Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fifth Chamber)

30 January 2020*

(EAGF and EAFRD – Expenditure excluded from financing – Expenditure incurred by Portugal – Articles 32 and 33 of Regulation (EC) No 1290/2005 – Article 54 of Regulation (EU) No 1306/2013 – Concept of 'national court')

In Case T-292/18,

Portuguese Republic, represented by L. Inez Fernandes, P. Estêvão, J. Saraiva de Almeida and P. Barros da Costa, acting as Agents,

applicant,

v

European Commission, represented by B. Rechena and A. Sauka, acting as Agents,

defendant,

APPLICATION under Article 263 TFEU for annulment of Commission Implementing Decision (EU) 2018/304 of 27 February 2018 excluding from European Union financing certain expenditure incurred by the Member States under the European Agricultural Guarantee Fund (EAGF) and under the European Agricultural Fund for Rural Development (EAFRD) (OJ 2018 L 59, p. 3), in so far as it excludes from European Union financing the sum of EUR 1 052 101.05 relating to expenditure declared by the Portuguese Republic,

THE COURT (Fifth Chamber),

composed of D. Spielmann, President, I. S. Forrester (Rapporteur) and U. Öberg, Judges,

Registrar: L. Ramette, Administrator,

having regard to the written part of the procedure and further to the hearing on 10 December 2019,

gives the following

* Language of the case: Portuguese.

Judgment

Legal context

EU Law

1 Article 9(1)(a) of Council Regulation (EC) No 1290/2005 of 21 June 2005 on the financing of the common agricultural policy (OJ 2005 L 209, p. 1) provides as follows:

'Member States shall:

(a) within the framework of the common agricultural policy, adopt all legislative, regulatory and administrative provisions and take any other measures necessary to ensure effective protection of the financial interests of the Community, and particularly in order to:
  (i) check the genuineness and compliance of operations financed by the EAGF and the EAFRD;
  (ii) prevent and pursue irregularities;
  (iii) recover sums lost as a result of irregularities or negligence.'

2 Article 32(5) of that regulation, concerning 'Provisions specific to the EAGF', reads:

'5. If recovery has not taken place within four years of the primary administrative or judicial finding, or within eight years where recovery action is taken in the national courts, 50% of the financial consequences of non-recovery shall be borne by the Member State concerned and 50% by the Community budget.

Member States shall indicate separately in the summary report referred to in the first subparagraph of paragraph 3 the amounts not recovered within the time limits specified in the first subparagraph of this paragraph.

The distribution of the financial burden of non-recovery in line with the first subparagraph shall be without prejudice to the requirement that the Member State concerned must pursue recovery procedures in compliance with Article 9(1) of this Regulation. Fifty percent of the amounts recovered in this way shall be credited to the EAGF, after application of the deduction provided for in paragraph 2 of this Article.

Where, in the context of the recovery procedure, the absence of any irregularity is recorded by an administrative or legal instrument of a definitive nature, the Member State concerned shall declare as expenditure to the EAGF the financial burden borne by it under the first subparagraph.

However, if for reasons not attributable to the Member State concerned, recovery could not take place within the time limits specified in the first subparagraph, and the amount to be recovered exceeds EUR 1 million, the Commission may, at the request of the Member State, extend the time limits by a maximum of 50% of the initial time limits.'

3 According to paragraph 8 of Article 33 of that regulation, entitled 'Provisions specific to the EAFRD':

'8. If recovery has not taken place prior to the closure of a rural development programme, 50% of the financial consequences of non-recovery shall be borne by the Member State concerned and 50% by the Community budget and shall be taken into account either at the end of the period of four years following the first administrative or judicial finding or eight years where recovery action is taken in the national courts, or on the closure of the programme if those deadlines expire prior to such closure.

However, if for reasons not attributable to the Member State concerned, recovery could not take place within the time limits specified in the first subparagraph, and the amount to be recovered exceeds EUR 1 million, the Commission may, at the request of the Member State, extend the time limits by a maximum of 50% of the initial time limits.'

4 Regulation No 1290/2005 was repealed and replaced by Regulation (EU) No 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EEC) No 352/78, (EC) No 165/94, (EC) No 2799/98, (EC) No 814/2000, (EC) No 1290/2005 and (EC) No 485/2008 (OJ 2013 L 347, p. 549, and corrigendum OJ 2016 L 130, p. 13), applicable with effect from 1 January 2014.

5 Article 9(1)(a) of Regulation No 1290/2005 was replaced and reproduced, in essence, in Article 58(1) of Regulation No 1306/2013, which adds to the requirements of that provision, in particular by requiring Member States to take the necessary measures to initiate the necessary court proceedings, where appropriate, to recover undue payments. The provisions of Article 32(5) and Article 33(8) of Regulation No 1290/2005 were reproduced, in essence, in the first subparagraph of Article 54(2) of Regulation No 1306/2013.

Portuguese law

6 Article 103 of the Lei Geral Tributária (General Tax Law) provides as follows:

'Enforcement procedure

1. The tax enforcement procedure is a judicial procedure, without prejudice to participation by bodies of the tax administration in acts that are not judicial.

2. The parties concerned shall have the right to challenge before the courts tax enforcement of any substantively administrative acts carried out by bodies of the tax administration in accordance with the preceding paragraph.'

7 Article 179 of the Código de Procedimento Administrativo (Code of Administrative Procedure) provides as follows:

'Enforcement of pecuniary obligations

1. Where, pursuant to an administrative act, cash benefits are to be paid to a public legal person, or by order of such a person, it is necessary, where no voluntary payment has been made within the time limit set, to rely on the tax enforcement procedure, in accordance with the provisions of the law on tax procedure.

2. For the purposes of the preceding paragraph, the competent body shall, in accordance with the statutory provisions, issue a certificate constituting an enforcement order, which it shall transmit to the competent department of the tax administration together with the administrative case file.

3. In cases where, in accordance with the law, the administration enforces, directly or through a third party, the payment of benefits that are de facto fungible, it shall always be possible to rely on the procedure laid down in the present article in order to obtain reimbursement of the costs incurred.'

8 Article 148 of the Código de Procedimento e de Processo Tributário (Code of Tax Procedure) provides as follows:

'Scope of tax enforcement

1. The tax enforcement procedure includes the enforced recovery of the following debts:

(a) charges, including customs duties, including excise duties and non-fiscal duties, fees, other additional financial contributions cumulatively collected for the benefit of the State, interest and other statutory charges;

(b) fines and other monetary penalties imposed by decisions or judgments because of the commission of tax offences, except where they are imposed by ordinary courts;

(c) fines and other monetary penalties relating to civil liability established under the general rules relating to tax offences.

2. The following may also be recovered under the tax enforcement procedure, in the cases and under the terms expressly laid down by law:

(a) other debts owed to the State and to other legal persons governed by public law that must be paid by virtue of an administrative act;

(b) refunds or recovery of payments.'

9 Article 149 of the Code of Tax Procedure provides as follows:

'Tax enforcement body

For the purposes of the present code, the body responsible for tax enforcement shall be the department of the tax administration which is required by law to carry out enforcement or, where enforcement must be carried out in the ordinary courts, the court having jurisdiction.'

Background to the dispute

10 By letter of 28 July 2015, the European Commission communicated its findings to the Portuguese Republic in accordance with Article 34(2) of Commission Implementing Regulation (EU) No 908/2014 of 6 August 2014 laying down rules for the application of Regulation No 1306/2013 with regard to paying agencies and other bodies, financial management, clearance of accounts, rules on checks, securities and transparency (OJ 2014 L 255, p. 59).

11 In particular, the Commission questioned the way in which the Portuguese authorities had categorised certain expenditure that had been incurred under the European Agricultural Guarantee Fund (EAGF) or the European Agricultural Fund for Rural Development (EAFRD) and was to be recovered. Article 32(5) of Regulation No 1290/2005 provides that if recovery has not taken place within four years of the primary administrative or judicial finding, or within eight years where recovery action is taken in the national courts, 50% of the consequences of non-recovery shall be borne by the Member State concerned and 50% by the Union's budget ('the 50/50 rule'). The Commission considered that the debts owed to the Portuguese paying agency, the Instituto de Financiamento da Agricultura e Pescas, I. P. (IFAP, Institute for the Financing of Agriculture and Fisheries, Portugal), recovery of which was the subject of an enforcement procedure by the Portuguese tax authorities, had been incorrectly categorised as cases in respect of which recovery action had been taken in the national courts, within the meaning of the abovementioned provision. In the Commission's view, the 50/50 rule should therefore already be applied to those debts in the event of non-recovery after four years and not merely after eight years, as the Portuguese authorities maintained. Consequently, the Commission informed the Portuguese authorities that it could propose excluding from Union financing some of the expenditure declared by the Portuguese Republic.

12 The Portuguese authorities responded to the Commission's findings by letter of 30 November 2015. They stated in particular that the form of enforcement to be applied for the recovery of the debts in question was tax enforcement and maintained that that procedure was to be considered to be a judicial procedure. In their opinion, the 50/50 rule was therefore only to be applied in the event of non-recovery after eight years.

13 By letter of 22 December 2015, the Commission invited the Portuguese authorities to a bilateral meeting, in accordance with Article 34(2) of Implementing Regulation No 908/2014.

14 By letter of 9 September 2016, the Commission communicated its findings to the Portuguese Republic, in accordance with the third subparagraph of Article 34(3) of Implementing Regulation No 908/2014. The Commission considered that if recovery action had not been taken in the national courts the 50/50 rule should be applied after four years and not eight years. It therefore proposed a correction amounting to EUR 1 272 594.35.

15 By letter of 21 October 2016, the Portuguese Republic requested that a procedure be initiated before the Conciliation Body, in accordance with Article 40 of Implementing Regulation No 908/2014.

16 On 21 March 2017, the Conciliation Body found that it was not possible to reconcile the views of the two parties. In its final report, the Conciliation Body stated that 'the procedure used in Portugal, which [was] considered to be an administrative procedure by the [Commission] services, but [was] considered to be a procedure similar to a judicial procedure by the [Portuguese] authorities, allow[ed] to a certain extent the involvement of (administrative) courts' and found that 'cases brought before those courts [were] likely to benefit from the eight-year period provided for by the European legislation'.

17 By letter of 20 October 2017, the Commission maintained in its final position that the tax enforcement procedure was an administrative procedure that did not meet the conditions laid down in Article 32(5) of Regulation No 1290/2005. Moreover, it stated that only 19 of the 604 cases in which the proposed financial correction had been imposed had been brought before a court. It reduced the amount of the financial correction to EUR 1 052 101.05 in order to take into account amounts recovered or already made subject to the 50/50 rule during preceding financial years.

18 By Implementing Decision (EU) 2018/304 of 27 February 2018 excluding from European Union financing certain expenditure incurred by the Member States under the European Agricultural Guarantee Fund (EAGF) and under the European Agricultural Fund for Rural Development (EAFRD) (OJ 2018 L 59, p. 3, 'the contested decision'), the Commission, inter alia, excluded from Union financing expenditure declared by the Portuguese Republic in the sum of EUR 1 052 101.05 on the ground that it comprised 'debts wrongly reported in the Annex III tables, having escaped the application of the 50/50 rule'.

Procedure and forms of order sought

19 By application lodged at the Court Registry on 7 May 2018, the Portuguese Republic brought the present action.

20 On 11 July 2018 the Commission lodged its defence.

21 On 28 September 2018 the Portuguese Republic lodged its reply.

22 On 19 November 2018 the Commission lodged its rejoinder.

23 On 8 July 2019 the Court put written questions to the parties by way of measures of organisation of procedure, as provided for in Article 89 of its Rules of Procedure. The parties complied with that request within the time allowed.

24 On a proposal from the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral part of the procedure. The parties presented oral argument and answered the questions put by the Court at the hearing on 10 December 2019.

25 The Portuguese Republic claims that the Court should:

– annul the contested decision, in so far as it excludes from European Union financing the amount of EUR 1 052 101.05 relating to expenditure declared by the Portuguese Republic, on the ground that it is comprised of ‘debts wrongly reported in the Annex III tables, having escaped the application of the 50/50 rule’;

– order the Commission to pay the costs.

26 The Commission contends that the Court should:

– dismiss the application;

– order the Portuguese Republic to pay the costs.

Law

27 In support of its action, the Portuguese Republic raises a single plea, alleging infringement of Articles 32 and 33 of Regulation No 1290/2005 and Article 54 of Regulation No 1306/2013, in that the Commission wrongly held that the debts owed to IFAP, the recovery of which was the subject of an enforcement procedure by the tax authorities, did not constitute cases in which an action for recovery had been brought before the national courts, within the meaning of those articles.

28 First, it states that Portuguese law requires that enforced recovery of amounts owing in the context of administrative relationships should be carried out by means of the tax enforcement procedure. To that end, the public creditor issues a debt certificate, which it submits to the competent department of the tax administration in order to initiate tax enforcement, in the context of which the enforcement order is the debt certificate in question, and the distraining public creditor may intervene as a party. According to the Portuguese Republic, Portuguese legislation and the case-law of the Portuguese higher courts unanimously recognise that the tax enforcement procedure is a judicial procedure and is presided over by a judge. Thus, Article 103(1) of the General Tax Law expressly provides that ‘the tax enforcement procedure is a judicial procedure’. The Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal) also held, in its judgment of 8 August 2012, delivered in Case 0803/12, that ‘the tax enforcement “procedure” [was] an entirely judicial procedure’. Similarly, the Tribunal Constitucional (Constitutional Court, Portugal) held in its judgment 80/2003, delivered in Case 151/02, that ‘[its] basic law [did not require] that all the acts involved in the tax enforcement procedure should necessarily be carried out by the court, although tax case-law and, currently and clearly, the General Tax Law (Article 103(1) … attributed a “judicial nature” to the tax enforcement procedure’. In the same judgment, the Tribunal Constitucional (Constitutional Court) held that ‘the act initiating tax enforcement … [was] simply the submission, during the distribution of finances, of the corresponding enforcement order … and its nature [was] no different from that of the act giving rise to the action for enforcement under the civil proceedings instituted by the creditor’. In addition, the administrative tax court had all the characteristics of a judicial body for the purposes of Article 267 TFEU: it was established by law, was permanent, its jurisdiction was compulsory, its procedure was inter partes, it applied rules of law and it was independent. In support of its argument,

the Portuguese Republic also relies on the judgments of 12 June 2014, *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta* (C-377/13, EU:C:2014:1754), and of 17 September 2014, *Cruz & Companhia* (C-341/13, EU:C:2014:2230).

29 Secondly, the Portuguese Republic contends that the term 'tribunais nacionais' used in the Portuguese version of the first subparagraph of Article 54(2) of Regulation No 1306/2013 is equivalent to the term 'jurisdições nacionais' used in the Portuguese version of Articles 32 and 33 of Regulation No 1290/2005 and must be construed as referring to 'national courts'.

30 Thirdly, the Portuguese Republic contends that the scheme and rationale of the provisions concerned focus on the sums that have been lost due to irregularities and have not been recovered within a reasonable period of time. It is for Member States to best organise themselves internally, taking into account the means available to them and in the way they deem most appropriate, in order to pursue and attain the objective of complying with their obligations under EU law.

31 Fourthly, in its reply, the Portuguese Republic adds that, if it were upheld, the contested decision would constitute an infringement of the principles of fairness, proportionality and justice because of the binding nature of the tax enforcement procedure in Portuguese law.

32 The Commission challenges the Portuguese Republic's arguments.

33 In the first place, it should be noted, as correctly pointed out by the Portuguese Republic, that the Portuguese terms 'tribunais nacionais' and 'jurisdições nacionais' must be construed as referring to the concept of 'national courts', all the more so since the words used in the first subparagraph of Article 32(5) and the first subparagraph of Article 33(8) of Regulation No 1290/2005 and in the first subparagraph of Article 54(2) of Regulation No 1306/2013 contain no differences in the versions of those provisions in other languages of the Union, such as, in particular, German, English, French and Italian.

34 In the second place, it should be pointed out that the concept of 'national court' cannot be left exclusively to the discretion of each Member State. It follows from the requirement of uniform application of EU law that, since Regulations No 1290/2005 and No 1306/2013 do not refer to the laws of the Member States as regards the concept of 'national court', that concept, which is decisive for determining the scope of the 50/50 rule, calls for an autonomous and uniform interpretation throughout the Union, having regard to the context of the provisions of which it forms part and the objective pursued by those regulations (see, by analogy, judgments of 7 June 2005, *VEMW and Others*, C-17/03, EU:C:2005:362, paragraph 41 and the case-law cited, and of 14 November 2013, *Baláž*, C-60/12, EU:C:2013:733, paragraphs 25 and 26).

35 As is clear in particular from recital 26 of Regulation No 1290/2005 and recital 37 of Regulation No 1306/2013, the purpose of the 50/50 rule is to introduce a system for dividing the financial burden fairly between the Union and the Member States in respect of the financial consequences resulting from non-recovery, within a reasonable time limit, of sums paid under the EAGF and the EAFRD, as a result of irregularities or negligence. That time limit is four years from the date of the primary administrative or judicial finding, which became the date of the recovery request under Regulation No1306/2013, or eight years where recovery action is taken in the national courts.

36 In that context, in order to interpret the concept of 'national court' referred to in Article 32(5) and Article 33(8) of Regulation No 1290/2005 and Article 54(2) of Regulation No 1306/2013, it is appropriate to rely on the criteria identified by the Court of Justice for determining whether a referring body is a 'court or tribunal' for the purposes of Article 267 TFEU (see, by analogy, judgment of 14 November 2013, *Baláž*, C-60/12, EU:C:2013:733, paragraph 32).

37 In that regard, according to settled case-law, it is necessary to take into account a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent (see, by analogy, judgment of 16 February 2017, *Margarit Panicello*, C-503/15, EU:C:2017:126, paragraph 27 and the case-law cited). Moreover, even if a body is regarded under the law of a given Member State as an administrative body, that fact is not, in itself, conclusive for the purpose of determining whether the body concerned is a 'court or tribunal' (see, to that effect and by analogy, judgment of 20 September 2018, *Montte*, C-546/16, EU:C:2018:752, paragraph 25, and Opinion of Advocate-General Szpunar in *Montte*, C-546/16, EU:C:2018:493, point 22).

38 In the present case, on the basis of the evidence available to the Court, it should be stated that, where no voluntary payment has been made within a time limit set and where recovery cannot take place through offsetting debts, IFAP, the Portuguese paying agency responsible for recovering sums wrongly paid under the EAGF and the EAFRD, issues a certificate constituting an enforcement order, which it transmits to the competent department of the tax administration in order to carry out a tax enforcement procedure (Article 103 of the General Tax Law, Article 179 of the Code of Administrative Procedure and Articles 148 and 149 of the Code of Tax Procedure).

39 That tax enforcement procedure is intended to ensure prompt recovery, inter alia, of debts owed to the State and to other legal persons governed by public law, such as IFAP (Article 148(2)(a) of the Code of Tax Procedure).

40 In that regard, it is clear from Portuguese tax law and from the case-law of the Supremo Tribunal Administrativo (Supreme Administrative Court) and the Tribunal Constitucional (Constitutional Court), that the competent department of the tax administration is responsible for carrying out only acts that are substantively administrative (Article 103(2) of the Portuguese General Tax Law), which lead ultimately to the seizure and sale of the debtor's assets (Articles 214 to 236 and 248 to 258 of the Code of Tax Procedure).

41 If, as the Portuguese Republic contends, the Portuguese higher courts hold that the tax enforcement procedure is a judicial procedure, they do so with the aim, first, of upholding the constitutionality of that procedure and the possibility for the tax administration to carry out non-judicial acts in the context of a tax enforcement procedure (judgment 80/2003 of the Tribunal Constitucional (Constitutional Court)) and, secondly, of emphasising that the rules of civil procedure apply to the tax enforcement procedure (judgment 0803/12 of the Supremo Tribunal Administrativo (Supreme Administrative Court)). The Portuguese higher courts nonetheless stress the fact that the tax administration is responsible for carrying out only non-judicial acts and that the act initiating the tax enforcement procedure is no more than the submission of an enforcement order to a tax office.

42 The 'judicial nature' of the tax enforcement procedure under Portuguese law derives from the potential review that the administrative tax courts may at any time be required to carry out in the event of a conflict of interests arising from an action by one of the parties or by a person not involved in the procedure, or from a decision taken by the tax administration (judgment 80/2003 of the Tribunal Constitucional (Constitutional Court)). It is not disputed therefore that intervention by the administrative tax courts corresponds to an action before the 'national courts' within the meaning of Article 32(5) and Article 33(8) of Regulation No 1290/2005 and Article 54(2) of Regulation No 1306/2013.

43 Furthermore, although the debtor does have the opportunity to object to enforced payment being carried out (Articles 203 to 213 of the Code of Tax Procedure) and lodge a complaint against the acts of the competent department of the tax administration (Articles 276 to 278 of the Code of Tax Procedure), the fact remains that examination, by that department, of the request for enforced recovery on the basis of an enforcement order is not an inter partes procedure.

44 In the event of a dispute, whether it arises from an action by one of the parties or by a person not involved in the procedure, or from a decision taken by the tax administration, the relevant department of the tax administration is required to send the case file to the competent judge of the administrative tax court for the purpose of carrying out a judicial review (Articles 203, 208, 237 and 276 to 278 of the Code of Tax Procedure).

45 Consequently, the relevant department of the tax administration carries out purely administrative functions and it is not its task to settle disputes or review the lawfulness of debt certificates issued by IFAP. It is only in the event of a challenge, of whatever nature, by one of the parties to the procedure or by a person not involved in it, that the administrative tax courts, to which the matter has thus been referred, will carry out a judicial function to review the lawfulness of an act establishing a debt owing to a debtor, and that the latter may assert his rights.

46 Furthermore, it should be noted also that the relevant department of the tax administration does not meet the independence criterion laid down in paragraph 37 above.

47 In that regard, it should be noted that the independence requirement comprises two aspects. The first aspect, which is external in nature, presupposes that the body concerned exercises its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions (see judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 44 and the case-law cited).

48 The second aspect, which is internal in nature, is linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law (see judgment of 16 February 2017, *Margarit Panicello*, C-503/15, EU:C:2017:126, paragraph 38 and the case-law cited).

49 Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it (judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 66).

50 In the present case, as it is stated in paragraphs 44 and 45 above, in the absence of any challenge, the administrative tax courts do not intervene in the tax enforcement procedure.

51 As regards the competent department of the tax administration, it follows from the provisions of national law, and in particular from Articles 55 and 58 of the General Tax Law, that the tax administration must be impartial and cannot be subordinate to the initiative of the author of the request.

52 Where it conducts an examination of the tax enforcement procedures, the tax administration therefore meets the internal aspect of the independence requirement, in that it carries out its tasks with complete objectivity and impartiality as regards the parties to the dispute and their respective interests in it.

53 However, the tax administration does not meet the external aspect of that requirement, which calls for there to be no hierarchical constraint or subordination to any body that could give it orders or instructions. Article 182 of the Constitution of the Portuguese Republic provides that the Government is the principal body in the Public Administration. Furthermore, under Article 199(d) of the

Constitution of the Portuguese Republic, it is for the Government, in the exercise of its administrative functions, to direct the State's departments and the activities of the civil and military authorities coming directly under the State, to supervise the indirect authorities and to exercise oversight over the latter and over the independent departments.

54 In addition, it should be noted that officials belonging to the competent department of the tax administration are officials of the tax administration and the Chief Financial Officer oversees that department, which is part of the Ministry of Finance. There is therefore a hierarchical constraint of subordination between the tax administration and the Government.

55 It follows from those considerations that, in the absence of any intervention by the administrative tax courts, it cannot be held that the competent department of the tax administration performs a judicial function. Therefore, an action before the competent department of the tax administration is not the same as an action before a 'national court' within the meaning of Article 32(5) and Article 33(8) of Regulation No 1290/2005, and Article 54(2) of Regulation No 1306/2013. It would be otherwise only in the event of intervention by the administrative tax courts.

56 Therefore, even if the tax enforcement procedure is presided over by a judge and the debtor is able at any time to challenge in the administrative tax courts decisions taken by the competent department of the tax administration, the fact remains that, in the absence of any challenge, that procedure will be handled entirely by a department of the administration which does not fully meet the criteria to be classified as a 'national court'.

57 That finding is not called in question by the case-law relied on by the Portuguese Republic in the present case.

58 It is clear from the judgments of 2 June 2014, *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta* (C-377/13, EU:C:2014:1754, paragraph 34), and of 17 September 2014, *Cruz & Companhia* (C-341/13, EU:C:2014:2230), that administrative tax courts, such as the Tribunal Arbitral Tributário (Tax Arbitration Tribunal, Portugal) and the Supremo Tribunal Administrativo (Supreme Administrative Court), were regarded as being a 'court or tribunal of a Member State' for the purposes of Article 267 TFEU. However, those cases did not concern the classification of the tax administration's departments.

59 In the third place, it should be noted that the system of shared financial responsibility established by Article 32(5) and Article 33(8) of Regulation No 1290/2005, which became in essence Article 54(2) of Regulation No 1306/2013, is intended to protect the financial interests of the Union's budget through partial charging to the Member State concerned of sums lost as a result of irregularities or negligence and not recovered within reasonable deadlines. In those particular situations, 50% of the financial consequences of non-recovery are to be borne by the Member State concerned and 50% by the Union's budget.

60 As regards the obligations of Member States in that context, Article 9(1)(a) of Regulation No 1290/2005, reproduced in essence in Article 58(1) of Regulation No 1306/2013, requires Member States to take all measures necessary to ensure effective protection of the financial interests of the Union and recover undue payments.

61 Those articles are the expression, as regards the financing of the common agricultural policy, of the general obligation of diligence laid down in Article 4(3) TEU (see, to that effect, judgments of 21 February 1991, *Germany* v *Commission*, C-28/89, EU:C:1991:67, paragraph 31; of 21 January 1999, *Germany* v *Commission*, C-54/95, EU:C:1999:11, paragraphs 66 and 177; and of 13 November 2001, *France* v *Commission*, C-277/98, EU:C:2001:603, paragraph 40).

62 However, those provisions do not lay down the specific measures which must be adopted for that purpose, in particular the procedures which must be initiated to recover such payments.

63 Since the financing of the EAGF and the EAFRD is managed primarily by the national administrative authorities responsible for ensuring that the EU rules are strictly observed, and which have the necessary geographical proximity for that purpose, the Member States are best placed to recover the sums unduly paid or lost as a result of irregularities or negligence and to determine the most appropriate steps to be taken in that respect (judgment of 30 January 2019, *Belgium* v *Commission*, C-587/17 P, EU:C:2019:75, paragraph 69).

64 This means in particular that it falls to the national authorities, subject to compliance with the obligation of diligence referred to in paragraph 61 above, to choose the remedies which they deem most appropriate in order to recover the sums in question, having regard to the particular circumstances of the case (see, to that effect, judgment of 21 July 2005, *Greece* v *Commission*, C-370/03, not published, EU:C:2005:489, paragraph 44).

65 That obligation of diligence, which applies throughout the recovery procedure, also means that Member States must recover the sums due and take steps to rectify irregularities in a prompt and timely manner. With the passage of time, recovery of the sums unduly paid is likely to become complicated or impossible for reasons such as the fact that undertakings may have ceased trading or accounting documents may have been lost (see, to that effect, judgment of 24 January 2018, *Commission* v *Italy*, C-433/15, EU:C:2018:31, paragraph 42).

66 Moreover, national authorities cannot justify a failure to fulfil that obligation by relying on the length of administrative or judicial proceedings commenced by an economic agent (judgment of 21 February 1991, *Germany* v *Commission*, C-28/89, EU:C:1991:67, paragraph 32).

67 It should be added that compliance with the relevant procedures and deadlines with regard to recovery under national law constitutes a minimum obligation, which is necessary but is not sufficient to show a Member State's diligence for the purposes of Article 9(1) of Regulation No 1290/2005, now in essence Article 58(1) of Regulation No 1306/2013 (judgment of 12 September 2012, *Italy* v *Commission*, T-394/06, not published, EU:T:2012:417, paragraphs 90 and 91).

68 In the present case, the Portuguese Republic contends that the procedure laid down in Portuguese law for recovering sums unduly paid under the EAGF and the EAFRD is binding and effective, so the eight-year time limit is justified. It should be noted, however, that the scheme of the system laid down in Article 32(5) and Article 33(8) of Regulation No 1290/2005, now in essence Article 54(2) of Regulation No 1306/2013, is based on a different question, that of establishing whether an action for recovery has been brought before the 'national courts' within the meaning of EU legislation. The existence of proceedings in the national courts is the decisive criterion, which can be verified objectively.

69 In that regard, it is clear from paragraphs 55 and 56 above that the tax enforcement procedure before the competent department of the tax administration cannot be classified as a recovery action in the 'national courts' within the meaning of Articles 32 and 33 of Regulation No 1290/2005 and Article 54 of Regulation No 1306/2013, at least in the absence of any intervention by the administrative tax courts.

70 That means that the Portuguese Republic must successfully conclude the tax enforcement procedure before the competent department of the tax administration within the strict time limit of four years laid down in Articles 32 and 33 of Regulation No 1290/2005 and Article 54 of Regulation No 1306/2013.

71 The time limit of eight years can be relied upon as a reasonable time limit applicable to the tax enforcement procedure only in cases where a dispute arises and the procedure is referred to a tax tribunal before the end of the four-year time limit.

72 To decide otherwise would be to allow an eight-year time limit for all tax enforcement procedures, including in cases in which the competent department of the tax administration brings the procedure to a close in the absence of any dispute or intervention by a court or tribunal, which would not be consistent with the legislature's objective of protecting the financial interests of the Union's budget and introducing systems for encouraging effective and timely recovery of sums unduly paid under the EAGF and the EAFRD.

73 In the fourth place, it should be noted that the reply contains express references to the claims alleging infringement of the principles of proportionality, fairness and justice. However, no specific, clear and consistent arguments providing evidence of how those principles were infringed are put forward to support those claims. Those claims must therefore be rejected as inadmissible under Article 76(d) of the Rules of Procedure.

74 Consequently, the Commission could validly exclude certain expenditure from Union financing on the ground that it had been the subject of a tax execution procedure before the competent department of the tax authorities for more than four years, which cannot be classified as a 'national court' within the meaning of Articles 32 and 33 of Regulation No 1290/2005 and Article 54 of Regulation No 1306/2013.

Costs

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

76 As the Portuguese Republic has been unsuccessful, it must be ordered to pay its own costs and those incurred by the Commission, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Fifth Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders the Portuguese Republic to pay its own costs and those incurred by the European Commission.**

Spielmann Forrester Öberg

Delivered in open court in Luxembourg on 30 January 2020.

[Signatures]