



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Tenth Chamber, Extended Composition)

14 April 2021 *

(Cohesion Fund and ERDF – Article 139(6) of Regulation (EU) No 1303/2013 –
Temporal application of an increased co-financing rate adopted after submission of the final
application for an interim payment but before acceptance of the accounts –
Legitimate expectation – Obligation to state reasons – Principle of good administration)

In Case T-543/19,

Romania, represented by E. Gane, A. Rotăreanu and M. Chicu, acting as Agents,

applicant,

v

European Commission, represented by A. Armenia, S. Pardo Quintillán and L. Mantl, acting as
Agents,

defendant,

APPLICATION under Article 263 TFEU for annulment in part of Commission Decision C(2019) 4027 final of 23 May 2019, with regard to the acceptance of the accounts and the calculation of the amount chargeable to the Cohesion Fund and the European Regional Development Fund (ERDF) for the accounting year 2017/2018 and for ‘Large Infrastructure’ Operational Programme CCI 2014RO16M1OP001, applying a co-financing rate for the first and second priorities of that operational programme of 75% and not 85%,

THE GENERAL COURT (Tenth Chamber, Extended Composition),

composed of M. van der Woude, President, A. Kornezov (Rapporteur), E. Buttigieg, K. Kowalik-Bańczyk and G. Hesse, Judges,

Registrar: P. Cullen, Administrator,

having regard to the written procedure and further to the hearing on 18 September 2020,

gives the following

* Language of the case: Romanian.

Judgment

Background to the dispute

- 1 By Implementing Decision C(2015) 4823 final of 9 July 2015 ('the 2015 Implementing Decision'), adopted on the basis of Article 29(4) and Article 96(10) of Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 (OJ 2013 L 347, p. 320), as amended, the European Commission approved certain elements of the Operational Programme 'Large Infrastructure' CCI 2014RO16M1OP001 for support from the European Regional Development Fund (ERDF) and the Cohesion Fund under the Investment for growth and jobs goal in Romania for the period 1 January 2014 to 31 December 2020 ('the operational programme').
- 2 The operational programme included eight priority axes, the first of which concerned improving mobility through the development of the trans-European transport (TEN-T) network and metro system, and was associated with the Cohesion fund, and the second of which concerned the development of a multimodal, high-quality, sustainable and efficient transport system, and was associated with the ERDF. Article 4(1) and (2) of the 2015 Implementing Decision, read with Annexes I and II to that decision, set the maximum amount of the support from the Cohesion Fund and the ERDF during the period covered by the operational programme. Article 4(3) of that decision, read with Annex II thereto, fixed the co-financing rate for the two abovementioned priority axes at 75% and stated that that rate would apply to eligible public expenditure.
- 3 On 6 July 2018, the Romanian authorities submitted to the Commission the final application for an interim payment in respect of the operational programme for the accounting year 2017/2018, in accordance with Article 135(2) of Regulation No 1303/2013.
- 4 On 9 October 2018, the Romanian authorities submitted an application for amendment of the operational programme, together with a revised operational programme.
- 5 By Implementing Decision C(2018) 8890 final of 12 December 2018 ('the 2018 Implementing Decision'), adopted on the basis of Article 96(10) of Regulation No 1303/2013, the Commission amended a number of elements of the 2015 Implementing Decision. In particular, it amended Annex II to the latter decision and increased the co-financing rate for the first and second priority axes of the operational programme to 85%.
- 6 At a meeting held on 15 January 2019 between the Romanian authorities and the Commission, the Romanian authorities requested that the co-financing rate of 85% for the first and second priority axes of the operational programme, as fixed in the 2018 Implementing Decision, be applied for the accounting year 2017/2018 instead of the co-financing rate of 75% fixed in the 2015 Implementing Decision. In answer to that request, the Commission stated that the guidance set out in the document entitled 'Guidance for Member States on Preparation, Examination and Acceptance of Accounts', in the version prepared by the Commission on 3 December 2018 ('the EGESIF Guidance'), precluded the application of the co-financing rate of 85% fixed in the 2018 Implementing Decision for that accounting year.

- 7 On 15 February 2019, the Romanian authorities submitted to the Commission the operational programme accounts for the accounting year 2017/2018, in accordance with Article 138(a) of Regulation No 1303/2013. On 1 March 2019, following a request from the Commission for further information, the Romanian authorities submitted a revised version of those accounts to the Commission.
- 8 By letters of 8 March and 13 May 2019, the Romanian authorities again requested the Commission to apply the co-financing rate of 85% for the first and second priority axes of the operational programme for the accounting year 2017/2018.
- 9 By letter of 17 May 2019, the Commission confirmed to the Romanian authorities that the co-financing rate of 85% for the first and second priority axes of the operational programme was not applicable for the accounting year 2017/2018. In particular, it explained that, in the context of the programme period 2014 to 2020 and in accordance with the guidance set out in the EGESIF Guidance, any amendment of a co-financing rate is to apply only to current and future accounting years, in application of the principle that accounts relate to a specific year.
- 10 By Decision C(2019) 4027 final of 23 May 2019, notified to Romania on 24 May 2019, the Commission accepted the operational programme accounts for the accounting year 2017/2018, in accordance with Article 139(2) and (3) of Regulation No 1303/2013, and, on the basis of the accepted accounts, calculated the amount chargeable to the Cohesion Fund and the ERDF for that year, in accordance with Article 139(6) of that regulation ('the contested decision'). It is apparent from the annex to that decision that, in calculating that amount, the Commission applied the co-financing rate of 75% for the first and second priority axes of the operational programme, as fixed in the 2015 Implementing Decision.

Procedure and forms of order sought

- 11 By application lodged at the General Court Registry on 30 July 2019, Romania brought the present action.
- 12 On 18 October 2019, the Commission lodged the defence at the Court Registry.
- 13 The reply was lodged at the Court Registry on 6 December 2019. The rejoinder was lodged at the Court Registry on 21 January 2020.
- 14 On 13 May 2020, the President of the General Court assigned the present case to a new Judge-Rapporteur, in application of Article 27(1) of the Rules of Procedure of the General Court.
- 15 By letter from the Court Registry of 10 June 2020, the Court sent, in the form of measures of organisation of procedure provided for in Article 89 of the Rules of Procedure, a number of written questions to the parties, which answered those questions within the prescribed period.
- 16 The parties submitted oral argument and their answers to the oral questions put by the Court at the hearing on 18 September 2020.

17 Romania claims, in essence, that the Court should:

- annul the contested decision in part, in so far as the Commission applied a co-financing rate of 75%, and not of 85%, for the first and second priorities of the operational programme;
- order the Commission to pay the costs.

18 The Commission contends that the Court should:

- dismiss the action;
- order Romania to pay the costs.

Law

19 In support of its action, Romania puts forward two pleas in law, alleging, first, infringement of Article 120(3) and Article 139(6) of Regulation No 1303/2013 and breach of the principle of legitimate expectations and, second, breach of the obligation to state reasons laid down in the second paragraph of Article 296 TFEU and of the principle of good administration.

First plea: infringement of Article 120(3) and Article 139(6) of Regulation No 1303/2013 and breach of the principle of legitimate expectations

20 The first plea consists of two parts, the first alleging infringement of Article 120(3) and Article 139(6) of Regulation No 1303/2013 and the second alleging breach of the principle of legitimate expectations.

First part: infringement of Article 120(3) and Article 139(6) of Regulation No 1303/2013

21 Romania claims, in essence, that the application in the contested decision of the co-financing rate of 75% for the first and second priority axes of the operational programme, as fixed in the 2015 Implementing Decision, instead of the co-financing rate of 85% fixed in the 2018 Implementing Decision is contrary to Article 120(3) and Article 139(6) of Regulation No 1303/2013. In Romania's submission, the co-financing rate applicable for the calculation of the amount chargeable to the Cohesion Fund and the ERDF for a given accounting year, in accordance with Article 139(6)(a) of Regulation No 1303/2013, is the rate in force at the time of the acceptance by the Commission of the accounts relating to that accounting year, not the rate in force on the date of submission, by the Member State concerned, of the final application for an interim payment corresponding to that accounting year, as applied by the Commission in the contested decision. Consequently, in the present case, as the operational programme accounts for the accounting year 2017/2018 were accepted on 23 May 2019, it is the co-financing rate of 85% that should have been applied for the first and second priority axes of the operational programme, since that rate had been introduced on 12 December 2018 by the 2018 Implementing Decision.

22 The Commission disputes Romania's arguments.

- 23 It should be observed, by way of a preliminary point, that the co-financing rate initially fixed by a Commission decision approving an operational programme may be subsequently amended, in accordance with Article 30(1) and (2) and Article 96(10) of Regulation No 1303/2013. In the present case, in application of those provisions, the co-financing rate for the first and second priority axes of the operational programme was increased from 75% to 85% by the 2018 Implementing Decision.
- 24 It should be stated, in addition, that Regulation No 1303/2013 contains no specific provision governing the temporal application of an amendment of the co-financing rate.
- 25 In particular, Article 139(6) of Regulation No 1303/2013, on the basis of which the contested decision was adopted, merely provides that the co-financing rate for each priority is to be applied to the amounts in the accounts referred to in Article 137(1)(a) of that regulation, but does not specify the co-financing rate that is applicable where that rate is amended after the final application for an interim payment has been submitted but before the accounts corresponding to a given accounting year have been accepted.
- 26 Likewise, the 2018 Implementing Decision does not specify whether the amendment of the co-financing rate for the first and second priority axes of the operational programme was applicable for the accounting year 2017/2018, or whether it was applicable only for the accounting year during which that decision was adopted and for subsequent accounting years.
- 27 In that regard, it should be noted that, in accordance with Article 2(29) of Regulation No 1303/2013, an ‘accounting year’ is defined, for the purposes, in particular, of Part Four of that regulation, as the period from 1 July of one year to 30 June of the following year. In this instance, the accounting year ran from 1 July 2017 to 30 June 2018 and had therefore already ended on the date on which the 2018 Implementing Decision was adopted.
- 28 In those circumstances, in order to determine the co-financing rate applicable, for the purposes of Article 139(6) of Regulation No 1303/2013, where the rate is amended after the final application for an interim payment has been submitted, but before the accounts have been accepted, it is necessary to consider the wording of that provision, the context in which it occurs and the objectives pursued by the rules of which it is part (see, to that effect, judgment of 22 January 2020, *Ursa Major Services*, C-814/18, EU:C:2020:27, paragraph 49 and the case-law cited).
- 29 As regards, in the first place, the wording of Article 139(6) of Regulation No 1303/2013, that provision reads as follows:
- ‘On the basis of the accepted accounts, the Commission shall calculate the amount chargeable to the Funds and to the EMFF for the accounting year and the consequent adjustments in relation to the payments to the Member State. The Commission shall take into account:
- (a) the amounts in the accounts referred to in point (a) of Article 137(1) and to which the co-financing rate for each priority is to be applied;
 - (b) the total amount of payments made by the Commission during that accounting year, consisting of:
 - (i) the amount of interim payments paid by the Commission in accordance with Article 130(1) and Article 24; and

(ii) the amount of the annual pre-financing paid under Article 134(2).’

- 30 As observed in paragraph 25 above, Article 139(6) of Regulation No 1303/2013 does not specify the temporal application of an amendment of the co-financing rate that was adopted after the final application for an interim payment relating to an accounting year, but before acceptance of the accounts for that year. Nonetheless, it is apparent from the wording of that provision that the Commission is to calculate the amount chargeable to the Cohesion Fund and the ERDF ‘for the accounting year’ concerned. In addition, the matters to be taken into consideration by the Commission in the context of that calculation, which are referred to in the first part of point (a) and in point (b) of that provision, are also connected with the accounting year to which the accepted accounts relate.
- 31 First, in the words of Article 139(6)(a) of Regulation No 1303/2013, the Commission is to take into consideration the ‘amounts in the accounts referred to in point (a) of Article 137(1)’ of that regulation, which defines those amounts as, inter alia, the ‘total amount of eligible expenditure entered into the accounting systems of the certifying authority which has been included in [interim] payment applications submitted to the Commission in accordance with Article 131 and Article 135(2) by 31 July following the end of the accounting year’.
- 32 Second, in the words of Article 139(6)(b) of Regulation No 1303/2013, the Commission is to take into consideration the ‘total amount of payments made by the Commission during that accounting year’, including, in particular, the ‘amount of interim payments paid by the Commission in accordance with Article 130(1) and Article 24 [of that regulation]’.
- 33 The wording of Article 139(6) of Regulation No 1303/2013 thus shows that the matters which the Commission must take into consideration when calculating the amount chargeable to the Cohesion Fund and the ERDF relate to the accounting year concerned.
- 34 As regards, in the second place, the context to which Article 139(6) of Regulation No 1303/2013 belongs, it should be observed, first, that one of the main amendments introduced by that regulation consists in the creation of a new system of shared management of European structural funds and investment based on the principle that accounts relate to a specific year. That principle is reflected in the existence of an annual cycle for the declaration and checking of expenditure, which has, as a single reference period, the accounting year. Under the regulation previously in force, on the other hand, namely Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 (OJ 2006 L 210, p. 25), which was applicable for the programming period 2007 to 2013, the reference period was the multiannual period of seven years.
- 35 Second, it should be observed that, in accordance with the principle that accounts relate to a specific year, the procedures laid down in Regulation No 1303/2013 concerning both the financial management of the expenditure chargeable to the Cohesion Fund and the ERDF (see Part Two, Title IX, Chapter I and Part Four, Title II, Chapter I of that regulation) and the establishment, examination and acceptance of the accounts (see Part Two, Title IX, Chapter II and Part Four, Title II, Chapter II of that regulation), are based on the concept of accounting year.
- 36 Thus, third, as regards the procedure relating to the financial management of the expenditure chargeable to the Cohesion Fund and the ERDF, Article 135(1) of Regulation No 1303/2013 provides that the certifying authority of the Member State concerned may submit applications

for interim payment, in accordance with Article 131(1) of that regulation, covering amounts entered in its accounting system ‘in the accounting year’ concerned. In accordance with Article 135(2) of that regulation, that certifying authority may submit the final application for an interim payment ‘by 31 July following the end of the previous accounting year’ and, in any event, ‘before the first application for interim payment for the next accounting year’.

- 37 It should be observed, in that regard, that the final application for an interim payment submitted to the Commission by the Member State concerned for a given accounting year is made after the end of that accounting year and constitutes the basis on which the accounts are prepared and the amount chargeable to the Cohesion Fund and the ERDF is calculated, in accordance with Article 139(6) of Regulation No 1303/2013. The final application for an interim payment is the basis for the determination of both the eligible expenditure taken into consideration by the Commission under Article 139(6)(a) of that regulation and the total amount of the interim payments taken into consideration by the Commission under Article 139(6)(b).
- 38 Thus, on the one hand, Article 139(6)(a) of Regulation No 1303/2013 refers to Article 137(1)(a) of that regulation, which, in turn, refers to Article 131 and 135(2). As the Commission submits, it follows from Article 131(1) of Regulation No 1303/2013 that the final application for an interim payment crystallises the total cumulative amount of the eligible expenditure entered in the certifying authority’s accounting system during the accounting year concerned and submitted for payment in the context of that accounting year. That application closes the declaration of eligible expenditure corresponding to the accounting year concerned since, following its submission, the Member State concerned can no longer submit eligible expenditure for payment in respect of that accounting year. Article 135(2) of that regulation sets the deadline for submission of the final application for an interim payment, namely by 31 July following the end of the previous accounting year.
- 39 It is thus clear on reading of Article 139(6)(a) of Regulation No 1303/2013 together with Article 137(1)(a) and Article 135(2) of that regulation – the first of which refers to the second and the second, in turn, to the third – that the eligible expenditure which the Commission takes into consideration when calculating the amount chargeable to the Cohesion Fund and the ERDF is the expenditure that has been entered in the certifying authority’s accounting system during the accounting year concerned and submitted in the final application for an interim payment. The eligible expenditure and the co-financing rate, which is applied to that expenditure, are two intrinsically linked elements on the basis of which the amount chargeable to the Cohesion Fund and the ERDF is calculated. Thus, as the total amount of the eligible expenditure relating to a given accounting year is determined at the time of the final application for an interim payment relating to that accounting year, it seems to be consistent with the scheme of Regulation No 1303/2013 that the determination of the co-financing rate applicable to that expenditure should follow the same logic, so that that rate is the rate that was in force no later than the time of submission of the final application for an interim payment.
- 40 On the other hand, in accordance with Article 139(6)(b) of Regulation No 1303/2013, when the Commission calculates the amount chargeable to the Cohesion Fund and the ERDF, it must also take into account the total amount of payments which it has made ‘during that accounting year’, which consists, in particular, of the total amount of interim payments paid by the Commission in accordance with Article 130(1) of that regulation. According to that provision, the Commission is to reimburse as interim payments 90% of the amount resulting from applying the co-financing rate for each priority, laid down in the decision adopting the operational programme, to the eligible expenditure for the priority included in the payment application.

- 41 Article 130(1) thus confirms the intrinsic link between the eligible expenditure set out in the applications for an interim payment and the co-financing rate applicable to that expenditure. In particular, it is not disputed that each of those payment applications takes into account the cumulative total of the eligible expenditure entered in the certifying authority's accounting system up to the time of that application and that the interim payment to be paid for the application in question corresponds to the difference between (i) the total amount of the eligible expenditure entered in the accounting system up to the time of that application, to which the co-financing rate then in force applies, and (ii) the interim payments already made. That implies – and Romania does not dispute – that any amendment of the co-financing rate adopted up to the date of submission of the final application for an interim payment relating to a particular accounting year should be taken into account for that accounting year and be applied to all the eligible expenditure incurred during that year. Thus, the final application for an interim payment consolidates both the cumulative total amount of the eligible expenditure for the accounting year in question and the co-financing rate applicable to all of that expenditure.
- 42 Fourth, as regards the procedure for the preparation, examination and acceptance of the accounts, recital 118 of Regulation No 1303/2013 states that, in the context of the programming period 2014 to 2020, the operational programme accounts are verified and accepted 'every year'.
- 43 To that end, initially, in accordance with Article 138 of Regulation No 1303/2013, read with Article 63(5) and (7) of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ 2018 L 193, p. 1), the Member State concerned must submit to the Commission the operational programme accounts for a given accounting year by no later than 15 February of the following year.
- 44 The accounts submitted by the Member State concerned must include the information listed in Article 137(1) of Regulation No 1303/2013 and defined by reference to the accounting year concerned. According to that provision, those accounts, which are to be submitted to the Commission for each operational programme, are to 'cover the accounting year' and include, for each priority and, where applicable, each fund and category of regions, the total amount of eligible expenditure entered in the accounting systems of the certifying authority which has been included in payment applications submitted to the Commission in accordance with Article 131 and Article 135(2) of that regulation, 'by 31 July following the end of the accounting year'.
- 45 In addition, the accounts must be submitted to the Commission with a list of additional documents set out in Article 138 of Regulation No 1303/2013 and also relating to the previous accounting year.
- 46 Next, according to Article 139(1) and (2) of Regulation No 1303/2013, read with Article 84 of that regulation, the Commission must examine the documents submitted by the Member State concerned and accept the accounts presented by that Member State where it is able to conclude that they are complete, accurate and true, 'by 31 May of the year following the end of the accounting year'.

- 47 It is on the basis of the accounts thus accepted that the Commission is to calculate the amount chargeable to the Cohesion Fund and the ERDF ‘for the accounting year’ concerned and the consequent adjustments in relation to the payments to the Member State, in accordance with Article 139(6) of Regulation No 1303/2013.
- 48 It follows from the foregoing that the scheme of Regulation No 1303/2013 and, therefore, the regulatory framework of which Article 139(6) of that regulation forms part, is based on the principle that accounts relate to a specific year as regards both the financial management of the expenditure chargeable to the Cohesion Fund and the ERDF and the preparation, examination and acceptance of the accounts, and that the final application for an interim payment relating to an accounting year is of particular importance in that respect, in so far as it crystallises the cumulative total amount of the eligible expenditure relating to that accounting year, to which the co-financing rate in force at that time must be applied.
- 49 As regards, in the third place, the objectives pursued by Regulation No 1303/2013, it is clear from recital 10 that that regulation aims, in particular, on the basis of Article 317 TFEU and in the context of shared management, to specify the conditions that allow the Commission to exercise its responsibilities for implementation of the budget of the European Union and to clarify the responsibilities that cooperation entails for the Member States. Those conditions must enable the Commission to obtain assurance that the Member States are using the European Structural and Investment Funds in a legal and regular manner and in accordance with the principle of sound financial management within the meaning of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ 2012 L 298, p. 1), as Regulation No 966/2012 was repealed and replaced by Regulation 2018/1046.
- 50 The principle of good financial management requires, in particular, that European structural and investment funds be used by the Member State in keeping with the principles and legal requirements that underlie the EU sectoral regulations. In this instance, as was observed in paragraph 48 above, one of the guiding principles that constitute the actual scheme of Regulation No 1303/2013 is the principle that accounts relate to a specific year. Thus, the EU legislature considered that the good financial management of European structural and investment funds would be better ensured on the basis of the obligation, for Member States and for the Commission, respectively, to submit and accept operational programme accounts on an annual basis. If a co-financing rate adopted following the final application for an interim payment and therefore not in force either during the accounting year in question or at the date of the final application for an interim payment were to be applied to expenditure incurred during an accounting year and entered in the accounting system, that would amount, in essence, to a breach of the principle that accounts relate to a specific year.
- 51 Accordingly, it follows from a literal, contextual and teleological interpretation of Regulation No 1303/2013 that the co-financing rate applicable in the calculation of the amount chargeable to the Cohesion Fund and the ERDF for a specific accounting year, in accordance with Article 139(6)(a) of Regulation No 1303/2013, is the rate in force on the date of submission, by the Member State concerned, of the final application for an interim payment corresponding to the accounting year in question.

- 52 That conclusion is not undermined by the arguments put forward by Romania in support of the theory that the applicable co-financing rate for the purposes of Article 139(6)(a) of Regulation No 1303/2013 is the rate in force at the time when the accounts are accepted.
- 53 First, Romania cannot find support in the fact that, according to Article 139(6) of Regulation No 1303/2013, the amount chargeable to the Cohesion Fund and the ERDF is to be calculated ‘on the basis of the accepted accounts’.
- 54 In fact, since Article 139(6) of Regulation No 1303/2013 fails to specify the co-financing rate applicable when that rate is amended after the final application for an interim payment has been submitted, but before the accounts corresponding to a specific accounting year have been accepted, the fact that the amount chargeable to the Cohesion Fund and the ERDF is not calculated until after the accounts have been accepted does not mean that the applicable rate should be that in force at the time of the acceptance of the accounts.
- 55 Second, Romania’s argument that the date of submission of the final application for an interim payment is a ‘randomly chosen’ reference time cannot but be rejected, for the reasons set out in paragraphs 37 to 40 above.
- 56 It should nonetheless be added that Romania is correct to state that there is a gap of one month, at most, between the date of the end of an accounting year (30 June of a particular year) and the date of submission of the final application for an interim payment (no later than 31 July of the same year). However, that gap does not mean that the fact that the date of submission of the final application for an interim payment is taken into account for the purpose of determining the co-financing rate applicable would be incompatible with the principle that accounts relate to a specific year. That gap, which is limited to one month at most, is explained by constraints of an administrative and technical nature, as the certifying authorities clearly need a certain time after the end of an accounting year to gather and verify the final figures relating to that year and to prepare that application. To that end, the EU legislature considered it necessary to allow those authorities an extra month after the end of the accounting year to submit the final application for an interim payment.
- 57 Third, Romania submits that the provisions of Regulation No 1303/2013 relating to the final application for an interim payment, on the one hand, and Article 139 of that regulation, on the other, are in separate chapters of that regulation and have separate objectives, the former provisions relating to an intermediate procedural stage of a provisional nature and the latter relating to a final procedural stage attended by procedural guarantees. Thus, in Romania’s submission, the procedures relating to a given accounting year remain open until the time when the accounts are accepted and the amount chargeable to the Cohesion Fund and the ERDF is calculated.
- 58 In that regard, it should be observed, as Romania correctly submits, that the procedure relating to the preparation, examination and acceptance of the accounts for a specific accounting year is of crucial importance for the purpose of calculating the amount chargeable to the Cohesion Fund and the ERDF. That procedure enables the Commission to verify that the accounts submitted by the Member State concerned are complete, accurate and truthful. It is also after accepting the accounts that the Commission clears the annual pre-financing concerned and pays any additional amount, in accordance with Article 139(7) of Regulation No 1303/2013.

- 59 Nonetheless, important though it may be, the procedural stage in question is intended merely to carry out an *ex post facto* verification of the expenditure which the Member State concerned has included in its applications for interim payment relating to an accounting year. At that stage of the procedure, the Commission and the Member State concerned cannot, as a rule, add to the accounts submitted for acceptance any items that arose after the close of the accounting year in question. That procedural stage therefore consists in the verification of the figures relating to the period covered by the accounting year in question and included in the final application for an interim payment. That stage is thus of a procedural nature and cannot therefore result, in principle, in the expenditure incurred outside the accounting year in question being taken into account.
- 60 It is for that reason, moreover, that, as stated in paragraph 39 above, Article 139(6)(a) of Regulation No 1303/2013, read with Article 137(1)(a) and Article 135(2) of that regulation – the first of which refers to the second and the second, in turn, to the third – states that the eligible expenditure taken into account by the Commission in the calculation of the amount chargeable to the Cohesion Fund and the ERDF is the expenditure entered in the certifying authority's accounts during the accounting year concerned and submitted in the final application for an interim payment. The co-financing rate applicable to that expenditure should thus follow the same logic, in the absence of any other indication in that regard from the EU legislature.
- 61 That conclusion, moreover, is consistent with the principle of non-retroactivity of legal acts. In that regard, it should be borne in mind that, according to settled case-law, substantive rules are usually interpreted as applying to situations existing before their entry into force only in so far as it follows clearly from their terms, their objectives or their general scheme that such an effect must be given to them (see judgment of 7 November 2018, *O'Brien*, C-432/17, EU:C:2018:879, paragraph 26 and the case-law cited).
- 62 Thus, a new legal rule applies from the entry into force of the act introducing it and, while it does not apply to legal situations that arose and became definitive prior to that entry into force, it does apply immediately to the future effects of a situation which arose under the old law, and to new legal situations. The position is otherwise, subject to the principle of the non-retroactivity of legal acts, only if the new rule is accompanied by special provisions which specifically lay down its conditions of temporal application (see judgment of 7 November 2018, *O'Brien*, C-432/17, EU:C:2018:879, paragraph 27 and the case-law cited).
- 63 In the present case, as the Court observed in paragraphs 24 to 26 above, neither the 2018 Implementing Decision nor Regulation No 1303/2013 contains any specific provision determining the conditions of the temporal application of an amendment of the co-financing rate such as that introduced by the 2018 Implementing Decision.
- 64 Accordingly, it follows from the case-law cited in paragraph 62 above that the rule fixing a new co-financing rate – which is a substantive rule, since it determines the amount chargeable to the Cohesion Fund and the ERDF – is to apply from the entry into force of the act introducing it, that is to say, from the date of adoption of the 2018 Implementing Decision, 12 December 2018, whereas it is not to apply to legal situations that arose and became definitive before that date.
- 65 At that time, Romania's legal situation as regards the expenditure incurred during the accounting year 2017/2018 had already become definitive, within the meaning of the case-law cited in paragraph 62 above. As that accounting year had ended on 30 June 2018 and the final application for an interim payment had been submitted on 6 July 2018, all the eligible expenditure for that

accounting year had been definitively entered and submitted for payment. To uphold Romania's theory would thus amount to applying retroactively to expenditure already incurred, entered and submitted for payment a co-financing rate adopted subsequently and for that reason applicable for the following accounting year.

- 66 Nor, fourth, can the argument that Romania derives from Article 137(2) of Regulation No 1303/2013 succeed. According to that provision, expenditure included in an application for interim payment corresponding to a particular accounting year may be excluded by a Member State from the accounts for that accounting year if there is an ongoing assessment of the legality and regularity of that expenditure. In such a situation, in accordance with that provision, any or all of that expenditure subsequently found to be legal and regular may be included in an application for interim payment relating to subsequent accounting years.
- 67 The possibility of excluding from the accounts expenditure that had been included in an application for interim payment because its legality and regularity are subject to an ongoing assessment is consistent with the very objective of the procedure relating to the preparation, examination and acceptance of the accounts, which, as stated in paragraph 58 above, is specifically intended to ensure that the expenditure included by the Member State concerned in its applications for interim payment are complete, accurate and truthful. The exceptional possibility for the certifying authority to include such expenditure in an application for interim payment relating to a subsequent accounting year enables the Member State to be reimbursed for that expenditure once it has been established that the expenditure was legal and regular.
- 68 However, that possibility cannot call into question the conclusion that the final application for an interim payment corresponding to an accounting year crystallises the cumulative total amount of the eligible expenditure entered in the certifying authority's accounting system during the accounting year in question and submitted for payment in the context of that year, referred to in Article 139(6)(a) of Regulation No 1303/2013. Even though, in accordance with Article 137(2) of that regulation, in the event of doubt as to its legality and regularity, expenditure included in an application for an interim payment for a specific accounting year is first of all excluded from the accounts for that accounting year and then included in an application for interim payment relating to a subsequent accounting year, the final application for an interim payment corresponding to that subsequent accounting year continues to express the cumulated total amount of eligible expenditure submitted for payment during that accounting year.
- 69 Nor, for the same reasons, is the fact that, in accordance with Article 135(1) of Regulation No 1303/2013, the certifying authority may, if it considers it necessary, include expenditure entered in its accounting system during a specific accounting year not in an application for interim payment corresponding to that accounting year, but in an application for interim payment corresponding to a subsequent accounting year, capable of calling in question the conclusion that the reference time for the determination of the co-financing rate applicable under Article 139(6)(a) of Regulation No 1303/2013 is the date of submission of the final application for an interim payment.
- 70 Fifth, Romania correctly submits that the EGESIF Guidance, point 8.1 of which states that, 'on the basis of the accepted accounts, the amounts chargeable to the Funds ... will be calculated using the co-financing rate in force at the date of the submission of the final interim application payment', has no mandatory force. However, that argument is inoperative. In fact, the conclusion that the co-financing rate applicable under Article 139(6)(a) of Regulation No 1303/2013 is the rate in force on the date of submission of the final application for an interim payment follows from a

literal, contextual and teleological interpretation of that regulation, not from the guidance supplied by the Commission in the EGESIF Guidance, which is not effectively binding on either the Courts of the European Union or the Member States.

- 71 Sixth, in so far as Romania also claims that there has been an infringement of Article 120(3) of Regulation No 1303/2013, it is appropriate to point out that that provision merely establishes the maximum amounts of the co-financing rates of operational programmes coming under the ‘Investment for growth and jobs’ goal. It is not disputed that the co-financing rate applied in the present case does not exceed the maximum amounts specified in that provision.
- 72 It follows that the first part of the first plea must be rejected as unfounded.

Second part: breach of the principle of protection of legitimate expectations

- 73 Romania claims, in essence, that the clear provisions of the 2018 Implementing Decision fixing the co-financing rate for the first and second priority axes of the operational programme at 85% without distinguishing between accounting years, on the one hand, and the absence of any specific provision in Regulation No 1303/2013 that would support the Commission’s position, on the other, caused Romania to have legitimate expectations that the co-financing rate of 85% for those priority axes of the operational programme would be applied in the calculation of the amount chargeable to the Cohesion Fund and the ERDF for the accounting year 2017/2018. Consequently, the application in the contested decision of the co-financing rate of 75% fixed in the 2015 Implementing Decision for that accounting year is contrary to the principle of legitimate expectations.
- 74 The Commission disputes Romania’s arguments.
- 75 According to settled case-law, the right to rely on the principle of legitimate expectations assumes that three conditions are satisfied. First, precise, unconditional and consistent assurances originating from authorised and reliable sources must have been given to the person concerned by the administration. Second, those assurances must be such as to give rise to a legitimate expectation on the part of the person to whom they are addressed. Third, the assurances must comply with the applicable rules (see judgment of 19 December 2019, *Probelte v Commission*, T-67/18, EU:T:2019:873, paragraph 109 and the case-law cited).
- 76 In this instance, it must be observed that the Commission did not give Romania precise, unconditional and consistent assurances that the co-financing rate of 85% pour the first and second priority axes of the operational programme, fixed in the 2018 Implementing Decision, would be applied in the calculation of the amount chargeable to the Cohesion Fund and the ERDF for the accounting year 2017/2018.
- 77 First, there is nothing in the 2018 Implementing Decision to indicate that the co-financing rate of 85% would be applied for the accounting year 2017/2018. As stated in paragraph 26 above, that decision contains no indication of the temporal application of that co-financing rate. That circumstance cannot constitute a precise, unconditional and consistent assurance from the Commission that that rate would apply for that accounting year.
- 78 Second, Romania cannot rely on any legitimate expectation that the co-financing rate of 85% would be applied for the accounting year 2017/2018, since point 8.1 of the EGESIF Guidance clearly states that the amounts chargeable to the Cohesion Fund and the ERDF are to be

calculated using the co-financing rate in force at the date of the submission of the final interim payment application. It should be noted that the first version of that guidance, point 8.1 of which already contained that information concerning the applicable co-financing rate, had been established and brought to the Member States' attention in 2016, and therefore before the contested decision was adopted. Although, as stated in paragraph 70 above, that guidance is not binding on either the Courts of the European Union or the Member States, it nonetheless indicates the Commission's position, and may therefore be taken into consideration for the purpose of determining whether the Member State concerned could have a legitimate expectation as to the approach which the Commission could be expected to take.

- 79 Third, by letter of 17 May 2019 (see paragraph 9 above), the Commission expressly refused to apply, for the accounting year 2017/2018, the co-financing rate of 85% for the first and second priority axes of the operational programme, referring to point 8.1 of the EGESIF Guidance.
- 80 Fourth, Romania relies on the judgment of 20 October 2016, *Czech Republic v Commission* (T-141/15, not published, EU:T:2016:621, paragraph 97), where the Court stated that Commission's failure to respond within a specific period was not equivalent to a Commission decision and was not capable of constituting a 'precise' assurance within the meaning of the case-law. According to Romania, on an *a contrario* interpretation of that judgment, it must be concluded that, when an EU institution expresses a position in an act having legal effects, such as the 2018 Implementing Decision, the Member States may rely on the principle of legitimate expectations. However, it must be borne in mind that, as stated in paragraph 77 above, the 2018 Implementing Decision did not state that the co-financing rate of 85% would be applied for the accounting year 2017/2018.
- 81 It follows that the second part of the first plea must also be rejected as unfounded.
- 82 Consequently, the first plea must be rejected in its entirety.

Second plea: breach of the obligation to state reasons laid down in the second paragraph of Article 296 TFEU and of the principle of good administration

- 83 The second plea consists of two parts, the first alleging breach of the obligation to state reasons laid down in the second paragraph of Article 296 TFEU and the second alleging breach of the principle of good administration.

First part: breach of the obligation to state reasons laid down in the second paragraph of Article 296 TFEU

- 84 Romania claims, in essence, that the contested decision does not contain a sufficient statement of reasons, since it does not mention either the legal basis or the reasons why the Commission applied, for the accounting year 2017/2018, the co-financing rate of 75% for the first and second priority axes of the operational programme, as fixed in the 2015 Implementing Decision, instead of the co-financing rate of 85% fixed in the 2018 Implementing Decision.
- 85 The Commission disputes Romania's arguments.

- 86 According to settled case-law, the statement of reasons required by the second paragraph of Article 296 TFEU must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution that adopted that measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the Courts of the European Union to exercise their power of review. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons for a measure meets the requirements of the second paragraph of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question. That is a fortiori the case where the Member States have been closely associated with the process of drafting the contested measure and are thus aware of the reasons underlying that measure (see judgment of 30 April 2019, *Italy v Council (Fishing quota for Mediterranean swordfish)*, C-611/17, EU:C:2019:332, paragraphs 40 and 41 and the case-law cited).
- 87 In the present case, while it is true, as Romania maintains, that the contested decision does not mention either the legal basis or the reasons why the Commission applied, for the accounting year 2017/2018, the co-financing rate of 75% for the first and second priority axes of the operational programme, fixed in the 2015 Implementing Decision, instead of the co-financing rate of 85% fixed in the 2018 Implementing Decision, the fact nonetheless remains that that Member State, having been closely associated with the process of drafting the contested decision, was aware of the reasons underlying that decision.
- 88 It is apparent from the documents in the file that, at the meeting of 15 January 2019 (see paragraph 6 above) and in the letter of 17 May 2019 (see paragraph 9 above), the Commission explained its intention to refuse to apply the rate of 85%, referring in particular to point 8.1 of the EGESIF Guidance, which states that the co-financing rate is to be applied to the expenditure declared in a given accounting year and makes clear that the co-financing rate applicable is to be that in force on the date of the submission of the final interim payment application.
- 89 In fact, first, Romania submits that, at the meeting of 15 January 2019, the Commission stated that the guidance in the EGESIF Guidance precluded the application of the new co-financing rate established in the 2018 Implementing Decision.
- 90 Second, in its letter of 17 May 2019, the Commission explained that, in the context of the programming period 2014 to 2020, and in accordance with the guidance in the EGESIF Guidance, any amendment of a co-financing rate is to apply only to current and future accounting years. The Commission pointed out that, during the programming period 2007 to 2013, payment applications were cumulative and contained expenditure incurred from the beginning of that programming period, which is why an amendment of the co-financing rate could apply to all expenditure declared during that programming period. According to the Commission, however, that was no longer possible in the context of the programming period 2014 to 2020, because, under Regulation No 1303/2013, payment applications are cumulative only during a specific accounting year, and because a different practice would be contrary to the principle that accounts relate to a specific year.
- 91 Romania's argument that a mere reference to the EGESIF Guidance during the administrative procedure cannot constitute a sufficient statement of reasons, as the reasons must be provided in the contested decision, cannot succeed. The reference to that guidance is an element that forms part of the context in which the contested decision was adopted, which must be taken into account for the purpose of assessing whether the reasons stated for an act satisfied the

requirements of Article 296 TFEU, as is clear from the case-law cited in paragraph 86 above. Provided that it is brought to the knowledge of the parties concerned, the internal guidance adopted by the Commission facilitates the understanding of the contested decision and, indirectly, forms part of the reasons on which it is based.

- 92 Romania also claims that the case-law resulting, in particular, from the judgment of 14 April 2005, *Portugal v Commission* (C-335/03, EU:C:2005:231, paragraph 84), according to which the reasons given for a decision are to be considered sufficient when the relevant Member State was closely involved in the process under which that decision was drawn up and knew the Commission's reasons, is not applicable in the present case, owing, in particular, to the Commission's 'tardy' and 'evasive' reaction during the administrative procedure.
- 93 In fact, irrespective of the Commission's conduct, the fact nonetheless remains that, as a result of having participated in the procedure that led to the adoption of the contested decision, the Romanian authorities knew the reason why the Commission had applied the co-financing rate of 75% for the first and second priority axes of the operational programme for the accounting year 2017/2018. Thus, in their letter of 8 March 2019, the Romanian authorities challenged the Commission's refusal to apply the new co-financing rate, explaining that that refusal was incorrectly based on the guidance in the EGESIF Guidance. In addition, Romania repeated that criticism in the application, claiming that the Commission had erred by applying the co-financing rate of 75% that was in force at the time of the final application for an interim payment. Last, as the Commission has observed, all of the arguments put forward by Romania in support of the present action, in particular with regard to the interpretation of Article 139(6) of Regulation No 1303/2013, show that Romania was in a position to know and to examine the grounds on which the contested decision is based.
- 94 In the light of the foregoing, the first part of the second plea must be rejected as unfounded.

Second part: breach of the principle of good administration

- 95 Romania claims, in essence, that by adopting an 'evasive' position during the administrative procedure that led to the adoption of the contested decision, the Commission breached the principle of good administration.
- 96 The Commission disputes Romania's arguments.
- 97 The principle of good administration is set out in Article 41 of the Charter of Fundamental Rights of the European Union, which states that every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union. That right includes the right of every person to be heard before any individual measure which would affect him or her adversely is taken.
- 98 According to settled case-law, the right to be heard does not include the right to an *inter partes* hearing involving the institution which has adopted the contested acts and the addressee of those acts, but guarantees every person the opportunity to make known his or her views effectively during an administrative procedure and before the adoption of any decision liable to affect his or her interests adversely (see judgment of 3 July 2018, *Transtec v Commission*, T-616/15, EU:T:2018:399, paragraph 145 and the case-law cited).

- 99 In the present case, first, it should be observed that Romania's argument that before the contested decision was adopted it did not have the opportunity to ascertain the Commission's point of view and to take a position in that respect is factually incorrect. The Commission's point of view with regard to the co-financing rate applicable had been known by Romania at least since the meeting of 15 January 2019, as stated in paragraphs 87 to 90 above. It is therefore immaterial that the Commission's letter of 17 May 2019 (see paragraph 9 above) reached Romania six days before the adoption of the contested decision. Furthermore, as the Commission has observed, Romania had the opportunity to express its point of view in that respect during the administrative procedure, in particular at that meeting of 15 January 2019 (see paragraph 6 above).
- 100 Second, Romania has failed to substantiate its argument that the Commission behaved in a discriminatory manner by accepting the operational programme accounts for the accounting year 2017/2018 within the period prescribed in the regulation, whereas, for other programmes, the Commission 'postponed the acceptance of the accounts'. Romania has failed to show that, in the context of those 'other programmes', the Commission applied a co-financing rate that was amended after the submission of the final application for an interim payment, but before the acceptance of the accounts corresponding to a specific accounting year.
- 101 It follows that the second part of the second plea must also be rejected as unfounded.
- 102 The second plea must therefore be rejected as unfounded and, consequently, the action must be dismissed in its entirety.

Costs

- 103 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.
- 104 As Romania has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds motifs,

THE GENERAL COURT (Tenth Chamber, Extended Composition)

hereby:

- 1. Dismisses the action;**
- 2. Orders Romania to pay the costs.**

van der Woude

Kornezov

Buttigieg

Kowalik-Bańczyk

Hesse

Delivered in open court in Luxembourg on 14 April 2021.

[Signatures]