



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Second Chamber)

3 April 2017*

(EAGF and EAFRD — Expenditure excluded from financing — Rural development — Land consolidation and village renewal — Criteria used for selection of operations — Principle of sincere cooperation — Subsidiarity — Legitimate expectations — Proportionality — Obligation to state reasons)

In Case T-28/16,

Federal Republic of Germany, represented initially by T. Henze and A. Lippstreu, and subsequently by T. Henze and D. Klebs, acting as Agents,

applicant,

v

European Commission, represented by J. Aquilina and B. Eggers, acting as Agents,

defendant,

APPLICATION pursuant to Article 263 TFEU seeking the annulment of Article 1 and the Annex of Commission Implementing Decision (EU) 2015/2098, of 13 November 2015, 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 2015 L 303, p. 35), in so far as the payments made by the agency responsible for payment in the Federal Republic of Germany under the European Agricultural Fund for Rural Development (EAFRD), in the total amount of EUR 7 719 920.30, are excluded from EU financing,

THE GENERAL COURT (Second Chamber),

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

Registrar: S. Bukšek Tomac, Administrator,

having regard to the written part of the procedure and further to the hearing on 13 December 2016,

gives the following

* Language of the case: German.

Judgment

Background to the dispute

- 1 According to Article 15 of Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) (OJ 2005 L 277, p. 1), the European Agricultural Fund for Rural Development (EAFRD) is to act in the Member States through rural development programs which may include a set of regional programs, as is the case in the Federal Republic Germany in view of the federal structure of that Member State.
- 2 As regards the 2007 to 2013 programming period, the Rural Development Programme for the Free State of Bavaria (Germany), entitled ‘Bayerisches Zukunftsprogramm Agrarwirtschaft und Ländlicher Raum 2007-2013 aus dem Europäischen Landwirtschaftsfonds (ELER) gemäss Verordnung (EG) Nr. 1698/2005’ (Bavarian Programme for the Development of the Agricultural and Rural Economy for the period 2007 to 2013 with the support of the EAFRD under Regulation No 1698/2005, the ‘BayZal’), which includes actions in respect of land consolidation and village renewal, was submitted to the Commission of the European Communities. The Commission approved it by Decision C(2007) 3994 final of 5 September 2007 (‘the Decision of 5 September 2007’), which provides for EAFRD financing of a maximum total amount of EUR 1 253 943 708 for the entire programming period.
- 3 Following an initial inspection carried out by its services from 2 to 6 March 2009, the Commission considered that there were shortcomings in the application of the criteria for the selection of land consolidation and village renewal operations in Bavaria supported by EAFRD for the 2007 and 2008 and that this amounted to a failure to meet a key criterion. At the end of the procedure which included referral to the Conciliation Body under Commission Regulation (EC) No 885/2006 of 21 June 2006 laying down detailed rules for the application of Council Regulation (EC) No 1290/2005 as regards the accreditation of paying agencies and other bodies and the clearance of the accounts of the EAGF and of the EAFRD (OJ 2006 L 171, p. 90), the Commission applied a financial correction in the form of a flat-rate set-off of 10%, namely EUR 1 040 620.50, to the projects in question which had received EAFRD financing for 2007 and 2008.
- 4 From 8 to 12 July 2013, the Commission services carried out a second inspection, which included the implementation of land consolidation and village renewal under the BayZal, in order to verify the management and control system put in place in Bavaria.
- 5 By letter of 3 September 2013 the Commission sent the results of the inspection to the German authorities and informed them of its finding of shortcomings in the establishment or application of selection criteria, as regards the operations supported by EAFRD in Bavaria, both for the years 2007 to 2008, which had already given rise to a correction, and for 2009 to 2012, as well as from 2013. Bilateral discussions took place between the Commission services and the German authorities. A second conciliation procedure under Article 16 of Regulation No 885/2006 was also initiated, but it was not possible to complete it.
- 6 On 13 November 2015, the Commission finally adopted Implementing Decision (EU) 2015/2098 of 13 November 2015 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 2015 L 303, p. 35, ‘the contested decision’), by which it applied a flat-rate correction of 10% to the expenditure incurred in Bavaria by the German authorities for 2009 to 2014. After rectification of the basis of calculation — the Commission having initially envisaged applying a correction of EUR 11 046 145.96 — the final amount of the correction came to EUR 7 719 920.

- 7 The criticisms made by the Commission which are the basis for the adoption of the contested decision are set out both in the report drawn up on 12 June 2015 by the Conciliation Body after being consulted by the German authorities following the second inspection, and in the summary report drawn up on 19 October 2015 by the Commission ('the summary report'). In essence, those criticisms can be summarised as follows.
- 8 The land consolidation and renewal of the villages in Bavaria, as presented by the German authorities, take place in three stages:
- the first stage, which corresponds to the initial and consultation stage, brings together regional, municipal or local actors in order to consult them and to clarify the objectives pursued, to distribute the tasks and to determine whether the various actors wish to continue the process and make use of the possibilities for aid. This stage is instigated by the competent regional public authorities, in the present case the Ämter für ländliche Entwicklung (rural development offices), when they consider that a procedure for the land consolidation and renewal of a village is necessary and must be undertaken in the interest of the stakeholders;
 - the second stage involves the decision by the rural development office to initiate the land consolidation and renewal of the villages, leading to the formation of a community of stakeholders, bringing together landowners and owners of property rights; this community is the future applicant and the beneficiary of the grants;
 - the third stage involves detailed planning and specific implementation of the land consolidation and village renewal operations in each area concerned.
- 9 First, according to the Commission, in 2007 and 2008, the land consolidation and village renewal operations were not approved on the basis of selection criteria laid down by the competent body as provided for by Article 71(2) of Regulation No 1698/2005.
- 10 Second, as regards 2009 to 2012, the criteria for the selection of projects as originally included in the BayZal were, following a decision of 22 December 2008 of the Monitoring Committee set up under Article 77 of Regulation No 1698/2005 to examine the selection criteria to be applied during the 2007 to 2013 programming period (the 'Decision of 22 December 2008'), the subject of an amendment as regards the first and second stages of the land consolidation and village renewal operations, but the Commission considers that those criteria are not appropriate for the purposes of selecting projects from those eligible in so far as such projects are not ranked and their selection is opaque and therefore not transparent. In addition, no selection criteria were laid down for deciding on the opening of procedures. Those procedures consist of different projects or operations which are not known at the time a decision is taken concerning them, so that they are approved only in the years following the opening of the procedure.
- 11 Third, as regards 2013, new selection criteria were approved in December 2012, which also apply to the pre-selection process, namely the selection of procedures implemented in Bavaria. The selection criteria are applied on the basis of three checklists:
- Checklist A sets out the selection criteria for checking whether the procedure can be considered to be in conformity with the BayZal's work programme and capable of being registered in that programme;
 - Checklist B sets out the selection criteria for verifying whether the execution of a procedure or operation, which may be registered in the work programme, can proceed;
 - Checklist C sets out the selection criteria for selecting a project.

- 12 The introduction of checklist C was decided on as early as December 2008 and applied from 2009. Checklists A and B were introduced in 2013 and applied retroactively to all procedures and projects from 2009.
- 13 However, the Commission considers that those checklists remain inadequate, in so far as, inter alia, they still do not include a ranking of the procedures implemented in Bavaria and do not apply to procedures on the opening of which no decision has been made, with the result that the selection of operations and projects at this stage remains non-transparent.

Procedure and forms of order sought

- 14 By document lodged at the Court Registry on 26 January 2009, the Federal Republic of Germany brought the present action.
- 15 The defence, the reply and rejoinder were lodged at the Court Registry on 8 April, 25 May and 7 July 2016, respectively.
- 16 The Federal Republic of Germany claims that the Court should:
- annul Article 1 and the annex to the contested decision in far as it excludes from European Union financing the payments made under the EAFRD by the German agency responsible for payment in the total amount of EUR 7 719 920.30;
 - order the Commission to pay the costs.
- 17 The Commission contends that the Court should:
- dismiss the application;
 - order the Federal Republic of Germany to pay the costs.

Law

- 18 The Federal Republic of Germany raises four pleas in law.
- 19 First, it alleges an error of law by the Commission, consisting in an infringement of Article 71(2) of Regulation No 1698/2005, read in conjunction with Article 2(e) of that regulation in so far as the Commission disregarded the requirements of that regulation as regards the eligibility criteria for expenditure taken into account under the EAFRD.
- 20 Second, it alleges infringement of the partnership principle set out in Article 6 of Regulation No 1698/2005, the principle of sincere cooperation as set out in the first subparagraph of Article 4(3) TEU and the principle of the protection of legitimate expectations, in so far as the Commission disregarded the merits of a practice which it had approved or had not opposed.
- 21 Third, it alleges infringement of the principle of subsidiarity as set out in Article 5 TEU in so far as the Commission encroaches on the Member States' procedural autonomy and prerogatives in the area of spatial planning.
- 22 Fourth, it alleges infringement of Article 52(2) of Regulation (EU) No 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EEC) No 352/78, (EC) No 165/94,

(EC) No 2799/98, (EC) No 814/2000, (EC) No 1290/2005 and (EC) No 485/2008 (OJ 2013 L 347, p. 549), Article 31(2) 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) and of the principle of proportionality inasmuch as, in the 10% flat-rate correction which it applied, the Commission, first, did not have due regard to the nature and, in any event, limited extent of a potential infringement in connection with the selection criteria and, second, did not take into account the fact that the European Union neither suffered any actual financial loss nor ran any real risk that it would suffer loss. Therefore, the contested decision is characterised by a failure to state reasons in that regard.

The first plea in law, alleging infringement of Article 71(2) of Regulation No 1698/2005, read in conjunction with Article 2(e) of that regulation, in that the Commission disregarded the eligibility criteria for expenditure

- 23 In the first place, the Federal Republic of Germany points out in the application that, under Article 71(2) of Regulation No 1698/2005, expenditure is eligible for an EAFRD contribution only if it is used for operations decided in accordance with the selection criteria laid down by the competent body, the concept of ‘operation’ being defined in Article 2(e) of that regulation as ‘a project, contract or arrangement, or other action selected according to criteria laid down for the rural development programme concerned and implemented by one or more beneficiaries allowing achievement of the objectives set out in Article 4’.
- 24 The Commission requires selection criteria to be applied in the first and second stages of the land consolidation and village renewal procedure as it is implemented in Bavaria, even though these are the upstream stages of the procedure in which there are as yet no operations or beneficiaries, at the most only ‘potential beneficiaries’, with these potential beneficiaries only appearing at the third stage of the land consolidation and village renewal operation after the formation of the stakeholder community which acquires the status of the applicant for the aid.
- 25 Second, the Commission errs in taking the view that, in the first two stages of the land consolidation and village renewal operation, the German authorities undertook an unlawful pre-selection of the projects, in so far as they decide to proceed to the third stage according to non-transparent criteria. According to the German authorities, these two stages are part of a process for gathering information, consulting and engaging in a complex determination the purpose of which is to assess whether it is appropriate to commence the procedure and to verify that the preconditions arising from federal legislation concerning the land consolidation are fulfilled. The Commission’s complaint was also vitiated by a failure to state reasons.
- 26 Third, as regards the selection criteria themselves, the Commission imposes excessive requirements which do not correspond to the law in force and are not included in Regulation No 1698/2005 in so far as the Commission requires that the projects be ranked, a selection list in the form of a summary table be drawn up and even that a decision on which procedure best meets the selection criteria be made. The eligible projects were indeed subject to selection criteria, as determined, in particular, by the decision of 22 December 2008 taken in the presence of the Commission’s representatives. The decision of 22 December 2008 contained in an annex checklist C relating to the selection criteria for rural development, supplemented later by checklists A and B.
- 27 The German authorities point out for the sake of completeness that the Commission also disregarded its own guidelines as set out in Document No VI/10535/99 of 23 July 2002, entitled, ‘Guidelines for the implementation of systems of management, checks and penalties concerning rural development measures under Council Regulation (EC) No 1257/1999 — EAGGF Guarantee funded rural development measures’, (‘Document No IV/10535/99’) which it adopted in 2002 and which it referred to in its communication to the German authorities of 11 May 2009. It is true that those guidelines concern direct payments for the common agricultural policy (CAP) and not the EAFRD. However, it

can be inferred from this that the purpose of the selection criteria is only to allow a choice to be made between specific requests for aid considered to be eligible. Those criteria, therefore, only become relevant when a selection has to be made, for example because of limited financial resources in terms of the number of projects, which, according to the German authorities, is not the case here.

- 28 At the reply stage the Federal Republic of Germany seeks to reinforce its argument that the Commission misinterpreted the provisions of Regulation No 1698/2005 by emphasising the difference between ‘measures’ and ‘operations’, which are defined in Article 2(d) and Article 2(e) of Regulation No 1698/2005 respectively. Thus, a consolidation procedure is specifically not an ‘operation’ but a ‘measure’ within the meaning of those definitions, as ‘measures’ are upstream of ‘operations’. EU law does not require Member States to apply selection criteria at the stage of measures since the degree of specificity required to constitute an operation is not yet reached. Moreover, at the early stage where the Commission intends to place itself, there is as yet no ‘beneficiary’ within the meaning of Regulation No 1698/2005. The concept of ‘potential beneficiary’ used by the Commission has no legal significance and, by employing that concept, the Commission implicitly accepts that there is no actual beneficiary in the first and second stages of the land consolidation and village renewal procedure. The Federal Republic of Germany also disputes the Commission’s assertion that that Member State agrees with the Commission’s analysis since it failed to bring an action against the financial correction which had been imposed on it in 2013 in respect of the years 2007 and 2008.
- 29 As regards the comparison carried out by the Commission with the procedures in force in the Land of North Rhine-Westphalia (Germany) and Land Mecklenburg-Western Pomerania (Germany), which it cites as an example, the German authorities argue that it is irrelevant, in particular because federal legislation on land consolidation allows the stakeholder community to be entrusted with the essential tasks of the competent authority as regards land consolidations, and that this sets apart the case of the Free State of Bavaria under the Bavarian legislation for the enforcement of federal legislation relating to land consolidation. Furthermore, the procedure referred to in the case of the Land of Mecklenburg-Western Pomerania concerns only the 2014 to 2020 programming period.
- 30 The Commission contests the arguments of the German authorities and submits that its complaints made, in particular, during the conciliation procedure and in its summary report, are well founded.
- 31 As a preliminary point, it must be borne in mind that, where the Commission refuses to charge certain expenditure to the European Agricultural Guarantee Fund (EAGF) or the EAFRD on the ground that it was incurred as a result of breaches of provisions of EU law for which a Member State can be held responsible, it is for the Commission to prove the infringements in question (judgment of 28 October 1999, *Italy v Commission*, C-253/97, EU:C:1999:527, paragraph 6). In other words, the Commission is obliged to give reasons for its decision finding an absence of, or defect in, inspection procedures operated by the Member State in question (judgment of 8 May 2003, *Spain v Commission*, C-349/97, EU:C:2003:251, paragraph 46).
- 32 The Commission is not required to demonstrate exhaustively that there are insufficiencies in the checks carried out by the national authorities or that there are irregularities in the data submitted but to adduce evidence of serious and reasonable doubt on its part regarding those checks or those data (judgment of 20 September 2001, *Belgium v Commission*, C-263/98, EU:C:2001:455, paragraph 36, and 8 May 2003, *Spain v Commission*, C-349/97, EU:C:2003:251, paragraph 47).
- 33 It is then, subsequently, for that Member State to show that the conditions for obtaining the financing refused by the Commission are fulfilled (see, to that effect, judgment of 20 September 2001, *Belgium v Commission*, C-263/98, EU:C:2001:455, paragraph 37). In other words, the Member State concerned cannot rebut the Commission’s findings by mere assertions which are not substantiated by evidence of a reliable and operational supervisory system. If it is not able to show that they are inaccurate, the Commission’s findings can give rise to serious doubts as to the existence of an adequate and effective

series of supervisory measures and inspection procedures (judgments of 28 October 1999, *Italy v Commission*, C-253/97, EU:C:1999:527, paragraph 7, and 8 May 2003, *Spain v Commission*, C-349/97, EU:C:2003:251, paragraph 48).

- 34 In the present case, it must be pointed out that, in the general framework of the CAP, the implementation of the EU's rural development policy, through the financing and programming instrument of the EAFRD, is based on the principle of shared management between the EU and the Member States, with EU law establishing a general legal framework that is to be supplemented by national laws (Opinion of Advocate General Saugmandsgaard Øe in *Občina Gorje*, C-111/15, EU:C:2016:280, point 7).
- 35 First, the provisions governing the financing of the EAFRD at EU level came from Regulation No 1290/2005 for the 2007 to 2013 programming period. Regulation No 1306/2013 covers the 2014 to 2020 programming period.
- 36 The general provisions governing the operation of the EAFRD during the 2007 to 2013 programming period are taken from Regulation No 1698/2005, which was repealed by Regulation (EU) No 1305/2013 of the European Parliament and of the Council of 17 December 2013 on support for rural development by the EAFRD and repealing Regulation No 1698/2005 (OJ 2013 L 347, p. 487), which covers the following programming period (2014 to 2020).
- 37 The rural development aid provided by Regulation No 1698/2005 is implemented by means of four axes set out in four separate sections which appear under Title IV of that regulation. Section 1, entitled 'Axis 1 — Increasing the competitiveness of the agricultural and forestry sector', states at Article 30 thereof that support 'may cover ... land consolidation and improvement'. Section 3, entitled, 'Axis 3 — Improving quality of life in rural areas and diversification of the rural economy' states at Article 52 that '[s]upport under this section shall involve ... measures to improve the quality of life in the rural areas, comprising ... village renewal and development'. Land consolidation operations, on the one hand, and village renewal operations, on the other, thus fall under two distinct axes.
- 38 Pursuant to Article 71(2) of Regulation No 1698/2005 'expenditure shall be eligible for EAFRD contribution only where incurred for operations decided on by the Managing Authority of the programme in question or under its responsibility, in accordance with the selection criteria fixed by the competent body'. Article 2(e) of Regulation No 1698/2005 defines the concept of 'operation' as 'a project, contract or arrangement, or other action selected according to criteria laid down for the rural development programme concerned and implemented by one or more beneficiaries allowing achievement of the objectives set out in Article 4'. Article 2(d) of Regulation No 1698/2005 defines the concept of 'measure' as 'a set of operations contributing to the implementation of an axis as referred to in Article 4(2)'.
- 39 Additional provisions are set out in Commission Regulation (EC) No 1974/2006 of 15 December 2006 laying down detailed rules for the application of Council Regulation No 1698/2005 (OJ 2006 L 368, p. 15), Article 48(1) of which provides that, in order to ensure the effective protection of the European Union's financial interests 'Member States shall ensure that all the rural development measures they intend to implement are verifiable and controllable' and '[t]o this end, Member States shall define control arrangements that give them reasonable assurance that eligibility criteria and other commitments are respected'.
- 40 Regulation No 1305/2013 states in Article 49(1) that 'selection criteria [defined by the managing authority for the rural development programme following a consultation with the Monitoring Committee] shall aim to ensure equal treatment of applicants, better use of financial resources and targeting of measures in accordance with the EU priorities for rural development' and that '[i]n defining and applying selection criteria the principle of proportionality shall be taken into account in relation to the size of the operation'.

- 41 Secondly, the rules arising from the German federal legislation applicable to the land consolidation and village renewal in Bavaria are governed by the Flurbereinigungsgesetz (Land consolidation act, 'FlurbG'), in the version resulting from the revision of 16 March 1976 (BGBl., 1976 I, p. 546), as last amended on 19 December 2008 (BGBl., 2008 I, p. 2794). Under Paragraphs 1 and 37 of the FlurbG, land consolidation consists in a reorganisation of land ownership, in particular by redistributing communal agricultural land and scattered or unprofitable landholdings in order to improve the work conditions in agriculture and forestry.
- 42 In the Free State of Bavaria, the legal framework laid down at federal level by the FlurbG is supplemented by the Gesetz zur Ausführung des Flurbereinigungsgesetzes (Law for the enforcement of the land consolidation law). The rural development offices instigate village renewal and land consolidation, for which they are also responsible.
- 43 As regards the error of law allegedly committed by the Commission, consisting of a breach of Article 71(2) of Regulation No 1698/2005, read in conjunction with Article 2(e) of the same regulation, it should be borne in mind that, as regards the link between a regulation and provisions of national law to which it refers, the fact that a regulation is directly applicable does not prevent its provisions from empowering an EU institution or a Member State to take implementing measures and that, in that event, the detailed rules for the exercise of that power are governed by the public law of the State concerned (see, by analogy, judgment of 27 September 1979, *Eridania-Zuccherifici nazionali and Società italiana per l'industria degli zuccheri*, 230/78, EU:C:1979:216, paragraph 34).
- 44 Where a regulation contains such powers, it does not mean that the Member State has an unlimited discretion in the establishment of the implementing rules, or that they must have certain content. It is for a Member State to comply with the conditions and limits laid down by the EU rules which are specifically applicable in that context, and even constitute the specific legal basis of the legislative activity at issue (see, to that effect, judgment of 11 December 2015, *Finland v Commission*, T-124/14, EU:T:2015:955, paragraph 44).
- 45 In the light of the considerations set out above, it is clear from recital 61 in the preamble to and Article 71(2) of Regulation No 1698/2005 that, in accordance with the principle of subsidiarity, the rules on eligibility of expenditure are in principle set at national level and expenditure is eligible only if used for operations decided in accordance with the selection criteria laid down by the competent body.
- 46 In the present case, it appears that the setting of selection criteria for determining the eligibility of expenditure for the EAFRD contribution corresponds to implementing measures entrusted to the national authorities by Regulation No 1698/2005 in order to implement the objectives set out in the latter regulation, in this case support for rural development by the EAFRD.
- 47 In that context, it is for the German authorities to act in accordance with the guidelines and the limits laid down by the power conferred on them by Regulation No 1698/2005, first, in fixing the selection criteria in respect of the expenditure concerned and, second, in the application of those criteria.
- 48 The detailed rules for the implementation of land consolidation and village renewal are intended however to be laid down in their entirety exclusively in the national law. Regulation No 1698/2005 does not allow the Commission to impose a particular legislative procedure or legislative choices for the land consolidation and village renewal in the Member State concerned.
- 49 By contrast, in so far as the German authorities are requesting an EAFRD contribution for the expenditure incurred in connection with the land consolidation and village renewal in Bavaria, it is necessary to verify, first, the existence of selection criteria which satisfy the objective pursued by Regulation No 1698/2005 and, second, the conditions for the effective implementation of those criteria.

- 50 As regards the classification of land consolidation and village renewal as ‘operations’, which, by virtue of the wording of Article 2(e) of Regulation No 1698/2005, requires them to be submitted to selection criteria, it must be pointed out that, according to settled case-law, the need for a uniform application of EU law and the principle of equality require that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purposes of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union (see, by analogy, judgment of 25 October 2012, *Ketelä*, C-592/11, EU:C:2012:673, paragraph 34 and the case-law cited).
- 51 In accordance with the Commission’s contention, the definition of ‘operation’ in Article 2(e) of Regulation No 1698/2005, in so far as it refers to ‘a project, contract or arrangement or other action’, implemented by one or more beneficiaries allowing achievement of the objective of support for rural development is extremely broad, which ensures that, in spite of the variety of the types of transactions concerned and whatever the particular situation of the national procedure in question, a selection, as required by the legislation, is implemented properly.
- 52 Land consolidation and village renewal, once they are part of a project, contract, arrangement or any other actions that are intended to be actually put into effect, must be regarded as operations and must be subject to selection criteria as provided for in Regulation No 1698/2005.
- 53 By contrast, it must be held that the concept of ‘measure’, within the meaning of Article 2(d) of Regulation No 1698/2005, inasmuch as it corresponds to ‘a set of operations contributing to the implementation of an axis’ should be considered to be an abstract category of operations which it is open to the Member States to select in their development programme in order to pursue achievement of one of the four axes mentioned by Regulation No 1698/2005. Thus, land consolidation is a measure when it refers to the general action of rationalising the use of agricultural land. The same is true of village renewal when it refers to the general action of improving the living environment in rural areas. Conversely, as soon as a land consolidation or renewal of a village is part of an identifiable action, linked in particular to a geographical location or an identified community of individuals, it must be deemed an operation.
- 54 Given the immediate and direct effect of Regulation No 1698/2005, that qualification has the effect of requiring selection criteria, irrespective of the stage in which the operation takes place in the light of national legislation. Coming to the opposite conclusion would be tantamount to calling into question the principle of autonomous and uniform interpretation of the concepts of European Union law.
- 55 The Federal Republic of Germany therefore errs in stating that the land consolidation and village renewal in Bavaria constitute a specific situation which would not allow the application of the selection criteria in their first two stages owing to the lack of specific projects or beneficiary communities.
- 56 The Federal Republic of Germany also accepts the possibility of applying selection criteria to the two initial stages of the land consolidation and village renewal operations in Bavaria since, as from the decision of 22 December 2008, it amended the selection criteria for the projects initially included in the BayZal, with the aim of applying those criteria, at that point, to the first and second stages even though those criteria were considered unsuitable by the Commission. In addition, the document produced as an annex by the Commission from the authorities of the Regierungsbezirk der Oberpfalz (Upper Palatinate District, Germany), entitled ‘Work programme 2003 District of Upper Palatinate and the Rural Development Directorate of Regensburg — Calendar 2003’, shows that the local authorities ranked the requests for land consolidation or village renewal projects in order to divide them into four groups, which would be the subject of a land consolidation decision at some stage in the future. As the Commission points out, the earliest applications were registered as early as 1985, and the scale of the

number of pending applications suggests that they would not all benefit from financing, because of a failure to complete registration in the work programme of the locally competent rural development office.

- 57 Those findings provide a basis for the rejection of the German authorities' objections to the complaint raised by the Commission, which appears to be well founded, according to which, during the first two stages of the land consolidation and village renewal in force in Bavaria, the competent authorities actually carry out a pre-selection of projects intended to benefit from EAFRD financing, but decide to initiate the third stage on the basis of non-transparent criteria, which, moreover, conflicts with the principle of equal treatment which entities and individuals seeking to benefit from EAFRD financing may legitimately rely on. This situation, which existed before that decision of 22 December 2008 was reached, persisted after that decision was made.
- 58 As the Federal Republic of Germany admits in paragraph 54 of the reply, although checklist A was introduced in the framework of the 2008 decision in order to improve the documentation for the preparatory work required for the adoption of the decision to initiate a procedure for land consolidation or village renewal, it does not contain selection criteria within the meaning of Article 71(2) of Regulation No 1698/2005 in so far as the German authorities consider in any event, that, at this stage, even if they decide to register an operation under the framework of the BayZal's work programme, there still would be no beneficiary of the aid and it would not be possible to submit requests for financing for specific projects.
- 59 The Court must also reject the German authorities' claim that there was a failure to state reasons with regard to the Commission's complaint relating to the unlawful pre-selection of applications for financing. In the particular context of the preparation of decisions relating to the clearance of the CAP's accounts, the statement of reasons for a decision must be regarded as sufficient if the Member State to which the decision was addressed was sufficiently involved in the process by which the decision came about and was aware of the reasons for which the Commission took the view that it must not charge the sum in dispute to the EAGF or the EAFRD (see, to that effect, judgment of 13 December 1990, *Netherlands v Commission*, C-22/89, EU:C:1990:471, paragraph 18). The German authorities participated in the conciliation procedure under Article 16 of Regulation No 885/2006, prior to the adoption of the contested decision, in such a way that they were closely involved in the process by which that decision came about and that they were aware of the reasons why the Commission did not consider that it had to charge the contested sums to the EAFRD because of an illegal selection of the projects during the first two stages of the procedure of land consolidation and village renewal as implemented in Bavaria.
- 60 Finally, as regards the Federal Republic of Germany's argument that the Commission lays down excessive requirements with regard to the selection criteria themselves, it is necessary to note the following.
- 61 It must be recalled that, according to settled case-law, when the wording of secondary European Union law relating to the CAP is open to more than one interpretation, preference should be given to the interpretation which renders the provision consistent with the Treaty (see judgment of 13 April 2011, *Germany v Commission*, T-576/08, EU:T:2011:166, paragraph 103 and the case-law cited).
- 62 In the present case, it is clear from Article 71(2) of Regulation No 1698/2005, read in conjunction with Article 2(c) of the same regulation, that the expenditure incurred in respect of operations such as land consolidation or village renewal must be carried out according to selection criteria. As is clear from Article 73 of Regulation No 1698/2005, it is for the Commission, in the context of shared management between the EU institutions and the Member States, to ensure sound financial management in accordance with Article 274 EC, the provisions of which are now contained in Article 317 TFEU.

- 63 While the principle of sound financial management should not be reduced to a purely accounting definition, it implies that budgetary appropriations should be used in accordance with the principles of economy, efficiency and effectiveness, since that latter principle is intended to ensure the best ratio between the means employed and the results obtained, as is clear from Article 28a of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1), as amended, and Article 30 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)
- 64 Compliance with those principles requires that the selection criteria chosen should make it possible to finance, as a matter of priority, the operations which best meet the objectives of rural development as they result from the four axes mentioned in Regulation 1698/2005.
- 65 It is therefore necessary to ensure that the criteria used make it possible to identify, from among all the operations for which EAFRD financing is requested, those most likely to achieve the objectives of the CAP through Regulation No 1698/2005.
- 66 In this context, in view of the cooperation between the European Union and the Member States, although the list of selection criteria can be freely determined by the German authorities, without necessarily having a system of scoring or ranking of the operations, it must nevertheless make it possible to determine those which, as a matter of priority, must benefit from EAFRD support on the basis of their merits.
- 67 The Court must therefore examine whether the selection procedures applied by the German authorities are in conformity with those requirements.
- 68 In that context, as the Commission rightly points out, the eligibility criteria for the operations must be distinguished from the selection criteria.
- 69 At most, the eligibility criteria make it possible to establish that the operations fulfil the essential conditions in order to benefit from EAFRD financing, such as being broadly in line with the CAP objectives as reproduced in the BayZal, but do not make it possible to identify the operations which should be given priority for funding, according to their merits.
- 70 The selection criteria of the German authorities to be examined are, first, those introduced in December 2008 following the first inspection by the Commission and included in checklist C and, second, those made in December 2012 and included in checklists A and B.
- 71 Checklist C, entitled 'Criteria for applying for one or more financial measure(s) by the EAGF', corresponds to the checklist which had been drawn up in December 2008 by the German authorities.
- 72 It is composed of three tables, the first of which, entitled 'Correspondence with the objectives of the BayZal', contains a list of questions allowing verification that the operation in question is in line with the objectives of the BayZal. The second table which concerns the 'selection criteria common to all measure codes' is intended to verify that the basic conditions for receiving a subsidy are met, in particular with regard to reliability and performance of the project holder, the certainty of the financing, the assurance that the operation is carried out in an eligible region, during the programming period and is not doubly subsidised. The third table, entitled 'selection criteria specific to the different measure codes', refers to five criteria, serving as a summary, such as the inclusion of the operation in the work programme, at least two of which must be fulfilled in order for an operation to be eligible under the EAFRD.

- 73 Although the criteria in checklist C make it possible to determine whether an operation is eligible, they do not, by contrast, contain factors which make it possible to carry out an evaluation comparing an operation with other projects which themselves are eligible. In these circumstances, they do not comply with the requirements of Regulation No 1698/2005.
- 74 Checklist A is entitled 'Criteria for the inclusion of a procedure/operation in the work programme' and consists of four tables entitled 'Development of rural areas (strategy)', 'Regional Synergies', 'Communal involvement and current performance of the administration in the municipality' and 'Compliance with the objectives of rural development'.
- 75 These four tables set out a number of criteria which must be checked to see if they are met in order to decide whether a request for a land consolidation procedure should be included in the work programme. As the Commission observes, there is no relationship between the criteria, the number of 'yes' or 'no' replies and the overall assessment that the procedure corresponding to a land consolidation operation or village renewal operation may be included in the work programme of the competent rural development office.
- 76 Checklist A, although it allows the theoretical eligibility of an operation to be checked, does not allow any comparison to be made and does not satisfy the requirements of Regulation No 1698/2005 either.
- 77 Checklist B, entitled 'Criteria for the introduction of a procedure/operation', allows it to be determined whether there are grounds to take a formal decision to initiate a land consolidation procedure according to the legislation in force in Bavaria.
- 78 It contains only six formal criteria for determining whether a procedure can be initiated, such as the criterion of the actual inclusion of the procedure or operation in the work programme. However, these criteria relate to the possible eligibility for EAFRD financing, but clearly do not enable comparison with other operations.
- 79 As regards the German authorities' argument that, in the light of Document No VI/10535/99, which the Commission referred to in its letter of 11 May 2009, the selection of the operations is merely 'possible', so that it is not mandatory, it must be stated that the guidelines set out in Document No VI/10535/99 relate to the previous programming period (2000 to 2006) and that the optional nature of the selection was not reproduced in Regulation No 1698/2005.
- 80 It is therefore not possible to rely on Document No VI/10535/99 in order to oppose the application of the mandatory provisions of Regulation No 1698/2005. Furthermore, it should be noted that, in the Commission's letter of 11 May 2009, Document No IV/10535/99 was mentioned with reference to the detailed rules for the implementation of the selection criteria and not as regards the option of whether or not to implement them.
- 81 It follows from all of the foregoing that the Commission did not err in finding, first, that Article 71(2) of Regulation No 1698/2005 imposed criteria allowing a comparative selection of operations and, second, that the criteria applied in Bavaria did not meet this requirement.
- 82 It must also be pointed out that, although the German authorities only refer to an infringement of Regulation No 1698/2005, which concerns the 2007 to 2013 programming period, the obligation to select land consolidation and village renewal operations was maintained for the 2014 to 2020 programming period, as is clear from Article 49 of Regulation No 1305/2013. Since the Federal Republic of Germany has failed to demonstrate that, as regards 2014, the Commission erred in requiring the application of comparative selection criteria, no criticism can be made of the contested decision in that respect.
- 83 In the light of all the foregoing analysis, the first plea must be rejected.

The second plea, alleging infringement of the partnership principle set out in Article 6 of Regulation No 1698/2005, the principle of sincere cooperation as set out in the first subparagraph of Article 4(3) TEU, and the principle of the protection of legitimate expectations

- 84 The Federal Republic of Germany submits that by adopting the contested decision the Commission infringed the partnership principle and the obligation of reciprocal loyalty between the European Union and the Member States under Article 6(1) and (3) of Regulation No 1698/2005 and the first subparagraph of Article 4(3) TEU.
- 85 In the first place, the Federal Republic of Germany submits that, by decision of 5 September 2007, the Commission approved the BayZal. The latter sets out precisely the procedure in Bavaria for land consolidation and village renewal, in particular the different stages of the procedure and its duration, which could extend over several years, and the need also to finance operations or projects decided before the start of the programming period in 2007 which were already in the implementation stage.
- 86 Germany argues that the decision of 5 September 2007, in so far as it was preceded by a nine month consultation stage, enabled the Commission to discern all the relevant aspects of the procedure in Bavaria, which meant that it could not call into question how the German authorities acted. Finally, it was up to the Commission to adopt a decision amending the decision of 5 September 2007 if it considered it necessary for the German authorities to adopt a different practice, and the Commission did not do so.
- 87 In the second place, the Monitoring Committee met several times from November 2007 in the presence of representatives of the Commission. Following the Commission's opposition to the approach initially envisaged, additional selection criteria were laid down. The Commission's representatives did not express any misgivings about these criteria or raise any objections to the fact that, because there were sufficient financial resources, it was not necessary to rank the operations.
- 88 The German authorities, claiming that they relied on the expectations which the Commission had created both by the validation of the BayZal and by the attitude of its representatives present at the meeting of the Monitoring Committee, allege infringement of the principle of protection of legitimate expectations.
- 89 In the reply, the German authorities also claim, in the alternative, that the Commission was jointly responsible for any infringement of Regulation No 1698/2005, which should in any event limit the amount of the financial correction.
- 90 The Commission contends that the second plea must be rejected on the ground that EU secondary legislation, in this case Regulation No 1698/2005, prevails over the provisions of the BayZal. It submits that, although it did in fact approve the BayZal, that does not preclude the application of a comparative selection of the operations in question by the German authorities.
- 91 Furthermore, it states that, although its representatives participated in the work of the Monitoring Committee, their participation was in an advisory capacity, as provided for in the third subparagraph of Article 77(2) of the Regulation No 1698/2005. In these circumstances, the Commission dismisses any suggestion that it approved the approach called for by the German authorities which excludes the implementation of comparative selection criteria. It refers in particular to the letter which it sent to the German authorities on 11 May 2009, in which it made clear mention of the need for the implementation of such criteria.
- 92 It must be recalled that the first paragraph of Article 4(3) TEU provides that pursuant to the principle of sincere cooperation, the European Union and the Member States are, in full mutual respect, to assist each other in carrying out tasks which flow from the Treaties. In addition, according to Article 6(1) of Regulation No 1698/2005, 'EAFRD assistance shall be implemented through close consultations ...

between the Commission and the Member State and with the authorities and bodies designated by the Member State under national rules and practices’, it being specified that, according to paragraph 3 of that article, the ‘partnership shall be involved in the preparation and monitoring of the national strategy plan and in the preparation, implementation, monitoring and evaluation of the rural development programmes’.

- 93 According to the Court’s settled case-law, the principle of the protection of legitimate expectations is among the fundamental principles of EU law. The right to rely on that principle extends to any person with regard to whom an institution of the European Union has given rise to justified hopes (see judgment of 14 March 2013, *Agrargenossenschaft Neuzelle*, C-545/11, EU:C:2013:169, paragraph 23 and 24 and the case-law cited).
- 94 In whatever form it is given, information which is precise, unconditional and consistent and comes from authorised and reliable sources constitutes assurances capable of giving rise to such hopes. However, a person may not plead a breach of that principle unless he has been given precise assurances by the administration (judgment of 14 March 2013, *Agrargenossenschaft Neuzelle*, C-545/11, EU:C:2013:169, paragraph 25).
- 95 In the present case, it must first be pointed out that, as the Commission argues, the fact that the BayZal did not provide that the granting of EAFRD support was to be conditional on the implementation of comparative selection criteria between potentially eligible operations has no bearing on the interpretation of Article 71(2) of Regulation No 1698/2005, as set out in paragraphs 65 and 66 above, according to which the implementation of such criteria was mandatory (see, by analogy, judgment of 7 July 2016, *Poland v Commission*, C-210/15 P, not published, EU:C:2016:529, paragraph 43).
- 96 Since that interpretation is binding on both the German authorities and the Commission, this means that, first, the drawing up and, second, the implementation, of comparative selection criteria was mandatory.
- 97 Consequently, the BayZal’s approval by the Commission could not have resulted in the Commission waiving the requirement for comparative selection criteria, which in any event would have resulted in its exceeding its powers. Consequently, the Federal Republic of Germany is mistaken as to the scope of the approval of the BayZal.
- 98 In any event, it was also not for the Commission to adopt a decision amending its decision of 5 September 2007. The provisions of the BayZal and those of the national regulations issued by FlurbG and the Law for the enforcement of the land consolidation law are indeed compatible with the implementation of comparative selection criteria. However, the failure of the German authorities lies in the failure to draw up and implement such criteria.
- 99 In the second place, it must also be pointed out that, pursuant to the third subparagraph of Article 77(2) of Regulation No 1698/2005, the participation of the Commission services in the Monitoring Committee was of an advisory nature, so that it is not appropriate to allege that those services adopted a firm position in that context. Moreover, it appears that, after the amendments introduced in December 2008, they disagreed clearly about the lack of comparative selection criteria. This is apparent in particular from the letter which the Commission sent to the German authorities on 11 May 2009 and which, in its annex, point 2.2.2, under the heading ‘New checklist “Selection criteria in rural development”’, raises doubts as to the methods of comparing new projects with those introduced before 2009, together with a request to the German authorities to clarify further the selection methods of such projects.

100 The Federal Republic of Germany is therefore wrong to claim a breach of the principle of partnership and the duty of loyalty and an alleged shared responsibility on the part of the Commission. Furthermore it cannot rely on precise, unconditional and concordant information from the Commission services to the effect that the selection system as it existed was satisfactory. The argument alleging infringement of the principle of the protection of legitimate expectations must therefore also be rejected.

101 In the light of the foregoing analysis, the second plea must be rejected.

The third plea, alleging infringement of the principle of subsidiarity as set out in Article 5 of the TEU

102 In the third plea, the Federal Republic of Germany submits that, by its wide interpretation of Regulation No 1698/2005, which requires the application of selection criteria to the various stages of the land consolidation and village renewal procedure in force in Bavaria, the Commission disregards the principle of subsidiarity by encroaching on the procedural autonomy of the Member States and the municipalities in the field of spatial planning. This is a field which is better managed by the Member States and, where appropriate, regional and local actors, the organisation of which enjoys constitutional protection in Germany.

103 The Commission is allegedly seeking to reduce the three stages of the land consolidation and village renewal in Bavaria to a single one, which would undoubtedly have a negative effect on citizen participation and would result in poorly prepared projects being taken into account, which would entail additional costs.

104 In that context the Federal Republic of Germany reiterates its argument that Regulation No 1698/2005 requires selection criteria only in respect of operations which have been identified at the third stage.

105 The Commission contends that the third plea must be rejected on the ground that national rules cannot invalidate the directly applicable rules of EU law, even in the light of the principle of subsidiarity.

106 In any event, it disputes that it wishes to take control of the procedure in force in Bavaria which, in its view, can be perfectly reconciled with the obligation to apply selection criteria. It states that, if the German authorities consider it impossible to do so, they also have the possibility of opting for other measures from the axis concerned as defined in Regulation No 1698/2005.

107 It is appropriate to recall that, in accordance with the principle of subsidiarity, enshrined in the third paragraph of Article 5 TEU, the European Union, in areas which do not fall within its exclusive competence, is to take action only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can, by reason of the scale or effects of the proposed action, be better achieved by the European Union (judgment of 17 June 2009, *Portugal v Commission*, T-50/07, not published, EU:T:2009:206, paragraph 105).

108 In the present case, the need to take account of the principle of subsidiarity appears in particular in recital 61 of Regulation No 1698/2005, according to which '[i]n accordance with the principle of subsidiarity and subject to exceptions, there should be national rules on the eligibility of expenditure', and which is supplemented by recital 63 of the same regulation which provides that '[d]ecentralised implementation of the actions under the EAFRD should be accompanied by guarantees relating in particular to the quality of implementation, the results, sound financial management and control'.

- 109 In this respect, the Commission, in its capacity as the entity responsible for the implementation of the EU budget, must, on the one hand verify the conditions under which the financing has been paid and the checks have been made and, on the other hand, finance expenditure only where those conditions offer all necessary guarantees regarding compliance with EU rules (see, by analogy, *Portugal v Commission*, T-50/07, not published, EU:T:2009:206, paragraph 106).
- 110 Although the division of roles between the Commission and the German authorities results in the latter being entrusted with drawing up the relevant national rules governing the eligibility of expenditure, in so far as Regulation No 1698/2005 in particular refers to national implementing measures on this point, the fact remains that the Commission is required to verify whether the German authorities actually fulfil their obligations in this area, without this however conferring on the Commission any power to impose particular rules on national legislation relative to the land consolidation and village renewal procedure.
- 111 As the Commission submits, the obligations of the Member States under Article 71(2) of Regulation No 1698/2005 consist in implementing selection criteria enabling a comparative selection to be made of the operations concerned, which appears to be an objective which can be achieved without undermining the national or even regional legislation governing the land consolidation and village renewal procedure.
- 112 The Federal Republic of Germany cannot therefore invoke a breach of the principle of subsidiarity since it has failed to demonstrate that, by requiring compliance with the provisions of Article 71(2) of Regulation No 1698/2005, the Commission is encroaching on its field of competence resulting from the application of the principle of subsidiarity.
- 113 Having regard to the foregoing analysis, the third plea must be rejected.

The fourth plea, alleging infringement of Article 52(2) of Regulation No 1306/2013, Article 31(2) of Regulation No 1290/2005 and the principle of proportionality, and a failure to state reasons

- 114 The Federal Republic of Germany, which reiterates, in connection with the fourth plea, its claim that it did not infringe Regulation No 1698/2005, submits, in the alternative, that, by imposing a flat-rate correction of 10%, the Commission has in any event misjudged the nature and limited scope of the infringement, by disregarding the fact that the European Union had not suffered, or even been at risk of suffering, financial harm.
- 115 The Commission, by referring to the guidelines for the application of the financial corrections as set out in Document No VI/5330/97 of 23 December 1997, entitled 'Guidelines for the calculation of financial consequences when preparing the decision regarding the clearance of the accounts of EAGGF Guarantee', incorrectly considered that a key control had been violated.
- 116 In all the operations in respect of which applications for EAFRD financing were sought, the conditions for eligibility as laid down in Regulation No 1698/2005 were satisfied, which was, moreover, accepted by the Conciliation Body, the projects were in line with the EAFRD objectives and sufficient financial resources were also available. In addition, the selection criteria are not covered by the definition of key controls as set out in Document VI/5330/97.
- 117 The 10% correction may be imposed only where it is absolutely impossible to assess whether the operations in question are eligible and not in cases where there are alleged weaknesses in the selection of the best projects from among all the eligible operations.

- 118 The 10% correction also constitutes a breach of Article 52(2) of Regulation No 1306/2013 and Article 31(2) of Regulation No 1290/2005 in that the Commission did not take due account of the nature of the infringement, since it treated weaknesses in the assessment of the eligibility of expenditure in the same way as it treated weaknesses in the selection procedure.
- 119 The failure to state reasons results from the Commission failing to set out, within the meaning of its guidelines, what constitutes breach of the key controls in the light of the selection criteria.
- 120 In the reply, the Federal Republic of Germany states that, during the written stage of the proceedings before the Court, the Commission provided an *ex post facto* justification concerning the application of the 10% correction rate, explaining that a financial correction capped at 5% had been applied to other Member States for shortcomings of the same nature, but that was because those Member States applied a point system for classifying operations. Aside from the fact that this statement of reasons is out of time, it is based on a ground at odds with the fact that Regulation No 1698/2005 does not impose a points system for classifying operations.
- 121 Lastly, the Federal Republic of Germany rejects the Commission's assertion that it failed even to ensure, through administrative checks, the implementation of a proper selection since, on the contrary, it carried out and documented checks in respect of each operation.
- 122 The Commission states that, pursuant to Commission Regulation (EU) No 65/2011 of 27 January 2011 laying down detailed rules for the implementation of Regulation No 1698/2005, as regards the implementation of control procedures as well as cross-compliance in respect of rural development support measures (OJ 2011 L 25, p. 8), administrative checks must be carried out in the context of the selection of operations. The selection of operations does not consist merely of completing checklists A, B and C and verifying that expenses are eligible because they are part of the BayZal, but rather seeks to ensure that potentially eligible operations were selected properly.
- 123 According to the Commission, the central process whereby the local administration is supposed to decide whether or not to grant an operation for EAFRD financing has thus not been checked since checklists A, B and C do not ensure any comparative assessment of the projects. The subsidised operations tally, overall, with expenditure satisfying the eligibility criteria, so that the risk incurred by the EAFRD is not 100%. However, the lack of comparative selection creates an increased risk and is a failure of a key control which justifies the application of a 10% correction rate.
- 124 The Commission also states, as regards the plea of failure to state reasons relied on by the Federal Republic of Germany, that the 10% rate was applied because there was no selection of operations in accordance with the rules, in contrast with the case of the Member States subject to a correction at the 5% rate, and not because of the failure to use a point-based rating system. The Federal Republic of Germany was regularly informed of this situation by correspondence exchanged during the administrative procedure and in the summary report, with the result that it was informed of the reasons for the application of a 10% rate.
- 125 As regards the financial corrections for EAFRD, Article 31(2) of Regulation No 1290/2005 provides that the Commission is to assess the amounts to be excluded on the basis of the gravity of the non-conformity recorded. The Commission is to take due account of the nature and gravity of the infringement and of the financial damage caused to the European Union (judgment of 26 February 2015, *Lithuania v Commission*, T-365/13, EU:T:2015:113, paragraph 52, not published).
- 126 Document No VI/5330/97 sets out, in Annex 2, the financial consequences of the shortcomings in the checks carried out by the Member States. Where the information resulting from the enquiry does not permit the evaluation, by an extrapolation of determined losses, by statistical means or by reference to other verifiable data, of the losses sustained by the European Union as a result of a control deficiency, a

financial correction calculated on a flat-rate basis, depending on the extent of the risk of loss, may be envisaged (judgment of 26 February 2015, *Lithuania v Commission*, T-365/13, EU:T:2015:113, paragraph 53, not published).

- 127 In Document No VI/5330/97, when determining the degree of risk of loss for EU funds, the Commission classifies controls into two categories. Key controls are those physical and administrative checks required to verify substantive elements, in particular the existence of the subject of the claim, the quantity, and the qualitative conditions including the observance of time limits, harvesting requirements, etc. They are performed on the spot and by cross-checks to independent data such as land registers. Ancillary controls are those administrative operations required correctly to process claims, such as verification of the observance of time limits for their submission, identification of duplicate claims for the same subject, risk analysis, application of sanctions and appropriate supervision of the procedures (judgment of 26 February 2015, *Lithuania v Commission*, T-365/13, EU:T:2015:113, paragraph 54, not published).
- 128 For the purposes of calculating ineligible expenditure, Document No VI/5330/97 sets out four categories of flat-rate corrections:
- 25% of expenditure, where implementation of the checking system has been non-existent or seriously inadequate and there are indications of very frequent irregularities and negligence in combating irregular or fraudulent practices, and, consequently, there is a risk of particularly high losses to the EAGF;
 - 10% of expenditure, when one or more key controls are not applied or are applied so poorly or so infrequently that they are ineffective in determining whether claims are eligible or preventing irregularities, and it can reasonably be concluded that there is a high risk of wide-spread loss to the EAGF;
 - 5% of expenditure, when all key controls are applied, but not in the number, frequency or depth required by the legislation, and it can reasonably be concluded both that they do not provide the expected degree of assurance that claims are regular and that the risk of loss to the EAGF is significant;
 - 2% of expenditure, when a Member State has adequately performed the key controls but completely failed to carry out one or more ancillary controls, and, as a consequence, there is less risk of loss to the EAGF and the infringement is less serious.
- 129 In the present case, it is clear from the conclusions of the summary report that the Commission considered that the selection of the operations remained non-transparent, thus placing the EAFRD at risk and, therefore, a flat-rate correction of 10% had to be applied.
- 130 As the Commission submits, the non-transparent nature of the selection does not relate to the fact that the German authorities did not use a particular system of evaluation criteria including a rating system but, more fundamentally, to the failure to implement comparative selection criteria as required by Article 71(2) of Regulation No 1698/2005, as was demonstrated in connection with the examination of the first plea, with the result that the German authorities have failed to fulfil one of their fundamental obligations under that provision.
- 131 Pursuant to Article 31(2) of Regulation No 1290/2005, it was for the Commission to draw inferences from the failure to fulfil obligations found in assessing the amounts to be set having regard, in particular, to the extent of the non-compliance, taking into account the nature and gravity of the infringement and the financial damage suffered by the European Union.

- 132 The failure to fulfil obligations identified, in so far as it prevented the German authorities from determining the eligibility of applications for financing under the conditions laid down in Article 71(2) of Regulation No 1698/2005, must consequently be regarded as a failure affecting a key control which may reasonably be considered to entail a high risk of significant losses for the EAFRD. The claim of the availability of sufficient financial resources for all the operations is materially inaccurate if the entirety of the requests for projects for land consolidation and village renewal are taken into consideration, in particular those for which registration in the work programme of the locally competent rural development office has not been completed. The failure of the German authorities also entails a risk of allocating EU resources to operations which do not have the necessary merits, so that the argument of the Federal Republic of Germany that the European Union would not have suffered or even been at risk of financial harm because of the availability of sufficient financial resources must in any event be regarded as ineffective.
- 133 It appears that, in the context of an abstract assessment of the risk incurred in relation to the indeterminate number of individual cases concerned and their circumstances, the flat-rate amount applied as regards the ineligible expenditure, having regard to the recommendations contained in Document No VI/5330/97, was correctly assessed at 10%.
- 134 By upholding that rate, contrary to what the German authorities contend, the Commission therefore infringed neither the provisions of Article 52(2) of Regulation No 1306/2013 nor those of Article 31(2) of Regulation No 1290/2005, nor the principle of proportionality.
- 135 As regards the alleged breach of the obligation to state reasons, it must be recalled that, in so far as the German authorities participated in the conciliation procedure under Article 16 of Regulation No 885/2006, prior to the adoption of the contested decision, it appears that they were closely involved in the process of drafting that decision. They were therefore aware of the reasons for which the Commission considered it necessary to apply a flat rate of 10%.
- 136 The reference to the 5% correction rate adopted in respect of certain Member States does not therefore appear to be a statement of reasons provided *ex post facto* by the Commission to justify the application of a 10% rate. The arguments of the Federal Republic of Germany in this regard must therefore be rejected.
- 137 In the light of the foregoing analysis, the fourth plea must be rejected and, therefore, the action must be dismissed in its entirety.

Costs

- 138 Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.
- 139 Since the Federal Republic of Germany has been unsuccessful, and the Commission has applied for costs, the applicant must be ordered to pay the costs.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby:

- 1. Dismisses the action;**
- 2. Orders the Federal Republic of Germany to pay the costs.**

Prek

Schalin

Costeira

Delivered in open court in Luxembourg on 3 April 2017.

[Signatures]