



## Reports of Cases

JUDGMENT OF THE GENERAL COURT (Second Chamber)

25 September 2018\*

(EAGF and EAFRD — Expenditure excluded from financing — Decoupled direct aid — On-the-spot checks — Remote sensing — Evaluation of the risk factors — Corrective measures to be taken by the Member State concerned — Assessment of the financial damage — Proportionality)

In Case T-260/16,

**Kingdom of Sweden**, represented initially by L. Swedenborg, A. Falk, N. Otte Widgren, C. Meyer-Seitz and U. Persson, and subsequently by Swedenborg, Falk and Meyer-Seitz, acting as Agents,

applicant,

supported by

**Czech Republic**, represented by M. Smolek and J. Vláčil, acting as Agents,

intervener,

v

**European Commission**, represented by D. Triantafyllou and K. Simonsson, acting as Agents,

defendant,

ACTION on the basis of Article 263 TFEU seeking, primarily, the annulment of Commission Implementing Decision (EU) 2016/417 of 17 March 2016 excluding from European Union financing certain expenditure incurred by the Member States under the European Agricultural Guarantee Fund (EAGF) and under the European Agricultural Fund for Rural Development (EAFRD) (OJ 2016 L 75, p. 16), in so far as it concerns the total amount of EUR 8 811 286.44 in decoupled direct aid paid to the Kingdom of Sweden for the 2013 claim year, and, in the alternative, the reduction of the amount of that decoupled direct aid excluded from financing so that it is fixed at EUR 1 022 259.46,

THE GENERAL COURT (Second Chamber),

composed of M. Prek, President, F. Schalin (Rapporteur) and M.J. Costeira, Judges,

Registrar: P. Cullen, Administrator,

having regard to the written procedure and further to the hearing on 23 February 2018,

gives the following

\* Language of the case: Swedish.

## Judgment

### Background to the dispute

- 1 Following an inspection carried out by its services from 19 to 23 August 2013 concerning direct area aid for the 2011 and 2012 claim years, the European Commission found there to be failures in the implementation by the Kingdom of Sweden of its obligations as regards the selection of the control samples, as provided for in Article 31 of Commission Regulation (EC) No 1122/2009 of 30 November 2009 laying down detailed rules for the implementation of Council Regulation (EC) No 73/2009 as regards cross-compliance, modulation and the integrated administration and control system, under the direct support schemes for farmers provided for in that Regulation, as well as for the implementation of Council Regulation (EC) No 1234/2007 as regards cross-compliance under the support scheme provided for the wine sector (OJ 2009 L 316, p. 65).
- 2 The purpose of the controls to be conducted by the Member States is to update and check the information held by the Member States regarding the agricultural areas in respect of which aid applications are made, with a view to reducing the risk of error associated with the grant of such aid.
- 3 In essence, in the letter, accompanied by an annex, which it sent on 6 December 2013 to the Swedish authorities pursuant to the first subparagraph of Article 11(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) (together, ‘the communication of 6 December 2013’), the Commission submitted that the Swedish authorities had not fully complied with their obligations relating to the control of direct area payments for the 2011 and 2012 claim years, stating that comparison of the results of the remote sensing checks, on the one hand, and the on-the-spot checks, on the other, indicated a significantly different number of errors, whereas those two types of check should have given the same results. Accordingly, there was reason to suspect that, in the use made of remote sensing, there were deficiencies either in the selection of the control samples or in the control method. The error rate was lower as far as the remote sensing checks were concerned, indicating that the risk analysis based on a selection of the control samples was not properly conducted because it was carried out using a limited number of risk factors that themselves were neither assessed annually nor updated effectively in order to achieve better targeting of the risk to the European Agricultural Guarantee Fund ((EAGF) or ‘the Fund’). Lastly, the Commission asked the Swedish authorities to set out in their reply the corrective measures already taken and those which were envisaged.
- 4 On 5 February 2014, the Swedish authorities, in this case the Jordbruksverket (Swedish Agricultural Office, Sweden), sent the Commission a reply to the complaints made by the latter.
- 5 By letter of 11 April 2014, the Commission convened a bilateral meeting with the Swedish authorities, pursuant to Article 11(1) of Regulation No 885/2006. At the end of that meeting, which took place on 20 May 2014, the Commission maintained its conclusions regarding the failures identified for the 2011 and 2012 claim years.
- 6 On 25 September 2014, the Swedish authorities sent the Commission their response to the conclusions of the minutes of the bilateral meeting of 20 May 2014, submitting their own assessment of the damage suffered by the Fund for the 2011 to 2013 claim years, which in their view came to a sum of EUR 636 865.

- 7 On 15 January 2015, the Commission sent the Swedish authorities a communication pursuant to the provisions of the third subparagraph of Article 11(2) and of Article 16(1) of Regulation No 885/2006 ('the communication of 15 January 2015'). In that communication, it rejects the assessment of the damage made by the authorities, stating that, in the present case, they failed to implement an ancillary control correctly.
- 8 On 24 February 2015, the Kingdom of Sweden requested that the case be referred to the Conciliation Body provided for in Article 16 of Regulation No 885/2006. In its report of 9 July 2015, that body found the positions of the parties to be irreconcilable. It did, however, propose to the Commission that it exclude from the correction the applications from those Swedish counties which did not make use of remote sensing in 2013, and that it take account of a map relied on by the Swedish authorities showing a change to the geographic location of the control areas from 2013.
- 9 On 19 October 2015, the Commission communicated its final position ('the final position of 19 October 2015') to the Kingdom of Sweden. It opted to apply a flat-rate correction which covered only the 2013 claim year and the eight Swedish counties in which remote sensing had been implemented from 2011 to 2013. In essence, the Commission explains that the ongoing failure to update the risk analysis for the selection of control samples for remote sensing checks, which amounts to a lack of ancillary control given its persistence, gives rise to a risk of damage to the EAGF. In those circumstances, a flat-rate correction covering all area aid is the best way of quantifying that risk and a correction rate of 2% appears justified.
- 10 By Commission Implementing Decision (EU) 2016/417 of 17 March 2016 excluding from European Union financing certain expenditure incurred by the Member States under the European Agricultural Fund (EAGF) and under the European Agricultural Fund for Rural Development (EAFRD) (OJ 2016 L 75, p. 16), a flat-rate correction of 2% was applied with regard to the expenditure incurred by Sweden in respect of direct decoupled aid in the 2013 claim year, with the final amount of the correction coming to a sum of EUR 8 811 286.44 ('the contested decision').

### **Procedure and forms of order sought**

- 11 By application lodged at the Registry of the General Court on 24 May 2016, the Kingdom of Sweden brought the present action.
- 12 By document lodged at the Registry of the General Court on 7 September 2016, the Czech Republic sought leave to intervene in the case in support of the form of order sought by the Kingdom of Sweden; leave was granted to it by decision of the President of the Second Chamber of the General Court of 19 October 2016.
- 13 The defence, the reply and the rejoinder were lodged at the Registry of the General Court on 5 October 2016, 1 December 2016 and 13 January 2017, respectively.
- 14 Following the lodgement of the statement in intervention by the Czech Republic on 1 December 2016, the Kingdom of Sweden and the Commission submitted their observations on 21 and 23 February 2017, respectively.
- 15 The closure of the written part of the procedure was notified to the parties on 28 February 2017.
- 16 On 20 March 2017, the Kingdom of Sweden stated that it wanted a hearing to be held.
- 17 The Kingdom of Sweden claims that the Court should:
  - annul the contested decision;

- in the alternative, annul and vary the contested decision by reducing the amount excluded from European Union financing so that it is fixed at EUR 1 022 259.46;
- order the Commission to pay the costs.

18 The Commission contends that the Court should:

- dismiss the action;
- order the Kingdom of Sweden to pay the costs.

19 The Czech Republic contends that the Court should grant the form of order sought by the Kingdom of Sweden and annul the contested decision to the extent requested.

### **Pleas in law and arguments of the parties**

20 The Kingdom of Sweden raises three pleas in law in the action.

21 First, it claims that the Commission erred in law by failing to have regard to the provisions of Article 11(1) of Regulation No 885/2006 and those of Article 52 of Regulation (EU) No 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EEC) No 352/78, (EC) No 165/94, (EC) No 2799/98, (EC) No 814/2000, (EC) No 1290/2005 and (EC) No 485/2008 (OJ 2013 L 347, p. 549), in so far as, in the communication of 6 December 2013, which the Commission sent to it following the Commission's investigation, it neither specified the alleged deficiency in the present case nor stated the corrective measures which were to be taken to ensure compliance with EU rules in the future. That communication cannot, therefore, be relied on to justify the contested financial correction.

22 Secondly, it states that the Commission based the contested decision on erroneous conclusions regarding the differences identified on comparison of the number of errors found after the two control methods had been implemented. The view must therefore be taken that the Commission has failed both to demonstrate the alleged deficiencies and to show how those deficiencies, assuming they are proven to exist, could have given rise to a risk of damage to the EAGF.

23 Thirdly, it also submits that, in its calculation of the amount of the flat-rate correction, the Commission infringed both Article 52 of Regulation No 1306/2013 and its own guidelines, as defined in Commission Document No VI/5330/97 of 23 December 1997, entitled 'Guidelines for the calculation of financial consequences when preparing the decision regarding the clearance of the accounts of the EAGGF Guarantee' ('Document No VI/5330/97'), as well as the principle of proportionality.

24 The Commission contests the arguments advanced by the Kingdom of Sweden within the context of the three pleas in law raised by the latter.

25 The Czech Republic, which states that it wholly endorses the arguments put forward by the Kingdom of Sweden, confined itself to submitting comments on the second and third pleas.

***First plea in law, alleging infringement of the provisions of Article 52 of Regulation No 1306/2013 and of Article 11(1) of Regulation No 885/2006***

- 26 The Kingdom of Sweden states that Article 52 of Regulation No 1306/2013 and Article 11(1) of Regulation No 885/2006 govern the various stages which must be gone through during the procedure for the clearance of accounts relating to the EAGF. In particular, under the first subparagraph of Article 11(1) of Regulation No 885/2006, in order for it to remedy the deficiencies identified as soon as possible, the Member State concerned must be notified in advance of the results of the Commission's enquiries and be informed of the corrective measures to be taken in order to ensure compliance with the EU rules at issue in the future. Only such a written communication can form the point of reference for the start of the period of 24 months provided for in Article 52(4)(a) of Regulation No 1306/2013, which allows expenditure that may be excluded from European Union financing to be identified.
- 27 However, neither the communication of 6 December 2013, nor subsequent letters or communications from the Commission, satisfy the requirements of the first subparagraph of Article 11(1) of Regulation No 885/2006, since that communication does not clearly state the nature of the deficiency for which the Kingdom of Sweden is held responsible nor the corrective measures which the latter was required to take in order to remedy that deficiency. Such clarifications were provided by the Commission only in the final position of 19 October 2015, in which it also stated that the persistence of the alleged deficiencies had to be equated with a lack of ancillary control. In particular, it may be observed on the basis of the wording of the communication of 6 December 2013 that the Commission simply stated that it suspected either that there were deficiencies in an ancillary control, here in the risk analysis for the selection of remote sensing control samples, or that there was some form of deficiency in a key control, namely as part of a physical inspection by remote sensing. However, in accordance with case-law, the written communication provided for in Article 11(1) of Regulation No 885/2006 must inform the Member State concerned fully about the Commission's reservations so that it can perform its function as a warning.
- 28 Furthermore, although its services conducted an investigation solely in relation to the 2011 and 2012 claim years, the deficiencies suspected by the Commission were subsequently treated as a failure to conduct a risk analysis, without the basis for such a development of the Commission's position being apparent from the case file, EU legislation or case-law, or even from the Commission's own guidelines, in accordance with which the fact that the way in which a control procedure operates is perfectible is not sufficient grounds for financial corrections.
- 29 The Commission states in reply that, in the communication of 6 December 2013, in particular in paragraph 1.2.1 of the annex included with that communication, entitled 'Effectiveness of the risk analysis', it provided the Swedish authorities with details about the alleged deficiencies and asked them for further clarifications on the evaluation of the risks conducted for the purposes of the remote sensing checks and explanations as to how they ensure that due account is taken of the risk to the Fund. That request must be regarded, at least implicitly, as a general indication of the corrective measures to be taken. In the light of the differences identified between the two control methods, the Commission stated that there were grounds to suspect that there were deficiencies either in the selection of the control samples or in the control method.
- 30 The Commission states, in particular, that, in paragraph 1.3.2 of the annex included with the communication of 6 December 2013, it referred to the weakness observed during the rapid field checks conducted by the Swedish authorities following the remote sensing checking operations.
- 31 The Commission also contends that, although it is true that the communication of 6 December does relate to the 2011 and 2012 claim years, this is due to the fact that, since that communication related to an inspection conducted in August 2013, there were no results for 2013 at that stage. Nevertheless, since the irregularities persisted, it was incumbent on it to take account of that year in order to

determine the period of the financial correction. The fact that deficiencies existed during the years 2011 to 2013 meant that a risk analysis could not be regarded as having been implemented during those years and that no ancillary control had therefore taken place.

- 32 It may also be observed on the basis of the wording of the letter sent on 5 February 2014 by the Swedish Agricultural Office to the Commission that the Swedish authorities had understood which deficiencies existed in the Commission's view.
- 33 Subsequently, in the invitation of 11 April 2014 to the bilateral meeting on 20 May 2014 and in the conclusions of that meeting, the Commission provided further details about the corrective measures to be undertaken. This is due to the fact that the control procedure is a dynamic process and that the questions which arise are dealt with as the process runs its course, on the basis of the clarifications provided by the Member State concerned. In any event, corrective measures could apply only for the future, and not in relation to the 2011 to 2013 claim years.
- 34 The Commission further disputes the claim that it was only in the final position of 19 October 2015 that it clarified the terms of the alleged deficiency which, combined with the lack of any change in the situation in recent years, led it to find there to be no ancillary control. In its view, those factors were clear as early as its communication of 15 January 2015, which was made pursuant to the third subparagraph of Article 11(2) of Regulation No 885/2006.
- 35 In the present case, Article 11(1) and (2) of Regulation No 885/2006, upon which the Kingdom of Sweden relies, applied with effect from 16 October 2006 and reads as follows:

'Conformity clearance

1. When, as a result of any inquiry, the Commission considers that expenditure was not effected in compliance with [EU] rules, it shall communicate its findings to the Member State concerned and indicate the corrective measures needed to ensure future compliance with those rules.

The communication shall make reference to this Article. The Member State shall reply within two months of receipt of the communication and the Commission may modify its position in consequence. In justified cases, the Commission may agree to extend the period for reply.

After expiry of the period for reply, the Commission shall convene a bilateral meeting and both parties shall endeavour to come to an agreement as to the measures to be taken as well as to the evaluation of the gravity of the infringement and of the financial damage caused to the [EU] budget.

2. Within two months from the date of the reception of the minutes of the bilateral meeting referred to in the third subparagraph of paragraph 1, the Member State shall communicate any information requested during that meeting or any other information which it considers useful for the ongoing examination.

In justified cases, the Commission may, upon reasoned request of the Member State, authorise an extension of the period referred to in the first subparagraph. The request shall be addressed to the Commission before the expiry of that period.

After the expiry of the period referred to in the first subparagraph, the Commission shall formally communicate its conclusions to the Member State on the basis of the information received in the framework of the conformity clearance procedure. The communication shall evaluate the expenditure which the Commission envisages to exclude from [EU] financing under Article 31 of Regulation (EC) No 1290/2005 and shall make reference to Article 16(1) of this Regulation.'

- 36 Regulation No 1306/2013, which repealed Regulation (EC) No 1290/2005 of 21 June 2005 on the financing of the common agricultural policy (OJ 2005 L 209, p. 1), contains an Article 52, which is entitled 'Conformity clearance', applicable with effect from 1 January 2015.
- 37 Under the provisions of Article 52(4)(a) of Regulation No 1306/2013, financing may not be refused for '[EAGF] expenditure ... which is effected more than 24 months before the Commission notifies the Member State in writing of its inspection findings'.
- 38 It thus appears that Article 11 of Regulation No 885/2006 sets out the various stages which must be gone through during the procedure for the clearance of EAGF accounts. In particular, the first subparagraph of Article 11(1) of that regulation specifies the content of the written communication by which the Commission is to communicate the result of its enquiries to the Member State, before arranging the bilateral discussion. Under that provision, the first communication must inform the Member State concerned of the results of the Commission's investigations and indicate the corrective measures to be taken in order to ensure future compliance with the EU rules at issue (judgment of 7 June 2013, *Portugal v Commission*, T-2/11, EU:T:2013:307, paragraph 57).
- 39 In that regard, it should be pointed out that the EU judiciary has already held that, when implementing Commission Regulation (EC) No 1663/95 of 7 July 1995 laying down detailed rules for the application of 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), the communication written pursuant to Article 8(1) of that regulation, which is identical in essence to the communication provided for in the first subparagraph of Article 11(1) of Regulation No 885/2006, had to inform the Member State fully about the Commission's reservations, so that it can fulfil the function as a warning accorded to it by the first subparagraph of Article 8(1) of the Regulation (see, to that effect, judgment of 7 June 2013, *Portugal v Commission*, T-2/11, EU:T:2013:307, paragraph 58).
- 40 It follows that, in the first communication referred to in Article 11 of Regulation No 885/2006, the Commission must state, with sufficient precision, the purpose of the investigation carried out by its services and the deficiencies found during that investigation, which may be invoked subsequently as evidence of the serious and reasonable doubt it entertains about the checks carried out by the national authorities or about the figures submitted by them, and which may, accordingly, justify the financial corrections applied in the final decision excluding from European Union financing certain expenditure incurred by the Member State concerned under the EAGF (see, by analogy, judgment of 7 June 2013, *Portugal v Commission*, T-2/11, EU:T:2013:307, paragraph 59 and the case-law cited).
- 41 However, where irregularities justifying the application of a financial correction persist after the date of the written communication of the results of the checks, the Commission is entitled and even obliged to take account of that situation when it determines the period to which the financial correction in question is to relate (see, by analogy, judgment of 7 June 2013, *Portugal v Commission*, T-2/11, EU:T:2013:307, paragraph 63 and the case-law cited).
- 42 It is therefore necessary to examine whether the communication of 6 December 2013, consisting of the letter of 6 December 2013 and the annex attached thereto, may be regarded as consistent with the requirements laid down in Article 11 of Regulation No 885/2006. Accordingly, it is necessary to ascertain whether that communication contains, first, a sufficient indication of the purpose and findings of the investigation, in so far as they formed the basis of the contested financial correction, and, secondly, the corrective measures which had to be adopted in the future.
- 43 The letter included in the communication of 6 December 2013 refers, first of all, to the investigations which took place in Sweden from 19 to 23 August 2013, stating, in very general terms, that, in the light of the findings of those investigations concerning the direct area payments for the 2011 and 2012 claim years, the services of the Commission's Directorate-General for Agriculture and Rural Development took the view that the Swedish authorities had not fully complied with the requirements under

Council Regulation (EC) No 73/2009 of 19 January 2009 establishing common rules for direct support schemes for farmers under the common agricultural policy and establishing certain support schemes for farmers, amending Regulations (EC) No 1290/2005, (EC) No 247/2006, (EC) No 378/2007 and repealing Regulation (EC) No 1782/2003 (OJ 2009 L 30, p. 16), Regulation No 1122/2009 and Commission Regulation (EC) 1120/2009 of 29 October 2009 laying down detailed rules for the implementation of the single payment scheme provided for in Title III of Regulation No 73/2009 (OJ 2009 L 316, p. 1).

- 44 The letter in question further states that, under Article 31 of Regulation No 1290/2005, the deficiencies found may result in the exclusion from European Union financing of some of the expenditure financed by the EAGF and will form the basis of those corrections until appropriate corrective measures have been taken.
- 45 As for the annex included with the communication of 6 December 2013, paragraph 1.2.1 of that annex, entitled ‘Effectiveness of the risk analysis’, starts by providing a reminder of the provisions of Articles 26 and 31 of Regulation No 1122/2009, before setting out the principle that ‘remote sensing checks and traditional on-the-spot checks ... are generally meant to give the same results[, and if] that is not the case, there may be grounds to suspect deficiencies either in the selection of the control samples or in the control method’.
- 46 The annex contained in the communication of 6 December 2013 subsequently includes a comparison of the error rates observed during the area checks on the farms in receipt of aid, according to whether on-the-spot checks or remote sensing checks were used and whether the samples were selected at random or on the basis of an evaluation of the risk factors.
- 47 It may be observed in particular on the basis of a summary table that the error rates of the remote sensing checks relating to samples selected on the basis of an evaluation of the risk factors are systematically lower than the error rates of the on-the-spot checks: the former are between 0.96% and 0.31% for 2011 and 2012 respectively, the latter between 1.34% and 1.41% for those same years respectively.
- 48 Having set out the explanations provided by the Swedish, which relate, first, to the method of selecting the farms subject to checks and, second, to the rationalisation of the remote sensing checks in order to focus those checks on the areas of the Swedish territory with a particular density of farms, the Commission concluded that ‘there [was] therefore a risk that the Swedish authorities [were] not sufficiently targeting the risk as far as the remote sensing checks [were] concerned’.
- 49 That conclusion concerning the need for improved evaluation of the risk factors appears to be clear and unambiguous and cannot, contrary to the Kingdom of Sweden’s claim, be equated with a mere suspicion incapable of justifying a financial correction. It must therefore be regarded as providing a sufficient indication of the purpose and the findings of the investigation.
- 50 With regard to the corrective measures to be implemented, although the letter contained in the communication of 6 December 2013 does simply refer to the annex included in the same communication, whilst asking the Swedish authorities to inform the Commission of the corrective measures already taken or envisaged as well as the timetable for their implementation, that annex does contain a request made to the Swedish authorities to ‘provide further clarification of their evaluation of the risks conducted for the purposes of the remote sensing checks and to explain how they ensure that due account is taken of the risk’.

- 51 When read in the light of the shortcomings identified, that conclusion concerning the corrective measures to be taken appears to be both clear and unambiguous, particularly since the Swedish authorities provided certain explanations regarding the shortcomings identified by the Commission's services, such that the scope of that conclusion was manifestly clear as far as the authorities were concerned.
- 52 In those circumstances, the corrective measures which had to be taken in future by the Swedish authorities appear to be sufficiently detailed in the communication of 6 December 2013 in the light of the requirements under Article 11 of Regulation No 885/2006.
- 53 Furthermore, although the communication of 6 December 2013 relates to the 2011 and 2012 claim years only, whereas the financial correction concerns the 2013 claim year, it must be observed, first, that the 2013 claim year had not ended when the Commission's services carried out the inspection in August 2013 and, secondly, that, where irregularities justifying the application of a financial correction persist after the date of the written communication of the results of the checks, it is incumbent on the Commission to take account of that situation when determining the period to which the financial correction in question relates.
- 54 It is apparent from the provisions of Article 11 of Regulation No 885/2006 that, if the Member State fails to implement corrective measures in response to the irregularities found by the Commission, the Commission may exclude the expenditure affected by non-compliance with the EU rules until such time as the corrective measures which it imposes are actually implemented (judgment of 7 June 2013, *Portugal v Commission*, T-2/11, EU:T:2013:307, paragraph 80).
- 55 In addition, in the communication of 15 January 2015, the Commission found there to be a persistent and significant difference between the error rates of the remote-sensing checks and those of the on-the-spot checks: 0.39% and 0.74%, respectively.
- 56 As early as this stage, and not just with effect from the final position of 19 October 2015 as it wrongly submits, the Kingdom of Sweden was informed of the persistence of the deficiencies identified by the Commission's services, the corrective measures to be taken necessarily being of the same nature as those previously mentioned.
- 57 In the light of the foregoing, it appears that the Commission did not infringe the requirements under Article 11 of Regulation No 885/2006 and that the first plea in law raised by the Kingdom of Sweden must be rejected since it is unfounded.

***Second plea in law, alleging that the Commission has failed to provide evidence of the deficiencies alleged and the financial risk to the EAGF***

- 58 First of all, the Kingdom of Sweden submits that the Commission's claims concerning the alleged infringement of the provisions of Article 31(2) of Regulation No 1122/2009 are based on the erroneous premiss that the findings of the traditional checks conducted in the field and those of the remote sensing checks give the same result. They are two complementary methods: the on-the-spot checks are, by nature, more precise and allow a greater number of errors to be detected, whereas remote sensing provides an overview and enables larger areas to be inspected. This is, moreover, borne out by the wording of Article 35(1)(b) of Regulation No 1122/2009, which states that, where remote sensing does not provide the competent authority with satisfactory results in terms of accuracy, Member States using it are to carry out physical inspections. In addition, the Commission has not explained why the two control methods must give similar results.

- 59 Next, the Kingdom of Sweden claims that the discrepancies between the error rates observed depending on which of the two control methods is used, coupled with the fact that those rates varied in the assessments provided by the Commission during the ongoing examination, are low, or even marginal, since their absolute value ranges between 0.27% and 0.56%, which puts them below the 2% limit, the rate used in this type of case according to the Court of Auditors of the European Union. At the hearing, the Kingdom of Sweden reiterated this argument, referring to the case-law of the Court as it follows, in its view, from the judgment of 16 February 2017, *Romania v Commission* (T-145/15, EU:T:2017:86). The difference observed is, in any event, too minor to conclude that there is no ancillary control, such that the Commission has failed to demonstrate sufficiently the existence of doubts relating to the effectiveness of those checks, as is required in accordance with the principles laid down in case-law.
- 60 Finally, the Kingdom of Sweden submits that, although there are no common rules which set out the procedures for developing and updating the effectiveness of the risk analysis which must be carried out pursuant to Article 31(2) of Regulation No 1122/2009, meaning that it is for the Member States to establish the risk factors themselves, it did however follow the guidelines contained in the Commission database called 'WikiCap'. It also had to take account of the fact that the Commission made satellite images available only if 25% of the area photographed was used for inspection purposes, which gave rise to constraints in Sweden given the significant percentage of wooded areas in its territory and made it necessary to focus the checks on those counties with lots of agricultural land. Furthermore, the Swedish authorities state that they conducted partial on-the-spot inspections covering 85% to 90% of the farms subject to remote sensing checks, with the result that remote sensing alone was used only for a very small share of the farms inspected.
- 61 In those circumstances, the Kingdom of Sweden considers that it complied with the Commission's guidelines when selecting the areas to be checked using remote sensing and submits that it focused its checks on those areas in which the payment entitlements were highest in value, which is entirely consistent with those guidelines. Furthermore, the checks also targeted those farmers whose activities and the size of the area worked presented greater interest for the checks. Moreover, the Swedish authorities made changes to the areas inspected using satellite images specifically ordered for the 2011 to 2013 claim years, and, in the case of the 2013 claim year, the risk factors were also amended to mirror those provided for in the context of the on-the-spot checks. This contradicts the Commission's claims that the risk factors were neither updated nor assessed for 3 consecutive years.
- 62 In the reply, the Kingdom of Sweden takes the view that the Commission misinterpreted the conclusions of the bilateral meeting of 20 May 2014, and submits that, contrary to the Commission's claim, it did not state that it had not carried out any evaluation of the risk factors as far as the remote sensing checks were concerned.
- 63 The Czech Republic essentially states that the samples intended for the on-the-spot checks and those intended for the remote sensing checks are selected according to different methods, such that comparison of the errors detected depending on which of the two methods is used is irrelevant. In addition, since the selection of the areas in which remote sensing checks are to be conducted must be made at the end of the year preceding the year in which the aid application is made and since the Commission makes available only a limited number of satellite images, the selection of the areas to be inspected is based on geographic criteria and not on a risk analysis based on knowledge of all farmers and their applications for aid. The farmers subject to remote sensing checks thus present a lower risk overall and the error rate detected is likewise lower, meaning that the margin of error associated with this type of check is greater.
- 64 The Czech Republic adds that there is no provision in Regulation No 1122/2009 which states that the two types of check must produce the same error rate or that different error rates cast doubt on the effectiveness of the checks.

- 65 The Commission contends in response that the difference between the results of the on-the-spot checks and those of the remote sensing checks is in itself an issue. If, however, the two control methods are deemed to be equally valid where they do not produce similar results, this means that the quality of the checks or the choice of the control method can be called into question.
- 66 With regard to the variation in the figures that it submitted, the Commission explains that it provided data based both on random samples and on samples based on the risk analysis. It does, however, admit that the annual error rate of 0.99% for the traditional on-the-spot checks in 2012 is incorrect and that the correct rate is 0.87%, but states that this has no effect in the present case.
- 67 As for the lack of an annual assessment and appropriate updating vis-à-vis the risk analysis, the Commission contends that changes made to the location of the control areas for the 2013 claim year do not prove that an evaluation of the risk factors was undertaken. Moreover, the Commission takes the view that the Swedish authorities admitted at the bilateral meeting of 20 May 2014 that they had not carried out an evaluation of the risk factors as regards the remote sensing checks. According to the conclusions of that meeting, the risk analysis for the remote sensing checks was amended only with effect from the 2014 claim year, and not the 2013 claim year. In addition, it may be observed on the basis of the data provided by the Kingdom of Sweden in the application that, assuming that an amendment was made for 2013, that amendment did not bring about any improvement, such that the Commission's complaint remains well-founded.
- 68 The Commission contests the Swedish authorities' claim that the differences identified between the error rates are marginal, and contends, on the contrary, that those differences were significant: as compared with the remote sensing checks, the on-the-spot checks detected 1.5 times more errors in 2011, over 2.5 times more errors in 2012 and almost 2 times more errors in 2013. In addition, the 2% threshold relied on by the Swedish authorities does not apply in the context of the conformity clearance procedures under Article 52 of Regulation No 1306/2013.
- 69 It must be observed that, in accordance with settled case-law, only intervention in accordance with the EU rules in the framework of the common organisation of agricultural markets is to be financed by the EAGF. In that context, it is for the Commission to prove that an infringement of the rules on the common organisation of the agricultural markets has occurred. The Commission is therefore obliged to give reasons for its decision finding an absence of, or defects in, inspection procedures operated by the Member State in question (see judgment of 9 January 2003, *Greece v Commission*, C-157/00, EU:C:2003:5, paragraph 15 and the case-law cited).
- 70 However, the Commission is required not to demonstrate 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 (see judgment of 9 January 2003, *Greece v Commission*, C-157/00, EU:C:2003:5, paragraph 16 and the case-law cited).
- 71 The reason for this mitigation of the burden of proof on the Commission is that it is the Member State that is best placed to collect and verify the data required for the clearance of the EAGF accounts; consequently, it is for the State to adduce the most detailed and comprehensive evidence that it has made checks or that its figures are accurate and, if appropriate, that the Commission's assertions are incorrect (see judgment of 9 January 2003, *Greece v Commission*, C-157/00, EU:C:2003:5, paragraph 17 and the case-law cited).
- 72 The Member State concerned, 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 it 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 (see judgment of 9 January 2003, *Greece v Commission*, C-157/00, EU:C:2003:5, paragraph 18 and the case-law cited).

- 73 Under Title III of Regulation No 1122/2009, entitled ‘Controls’, paragraph 1 of Article 26, which is itself entitled ‘General principles’, states that ‘administrative controls and on-the-spot checks provided for in this Regulation shall be made in such a way as to ensure effective verification of compliance with the terms under which aids are granted and of the requirements and standards relevant for cross-compliance’. Title III includes a Chapter II, devoted to controls with regard to the eligibility criteria for aid applications, Section II of which is in turn devoted to on-the-spot checks.
- 74 Article 30 of Regulation No 1122/2009, which concerns in particular on-the-spot checks with regard to eligibility criteria, provides inter alia that ‘the total number of on-the-spot checks carried out each year shall cover at least 5% of all farmers applying respectively for the single payment scheme, the single area payment scheme or area-related payments under specific support’.
- 75 Article 31 of Regulation No 1122/2009, which concerns the selection of the control samples and the assessment and updating of the risk factors, reads as follows:

‘Selection of the control sample

1. Control samples for on-the-spot checks under this Regulation shall be selected by the competent authority on the basis of a risk analysis and representativeness of the aid applications submitted.

To provide the element of representativeness, the Member States shall select randomly between 20% and 25% of the minimum number of farmers to be subject to on-the-spot checks as provided for in Article 30(1) and (2).

However, if the number of farmers to be subject to on-the-spot checks exceeds the minimum number of farmers to be subject to on-the-spot checks as provided for in Article 30(1) and (2), the percentage of randomly selected farmers in the additional sample should not exceed 25%.

2. The effectiveness of the risk analysis shall be assessed and updated on an annual basis:

- (a) by establishing the relevance of each risk factor;
- (b) by comparing the results of the risk based and randomly selected sample referred to in the second subparagraph of paragraph 1;
- (c) by taking into account the specific situation in the Member State.

3. The competent authority shall keep records of the reasons for the selection of each farmer for an on-the-spot check. The inspector carrying out the on-the-spot check shall be informed accordingly prior to the commencement of the on-the-spot check.

4. A partial selection of the control sample may, where appropriate, be made before the end of the application period in question, on the basis of available information. The provisional sample shall be completed when all relevant applications are available.’

- 76 Article 35 of Regulation No 1122/2009, which concerns remote sensing and its relationship with on-the-spot checks, reads as follows:

‘Remote sensing

1. Where a Member State makes use of the possibility, provided for in the second paragraph of Article 33, to carry out on-the-spot checks by remote sensing, it shall:

- (a) perform photo interpretation of satellite images or aerial photographs of all agricultural parcels per application to be checked with a view to recognising the ground cover and measuring the area;
- (b) carry out physical inspections in the field of all agricultural parcels for which photo interpretation does not make it possible to verify the accuracy of the declaration to the satisfaction of the competent authority.

2. The additional checks referred to in Article 30(3) shall be carried out by means of traditional on-the-spot checks if it is no longer possible to carry them out by means of remote sensing within the current year.'

77 First, with regard to the Kingdom of Sweden's complaint that the Commission failed to demonstrate that it had infringed the provisions of Article 31 of Regulation No 1122/2009 and that the Commission based its view on the erroneous premiss that the remote sensing and on-the-spot control methods must give the same results, it must be observed that the checks which Member States are required to implement as part of the support scheme for farmers under the EAGF must be carried out in compliance with the general principles set out in Article 26(1) of Regulation No 1122/2009, in particular as regards the criterion of the effectiveness of the verification of compliance with the terms under which aid is granted as well as the requirements and standards relevant for cross-compliance.

78 Although, as the Commission contends and as is apparent from Articles 33 and 35 of Regulation No 1122/2009, the two control methods may be validly used by the Member States, the use of on-the-spot inspections is, however, mandatory in respect of all parcels for which remote sensing does not make it possible to verify the accuracy of the declaration.

79 In addition, although Regulation No 1122/2009 does not expressly state that the two control methods must give similar results, as mentioned by the Commission in paragraph 12.4.1.2 of the summary report, the fact remains that the weaknesses of the remote sensing checks must be mitigated by making use of on-the-spot checks to ensure effective verification of compliance with the terms under which aid is granted. Accordingly, if use of one or other of the forms of control reveals significant differences in the detection of errors, this can be only a temporary situation and one which must be rectified by making changes to way in which risk factors are taken into account, such that, with time, the error rates tend to be similar or, at the very least, to be moving closer to one another. The argument advanced by the Kingdom of Sweden that it conducted partial on-the-spot checks covering 85% to 90% of the farms subject to remote sensing checks appears irrelevant in this regard, since this has no bearing on the differences observed between the error rates. The need for an annual assessment and update of the risk factors is, moreover, expressly mentioned in Article 31(2) of Regulation No 1122/2009.

80 It must be observed, as the Commission contends, that the ground for the financial correction relied on by the Commission in the present case relates to the fact that the risk analysis was conducted using a limited number of risk factors, which were neither assessed annually nor updated appropriately in order to achieve better targeting of the risk to the Fund.

81 In those circumstances, the persistence of a significant difference between the error rates according to the control method used appears to be evidence of the serious and reasonable doubt that the Commission could have entertained in relation to the method used by the Swedish authorities in order to achieve better targeting of the risk to the Fund, in view of the number of risk factors used and the need to assess and update them annually.

- 82 In addition, the Commission's doubts were legitimately confirmed by the position adopted by the Swedish authorities during the conformity clearance procedure. It appears, as is clear from the minutes of the bilateral meeting which took place on 20 May 2014, that, in relation to the traditional on-the-spot checks, those authorities stated that they conducted an annual evaluation of the risk factors giving rise to over-declarations and that they subsequently amended the risk analysis, but that no such analysis was carried out in relation to the remote sensing checks. The only risk factor considered is the 'area declared in the application/payment made' ratio.
- 83 Although the Kingdom of Sweden disputes the Commission's interpretation of the minutes of the bilateral meeting of 20 May 2014, it must however be observed that, in the letter of 25 September 2014 which it sent in response to those minutes, the Swedish Agricultural Office did not formally challenge the alleged lack of risk analysis in relation to the remote sensing checks. It did, however, explain how it had assessed the damage suffered by the Fund, in particular as far as the 2014 claim year was concerned, using the preliminary figures of the anomalies detected in 2013.
- 84 Secondly, with regard to the claim made by the Kingdom of Sweden that the differences observed between the error rates depending on the control method use are too minor to establish an infringement of Article 31 of Regulation No 1122/2009 and are, in any event, below the 2% threshold defined by the Court of Auditors as representing an acceptable percentage of detected errors, it must be observed that the error rates observed, which formed the basis of the final position of 19 October 2015 and which are the result of the verification of samples selected on the basis of an evaluation of the risk factors and are mentioned in the communication of 15 January 2015, are, respectively, for the on-the-spot checks and remote sensing checks, 0.84% and 0.57% in 2011, 0.99% and 0.31% in 2012, and 0.74% and 0.39% in 2013. Over the 3 years in question, a much higher percentage of errors was therefore detected by the on-the-spot checks than by the remote sensing checks, that is to say, respectively, 1.5 times, 3 times and 2 times more errors.
- 85 Contrary to the claim made by the Kingdom of Sweden, that difference in results depending on the method used does appear substantial and it cannot be argued that the two control methods give equivalent results. In addition, with regard to the 2% rate, which is also referred to as the 'materiality threshold' and which is acceptable according to the standards established by the Court of Auditors, that rate is not relevant in the present case. The concept of 'minimal requirements for materiality', introduced by the Court of Auditors in its Opinion No 2/2004 of 18 March 2004 on the 'single audit' model (and a proposal for a Community internal control framework) (OJ 2004 C 107, p. 1) and the 2% materiality threshold mentioned inter alia in paragraph 17 of Annex 1.1, entitled 'Audit approach and methodology', to the Annual Report of the Court of Auditors on the implementation of the budget concerning the financial year 2014, together with the institutions' replies (OJ 2014 C 373, p. 1) concern a threshold on the basis of which the Court of Auditors plans its audit work, but it is not demonstrated that that threshold is relevant in the present case, as the Commission rightly points out, in connection with a conformity clearance procedure for accounts under Article 52 of Regulation No 1306/2013.
- 86 Finally, although it is true that the error rates submitted by the Commission may have changed during the clearance procedure (in the case of the remote sensing checks of the samples based on the risk assessment for the 2011 claim year, those rates went from 0.96% in the communication of 6 December 2013 to 0.84% in the communication of 15 January 2015), this is, however, irrelevant as regards the finding of the significant discrepancy between the rates depending on the method used, as observed in point 84 above.
- 87 Third, with regard to the claim made by the Kingdom of Sweden that, with effect from the 2013 claim year, the risk factors relating to the remote sensing checks were amended, it follows at most from the map annexed to the application and relating to the areas subject to remote sensing checks in 2013 that

changes were indeed made to those areas. In view of the persistence of a discrepancy between the error rates in 2013, it may be observed that those changes had only a very limited impact. However, as is clear from points 83 and 84 above, there is nothing to show that the risk factors were duly amended.

- 88 It thus appears that the evidence showing that the checks carried out by the Swedish authorities were insufficient, evidence which gave rise to doubts on the part of the Commission as to the existence of an adequate and effective series of supervisory measures and inspection procedures, has not been rebutted by the arguments advanced by those authorities, there being no need to examine those arguments further (see, to that effect, judgment of 15 October 2014, *Denmark v Commission*, C-417/12 P, EU:C:2014:2288, paragraph 73). In view of the significant size of the geographic area still in question after the Commission agreed to limit the financial correction to eight counties (see point 9 above), it appears that the Commission could legitimately entertain doubts as to the systemic nature of the failure identified, whereas the Kingdom of Sweden has not put forward any specific evidence capable of showing that the discrepancies observed between the error rates depending on the control methods were attributable to factors other than failures resulting from the choices made by the national authorities in relation to the implementation of the remote sensing checks. In those circumstances, the Commission could rightly find that the Kingdom of Sweden had failed to comply with the provisions of Article 31(2) of Regulation No 1122/2009, such that the second plea in law must be rejected as unfounded.

***Third plea in law, alleging infringement of Article 52 of Regulation No 1306/2013, the guidelines laid down in Document No VI/5330/97 and the principle of proportionality***

- 89 First, the Kingdom of Sweden claims that the 2% flat-rate correction is unjustified given the nature and the scale of the non-compliance at issue and the actual damage that it is likely to cause to the Fund. The fact that a control procedure may be improved cannot constitute a significant infringement of a rule of EU law and cannot, in itself, be sufficient to give rise to financial corrections in respect of the alleged failure of an ancillary control. In any event, the amount excluded from European Union financing must be reduced.
- 90 Secondly, the Kingdom of Sweden states that the flat-rate correction is unjustified in view of the fact that the financial damage caused to the European Union could have been assessed with proportionate effort. Without providing a relevant statement of reasons, the Commission decided to apply a flat-rate correction and also rejected the assessment provided by the Swedish authorities, even though it was possible to determine the amount which potentially had to be excluded from European Union financing, here EUR 1 022 259.46, on the basis of the differences between the two control methods. That amount was calculated by increasing the amount of the corrections determined following the remote sensing checks — the corrections using that method were two times lower than those using the on-the-spot checking method — and adding to that amount the amounts to be recovered retroactively. In addition, it was only in the final position of 19 October 2015 that the Commission informed the Swedish authorities that, in its view, there was no ancillary control, making it impossible to apply a correction for the 2011 to 2013 claim years, which had already elapsed.
- 91 Thirdly, the Kingdom of Sweden takes the view that the flat-rate correction is also incompatible with the Commission guidelines set out in Document No VI/5330/97. The Commission did not inform the Swedish authorities of its observations on the effectiveness of the risk analysis until December 2013, and did not specifically identify the deficiencies in question or the corrective measures to be taken, such that the complaint cannot be made that they did not take steps to improve the implementation of the ancillary checks.
- 92 Fourthly, the Kingdom of Sweden argues that the flat-rate correction is contrary to the principle of proportionality, since the amount of that correction is manifestly disproportionate to any damage suffered by the Fund.

- 93 In the reply, the Kingdom of Sweden claims, in response to the Commission, that the Court has jurisdiction under Article 263 TFEU to order the partial annulment of a Commission decision, which necessarily involves varying such a decision. The parts in respect of which annulment is sought, here the choice to apply a flat-rate correction, are also separable from the remainder of the contested decision, such that, if it were annulled in part, the substance of the contested decision would be unchanged.
- 94 The Czech Republic states that, pursuant to Article 52 of Regulation No 1306/2013, the Commission must favour the precise quantification of the amounts actually representing financial damage to the European Union, as is likewise clear from the guidance laid down in Commission communication C(2006) 2210 AGRI-2005-64043 of 9 June 2006 on how the Commission intends in the context of the EAGGF-Guarantee clearance procedure to handle shortcomings in the context of cross-compliance control systems implemented by the Member States (Article 3 of Regulation No 1782/2003; 'Document AGRI-2005-64043'). In the present case, the financial damage was quantifiable and it fell to the Commission at the very least, if it disagreed with the method used by the Kingdom of Sweden, to ask the latter to make a calculation using a method of calculation which the Commission deemed to be appropriate. This irregularity is in itself a ground for the annulment of the contested decision to the extent applied for by the Kingdom of Sweden.
- 95 The Commission contends that, since the action is based on Article 263 TFEU and it seeks the annulment of the contested decision, the Court does not have the power to vary that decision. If the contested decision must be annulled, it is for the Commission, in accordance with Article 264 TFEU, to take the necessary measures to comply with the judgment of the Court. Accordingly, the alternative head of claim advanced by the Kingdom of Sweden, as it is submitted by the line of argument developed as part of the third plea in law, cannot be examined as to its substance by the Court.
- 96 In the rejoinder, the Commission also states that, since, in the reply, it is now seeking the partial annulment of the contested decision in so far as that decision provides for a flat-rate correction, the Kingdom of Sweden is seeking to modify its application, which is prohibited by settled case-law in this regard. In addition, in so far as it relates to the alternative head of claim, the third plea in law is itself inadmissible vis-à-vis the assessment of the main head of claim.
- 97 In any event, the Commission contends that the persistence of the shortcomings observed over the years 2011 to 2013 means that the view cannot be taken that a risk analysis was actually conducted, with the result that no ancillary control took place and there is therefore a risk to the Fund. The Commission guidelines set out in Document No VI/5330/97 allow the application of a flat-rate correction where a Member State has failed to fulfil its obligation to carry out appropriate checks on the eligibility of certain applications allowed. A risk analysis is an ancillary control, which, if ineffective, justifies a flat-rate correction of 2%.
- 98 The differences between the error rates observed depending on the type of check is not in itself a ground for a flat-rate correction, but does however show that the risk analysis cannot be regarded as having been conducted. In those circumstances, the calculation of the risk to the Fund suggested by the Swedish authorities, which is based on that difference, is insufficient. Furthermore, it is incorrect to claim that that calculation had been approved by the Commission's accounting officers.
- 99 With regard to the principle of proportionality, the Commission takes the view that that principle has been observed since the correction was limited to the 2013 claim year and to the eight Swedish counties in which the checks had been conducted by remote sensing, and not in the field, between 2011 and 2013.
- 100 First, with regard to the admissibility of the third plea in law, it must be observed, as is apparent from the wording of the application, that that plea alleges, in essence, infringement of Article 52(2) of Regulation No 1306/2013. In addition, there is nothing to suggest that it is put forward by the

Kingdom of Sweden exclusively in support of the second head of claim, advanced in the alternative and seeking the reduction of the amount of the financial correction, and not also in support of the first head of claim, inasmuch as the latter seeks the annulment of the contested decision in so far as the Commission acted unlawfully, in particular by wrongly deciding to apply a flat-rate correction.

- 101 It may be observed, based on an examination of the wording of paragraph 11 of the application, that although the Kingdom of Sweden takes the view, primarily, that the contested decision should be set aside, since the Commission — following an unlawful procedure for the clearance of accounts — wrongly found that the Swedish authorities had not correctly carried out the risk analysis, which may result in the contested decision being annulled in its entirety and, therefore, the very principle of a financial correction being dismissed, it likewise considers that, if the Court were nevertheless to find that the Swedish authorities were responsible for certain deficiencies justifying a financial correction as a matter of principle, the method of assessing that correction is incorrect in any event.
- 102 In those circumstances, without it being necessary to examine the admissibility of the third plea in law in so far as it is advanced in support of the second head of claim, by which the Court is asked — having first annulled the contested decision in part — to vary the amount of the financial correction, it must be observed that there is nothing to prevent that plea from being regarded as admissible and taken into account in so far as it is advanced in support of the first head of claim, namely that the contested decision should be annulled. In addition, contrary to the argument advanced by the Commission and as is clear from the examination of paragraph 11 of the application in point 101 above, it does not appear that, in this regard, the Kingdom of Sweden has modified the form of order sought by it at the reply stage.
- 103 As the Kingdom of Sweden claims, case-law does allow the annulment of a decision of the Commission made in relation to the clearance of accounts in so far as that annulment relates to the grounds and operative part of a decision involving the application of a flat-rate correction (see, to that effect, judgment of 7 July 2005, *Greece v Commission*, C-5/03, EU:C:2005:426, paragraphs 54 and 55). Such annulment has no bearing on the legality of the remainder of the grounds of the decision in question, grounds which may relate inter alia to the finding of deficiencies in the checks to be conducted by the Member State in question.
- 104 With regard to the appropriate conclusions to be drawn from any annulment, it must be recalled that, although, in accordance with settled case-law, it is not the function of the European Union judicature to issue directions to the EU institutions or to substitute itself for those institutions when exercising its powers of review, it is however for the institution concerned, under Article 266 TFEU, to adopt the measures required to give effect to a judgment delivered in an action for annulment (see judgment of 30 May 2013, *Omnis Group v Commission*, T-74/11, not published, EU:T:2013:283, paragraph 26 and the case-law cited).
- 105 Accordingly, if the contested decision is annulled, and in so far as that annulment is based on the finding that a flat-rate correction was wrongly applied, it will be for the Commission to draw the appropriate conclusions from that annulment.
- 106 Secondly, with regard to the examination of the substance of the third plea in law, it must be noted that, in accordance with settled case-law, although it is for the Commission to prove that rules of EU law have been infringed, once it has established such an infringement it is for the Member State to demonstrate, if appropriate, that the Commission made an error as to the financial consequences to be attached to that infringement (judgments of 7 October 2004, *Spain v Commission*, C-153/01, EU:C:2004:589, paragraph 67, and of 7 July 2005, *Greece v Commission*, C-5/03, EU:C:2005:426, paragraph 38).

107 Article 52(2) of Regulation No 1306/2013, which is devoted to conformity clearance, reads as follows:

‘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 of the infringement and of the financial damage caused to the Union. It shall base the exclusion on the identification of amounts unduly spent and, where these cannot be identified with proportionate effort, may apply extrapolated or flat-rate corrections. Flat-rate corrections shall only be applied where, due to the nature of the case or because the Member State has not provided the Commission with the necessary information, it is not possible with proportionate effort to identify more precisely the financial damage caused to the Union.’

108 Accordingly, in the light of the provisions of Article 52(2) of Regulation No 1306/2013, the Commission is to base the exclusion from EU financing on the identification of amounts unduly spent and, where these cannot be identified with proportionate effort, it may apply extrapolated or flat-rate corrections. It follows therefrom that the calculation of the correction based on an individual assessment of the financial impact of the various deficiencies, on the basis of information provided by the Member State concerned, is, in principle, admissible where such an individual assessment does not require disproportionate efforts (judgment of 16 February 2017, *Romania v Commission*, T-145/15, EU:T:2017:86, paragraph 61).

109 Annex 2 to Document No VI/5330/97 defines ancillary controls as ‘those administrative operations required to correctly process claims, such as verification of the respect of time-limits for their submission, identification of duplicate claims for the same object, risk analysis, application of sanctions and appropriate supervision of the procedures’.

110 Document No VI/5330/97 also sets out the financial consequences of the shortcomings in the checks carried out by the Member States. When the information resulting from the enquiry does not allow the losses sustained by the European Union as a result of a control deficiency to be evaluated by an extrapolation of determined losses, by statistical means or by reference to other verifiable data, a financial correction calculated on a flat-rate basis, depending on the amplitude of the risk of loss to the Fund, may be envisaged (judgment of 3 March 2016, *Spain v Commission*, T-675/14, not published, EU:T:2016:123, paragraph 41).

111 As for Document AGRI-2005-64043, it adapts the guidelines contained in Document No VI/5330/97 to the issue of cross-compliance. It provides for three methods which may be used to determine the appropriate financial corrections: first, disallowance of the individual applications in respect of which the required controls have not been undertaken; secondly, evaluation of the risk to the Fund by extrapolating the results of the checks carried out on a representative sample; and, thirdly, the application of flat-rate corrections (judgment of 19 October 2017, *Spain v Commission*, T-502/15, not published, EU:T:2017:730, paragraph 59). It is apparent from the wording of Document AGRI-2005-64043 that there is an order of priority between those three options, and that the flat-rate evaluation of the risk must be regarded as being the method of last resort (see, to that effect, judgment of 3 March 2016, *Spain v Commission*, T-675/14, not published, EU:T:2016:123, paragraph 42). Furthermore, that hierarchy of the methods of determining the amounts to be excluded from European Union financing is expressly mentioned in Article 12(2), (3) and (6) of Commission Delegated Regulation (EU) No 907/2014 of 11 March 2014 supplementing Regulation No 1306/2013 with regard to paying agencies and other bodies, financial management, clearance of accounts, securities and use of the euro (OJ 2014 L 255, p. 18), which entered into force in September 2014.

112 It follows from the foregoing considerations that, in accordance with its own guidelines, the Commission could use the flat-rate method in the present case only if the use of the other methods, in particular calculation by means of extrapolation, had to be rejected. As the Kingdom of Sweden

rightly submits, the flat-rate calculation method is residual in nature in the light of the provisions of Article 52(2) of Regulation No 1306/2013, even though, in practice, the Commission makes frequent use of it.

- 113 It is clear from the findings made when examining the second plea in law that the shortcomings in the Kingdom of Sweden's implementation of the measures to assess and update the risk factors persisted from 2011 to 2013, and that, having regard to the guidelines contained in Document No VI/5330/97, since this is a case of a persistent lack of administrative operations required to process claims correctly, namely operations which involve risk analysis, the Commission, exercising its discretion, could regard their absence as a failure to implement an ancillary control. The issue here is the failure of an ancillary control required under Article 31(2) of Regulation No 1122/2009, and not the mere finding that the way in which a control procedure operates is perfectible, which is not such as to give rise to a financial correction. In those circumstances, the complaint made by the Kingdom of Sweden to the effect that, in the present case, there was no significant infringement of a rule of EU law capable of giving rise to financial corrections does not appear to be well-founded.
- 114 However, the Commission likewise took the view that the finding of a failure to implement an ancillary control, since it was a complete failure to perform any control, was sufficient in itself to exclude, as a matter of principle, the application of a correction based on the assessment by extrapolation of the financial damage suffered by the European Union and to reject the information provided by the Kingdom of Sweden with a view to quantifying that damage.
- 115 Although, in certain cases, it has been held that methods of extrapolation based on irregularities found over the course of a previous year cannot provide a firm basis for calculation, in particular where there is no repetition of irregularities in subsequent years or in the case of significant variations in the results of the checks from one year to the next (see, to that effect, judgments of 24 January 2002, *France v Commission*, C-118/99, EU:C:2002:39, paragraphs 44 and 45, and of 3 March 2016, *Spain v Commission*, T-675/14, not published, EU:T:2016:123, paragraphs 46 to 48), the fact remains that, in the present case, the failure to take account of the information submitted in the course of the clearance procedure by the Kingdom of Sweden concerning the calculation by extrapolation of the amounts unduly paid was based not on their possible unreliability, but on the fact that they were regarded as irrelevant by the Commission within the context of a clearance procedure triggered by the finding of a total failure of any ancillary control.
- 116 In this regard, it must be observed that the Swedish authorities did indeed provide the Commission with information allowing for the calculation by extrapolation of the amounts unduly paid. The letter sent on 25 September 2014 by the Swedish Agricultural Office to the Commission in response to the conclusions of the minutes of the bilateral meeting of 20 May 2014 contains an assessment of the damage suffered by the Fund. At that stage, the Swedish authorities, who were unaware that the correction would relate to the 2013 claim year only, provided an assessment covering the 2011 to 2013 claim years, using the preliminary figures of the errors detected in 2013.
- 117 The method of extrapolation used by the Swedish authorities consists, in essence, in increasing the rate of correction resulting from the remote sensing checks with a view to revising the amount of the correction already made in relation to the year in question.
- 118 By refusing to take into consideration the information provided by the Swedish authorities concerning the calculation by extrapolation of the amounts unduly paid, without assessing either their level of reliability or whether they could have been used with proportionate effort, on the ground that they were irrelevant in any event, the Commission disregarded the subsidiary nature of the use of the flat-rate method, which is clear from the provisions of Article 52(2) of Regulation No 1306/2013.

- 119 In those circumstances, without there being any need to examine the other arguments put forward by the Kingdom of Sweden, in particular regarding the non-observance of the principle of proportionality, the third plea in law must be declared well-founded and the first head of claim upheld. The contested decision must therefore be annulled in so far as the Commission wrongly used the flat-rate method in relation to the Kingdom of Sweden to exclude from European Union financing the sum of EUR 8 811 286.44 for the 2013 claim year, that is to say 2% of the total amount of the decoupled direct aid paid to Sweden for that claim year.
- 120 It must be recalled that it is for the Commission to draw the appropriate conclusions from this judgment when calculating the amount of the financial correction which it will, if appropriate, be prompted to determine in relation to the non-conformity recorded by it.

### **Costs**

- 121 Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.
- 122 Furthermore, under Article 138(1) of the Rules of Procedure, Member States which have intervened in the proceedings are to bear their own costs.
- 123 Since the Commission has been unsuccessful and the Kingdom of Sweden has applied for costs, the Commission must be ordered to bear its own costs and to pay those incurred by the Kingdom of Sweden.
- 124 As a Member State intervening in the proceedings, the Czech Republic is to bear its own costs.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby:

- 1. Annuls Commission Implementing Decision (EU) 2016/417 of 17 March 2016 excluding from European Union financing certain expenditure incurred by the Member States under the European Agricultural Guarantee Fund (EAGF) and under the European Agricultural Fund for Rural Development (EAFRD) in so far as it concerns the decoupled direct aid paid to the Kingdom of Sweden totalling EUR 8 811 286.44 for the 2013 claim year;**
- 2. Orders the European Commission to bear its own costs and to pay the costs incurred by the Kingdom of Sweden.**
- 3. Orders the Czech Republic to bear its own costs.**

Prek

Schalin

Costeira

Delivered in open court in Luxembourg on 25 September 2018.

[Signatures]