresponding entry control certificate issued by that agency for the quantities concerned, the inventories of the tobaccos approved and the processing control certificates issued by the prefecture of Kavala; and formal declarations made by a processing undertaking in connection with imports of tobacco from Bulgaria, together the corresponding bills of sale for baled tobacco. Those documents do not relate to the on-the-spot checks of the processing undertakings' stocks.

- 75 Finally, as regards the reference to the principle *non bis in idem*, it is sufficient to note, there being no need to rule on the admissibility of this argument, which was relied on at the reply stage, that the other two Commission decisions excluding from EU financing certain expenditure incurred by the Member States that are cited by the Hellenic Republic, read in the light of their summary reports, concern claim years, aid schemes or deficiencies different from those in the present case. Consequently, the argument put forward by the Hellenic Republic is manifestly unfounded.
- 76 In the light of the foregoing, the second part of the second plea in law must be dismissed as unfounded.

Costs

- 77 Under Article 134(3) of the Rules of Procedure of the General Court, each party is to bear its own costs where each party succeeds on some and fails on other heads. However, if it appears justified in the circumstances of the case, the General Court may order that one party, in addition to bearing its own costs, pay a proportion of the costs of the other party.
- 78 Since the action has been partly upheld, it will be fair in the circumstances of the case that each party bear its own costs.

On those grounds,

THE GENERAL COURT (Sixth Chamber)

hereby:

- 1. Annuls Commission Implementing Decision 2013/123/EU of 26 February 2013 on excluding from European Union financing certain expenditure incurred by the Member States under the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF), under the European Agricultural Guarantee Fund (EAGF) and under the European Agricultural Fund for Rural Development (EAFRD), in so far as it excludes certain expenditure incurred by the Hellenic Republic in the tobacco sector in claim year 2006;**
- 2. Dismisses the action as to the remainder;**
- 3. Orders the European Commission and the Hellenic Republic to bear their own costs.**

Frimodt Nielsen

Dehousse

Collins

Delivered in open court in Luxembourg on 16 December 2015.

[Signatures]