



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

5 July 2018*

(EAFRD — Last execution year of 2007-2013 programming period — Clearance of accounts of Member States' paying agencies — Decision declaring a certain amount non-reusable in the rural development programme of the Autonomous Community of Extremadura — Calculation method — Article 69(5b) of Regulation (EC) No 1698/2005 — Legitimate expectations)

In Case T-88/17,

Kingdom of Spain, represented by M.A. Sampol Pucurull and M.J. García-Valdecasas Dorrego, acting as Agents,

applicant,

v

European Commission, represented by J. Aquilina and M. Morales Puerta, acting as Agents,

defendant,

APPLICATION on the basis of Article 263 TFEU seeking the annulment in part of Commission Implementing Decision (EU) 2016/2113 of 30 November 2016 on the clearance of accounts of the paying agencies of Member States concerning expenditure financed by the European Agricultural Fund for Rural Development (EAFRD) in the last execution year of EAFRD 2007-2013 programming period (16 October 2014-31 December 2015) (OJ 2016 L 327, p. 79), by which the Commission classified an amount of EUR 5 364 682.52 as a 'non-reusable amount' in the clearance of the accounts of the Extremadura paying agency,

GENERAL COURT (Eighth Chamber),

composed of A.M. Collins, President, M. Kancheva and G. De Baere (Rapporteur), Judges,

Registrar: E. Coulon,

gives the following

* Language of the case: Spanish.

Judgment

Legal framework

Regulations (EC) No 1290/2005 and (EU) No 1306/2013

- 1 Council Regulation (EC) No 1290/2005 of 21 June 2005 on the financing of the common agricultural policy (OJ 2005 L 209, p. 1), was the basic regulation for the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD), which were created pursuant to that regulation.
- 2 Regulation No 1290/2005 was repealed by Regulation (EU) No 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EEC) No 352/78, (EC) No 165/94, (EC) No 2799/98, (EC) No 814/2000, No 1290/2005 and (EC) No 485/2008 (OJ 2013 L 347, p. 549).
- 3 Articles 23 and 29 of Regulation No 1290/2005, relating to budget commitments and automatic decommitment respectively, continued to apply to the facts of the present case which arose before the entry into force, on 20 December 2013, of Regulation No 1306/2013.
- 4 Articles 37 and 51 of Regulation No 1306/2013, relating to payment of the balance and closure of the programme, and clearance of accounts respectively, were applicable when the decision which is the subject of the action was adopted, given that, under Article 121 of that regulation, the majority of its provisions apply from 1 January 2014.
- 5 The first and second paragraphs of Article 23 of Regulation No 1290/2005 provided:

‘The Community’s budget commitments for rural development programmes ... shall be made in annual instalments over the period from 1 January 2007 to 31 December 2013.

The Commission decision adopting each rural development programme submitted by a Member State shall constitute ..., once notified to the Member State concerned, a legal commitment ...’
- 6 Article 29 of Regulation No 1290/2005, headed ‘Automatic decommitment’, provided in paragraphs 1 and 7:

‘1. The Commission shall automatically decommit any portion of a budget commitment for a rural development programme that has not been used for the purpose of prefinancing or making intermediate payments or for which no declaration of expenditure meeting the conditions laid down ... has been presented to it in relation to expenditure incurred by 31 December of the second year following that of the budget commitment.

...
7. In the event of automatic decommitment, the EAFRD contribution to the rural development programme concerned shall be reduced, for the year in question, by the amount automatically decommitted. The Member State shall produce a revised financing plan splitting the reduction of the aid between the priorities. ...’

- 7 Article 37 of Regulation No 1306/2013, headed ‘Payment of the balance and closure of the programme’, provides in paragraph 1:

‘After receiving the last annual progress report on the implementation of a rural development programme, the Commission shall pay the balance, subject to the availability of resources, on the basis of the financial plan in force, the annual accounts for the last execution year for the relevant rural development programme and of the corresponding clearance decision. Those accounts shall be presented to the Commission no later than six months after the final eligibility date of expenditure ... and shall cover the expenditure effected by the paying agency up to the last eligibility date of expenditure.’

- 8 Article 51 of Regulation No 1306/2013, headed ‘Clearance of accounts’, provides in the first paragraph:

‘Prior to 31 May of the year following the budget year in question and on the basis of the information transmitted in accordance with point (c) of Article 102(1), the Commission shall adopt implementing acts, containing its decision on the clearance of the accounts of the accredited paying agencies. Those implementing acts shall cover the completeness, accuracy and veracity of the annual accounts submitted ...’

Regulation (EC) No 1698/2005, as amended by Regulations (EC) No 74/2009 and (EC) No 473/2009

- 9 Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the EAFRD (OJ 2005 L 277, p. 1), laid down the general rules for Community support for rural development financed by the EAFRD.

- 10 Regulation No 1698/2005 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 (OJ 2013 L 347, p. 487). However, in accordance with Article 88 of Regulation No 1305/2013, Regulation No 1698/2005 shall continue to apply to operations implemented pursuant to programmes approved by the European Commission under Regulation No 1698/2005 before 1 January 2014, which is the situation in the present case.

- 11 Under Article 15 of Regulation No 1698/2005, each rural development programme implemented a rural development strategy through a set of measures grouped together in various axes. It was to cover a period between 1 January 2007 and 31 December 2013. A Member State could submit either a single programme for its entire territory or a set of regional programmes. Under Article 19 of that regulation, the programmes were to be re-examined and, if appropriate, adapted by Member States for the remainder of the period following Monitoring Committee approval. The revisions were to take into account the outcome of the evaluations and the Commission’s reports, particularly to strengthen or adapt the way in which the Community priorities were taken into account.

- 12 Article 69 of Regulation No 1698/2005, headed ‘Resources and their distribution’, provided in paragraph 1:

‘The amount for Community support to rural development under this Regulation for the period from 1 January 2007 to 31 December 2013, its annual breakdown and the minimum amount to be concentrated in regions eligible under the Convergence Objective shall be fixed by the Council, acting by a qualified majority on a proposal from the Commission, in accordance with the financial perspective for the period 2007 to 2013 and the Interinstitutional Agreement on budgetary discipline and improvement of the budgetary procedure for the same period.’

13 Article 70(1) of Regulation No 1698/2005 provided that the decision adopting a rural development programme was to set the maximum contribution from the EAFRD for each axis within a flexibility threshold and was to clearly identify, where necessary, the appropriations allocated to the regions eligible under the Convergence Objective. Article 70(2) added that the EAFRD contribution was to be calculated on the basis of the amount of eligible public expenditure.

14 On 19 January 2009, the Council of the European Union adopted Regulation (EC) No 74/2009, amending Regulation No 1698/2005 (OJ 2009 L 30, p. 100).

15 Regulation No 74/2009 inserted Article 16a into Regulation No 1698/2005. Article 16a(1)(a) to (f) of Regulation No 1698/2005 laid down certain priorities ('the new challenges') on which Member States were required to focus in their rural development programmes.

16 Article 16a of Regulation No 1698/2005 was amended by Council Regulation (EC) No 473/2009 of 25 May 2009 amending Regulation No 1698/2005 and Regulation No 1290/2005 (OJ 2009 L 144, p. 3), by the addition of a further priority, laid down in point (g) of that article.

17 Article 16a(1) of Regulation No 1698/2005, as amended, provided:

'By 31 December 2009, Member States shall provide in their rural development programmes, in accordance with their specific needs, for types of operations having the following priorities as described in the Community strategic guidelines and specified further in the national strategy plans:

- (a) climate change;
- (b) renewable energies;
- (c) water management;
- (d) biodiversity;
- (e) measures accompanying restructuring of the dairy sector;
- (f) innovation linked to the priorities mentioned in points (a) to (d);
- (g) broadband internet infrastructure in rural areas.

...'

18 Following the establishment of the new challenges and with a view to additional funds being made available to Member States to allow them to focus on the priorities at issue in their rural development programmes, Article 69 of Regulation No 1698/2005 was amended. Regulation No 74/2009 *inter alia* added paragraphs 5a and 5b to that article and Regulation No 473/2009 added paragraph 2a to that article and amended paragraphs 5a and 5b of that article.

19 Article 69(2a) of Regulation No 1698/2005 provided:

'The part of the amount referred to in paragraph 1 resulting from the increase of the global commitments as laid down by Council Decision 2006/493/EC of 19 June 2006 laying down the amount of Community support for rural development for the period from 1 January 2007 to 31 December 2013, its annual breakdown and the minimum amount to be concentrated in regions eligible under the Convergence Objective [(OJ 2006 L 195, p. 22)], as amended by Council Decision 2009/434/EC shall be devoted to types of operations related to priorities laid down in Article 16a(1) of this Regulation.'

- 20 The first and fourth subparagraphs of Article 69(5a) of Regulation No 1698/2005, as amended, provided:

‘An amount equal to the amounts resulting from the application of the compulsory modulation under Article 9(4) and Article 10(3) of Regulation (EC) No 73/2009 together with, as from 2011, the amounts generated under Article 136 of that Regulation shall be exclusively spent by Member States in the period from 1 January 2010 to 31 December 2015 as Community support under the current rural development programmes for operations of the types referred to in points (a) to (f) of Article 16a(1) of this Regulation.

The Member States’ share of the amount referred to in paragraph 2a shall be exclusively spent by Member States in the period from 1 January 2009 to 31 December 2015 as Community support under the current rural development programmes for operations of the types referred to in Article 16a(1).’

- 21 Article 69(5b) of Regulation No 1698/2005 provided:

‘If, at the closure of the programme, the actual amount of Community contribution spent on the operations referred to in Article 16a(1) is lower than the total of the amounts referred to in paragraph 5a of this Article, the difference shall be reimbursed by the Member State to the general budget of the European Communities up to the amount by which the total allocations available for operations other than those referred to in Article 16a(1) have been exceeded.

...’

Background to the dispute

- 22 As is apparent from recitals 1 to 3 of Regulation No 473/2009, in the context of the adoption by the European Council, on 11 and 12 December 2008, of a European Economic Recovery Plan envisaging the initiation of priority action, additional funds were also made available to all Member States via the EAFRD with a view to developing the priority related to broadband internet and to strengthening the operations related to the new challenges (‘the Recovery Plan funds’).
- 23 By Council Decision 2009/434/EC of 25 May 2009, amending Decision 2006/493/EC laying down the amount of Community support for rural development for the period from 1 January 2007 to 31 December 2013, its annual breakdown and the minimum amount to be concentrated in regions eligible under the Convergence Objective (OJ 2009 L 144, p. 25), additional funds were made available to all Member States via the EAFRD by way of Recovery Plan funds. In accordance with Annex I to Commission Decision 2009/545/EC of 7 July 2009, fixing the annual breakdown per Member State of the amount referred to in Article 69(2a) of Regulation No 1698/2005 and amending Commission Decision 2006/636/EC (OJ 2009 L 181, p. 49), a total amount of EUR 76 296 000 was allocated to the Kingdom of Spain.
- 24 As is apparent from recitals 1, 9 and 10 of Council Regulation (EC) No 73/2009 of 19 January 2009, establishing common rules for direct support schemes for farmers under the common agricultural policy and establishing certain support schemes for farmers, amending Regulations (EC) No 1290/2005, (EC) No 247/2006 and (EC) No 378/2007 and repealing Regulation (EC) No 1782/2003 (OJ 2009 L 30, p. 16), the European Community, taking into account the Commission’s presentation of a Communication to the European Parliament and the Council entitled ‘Preparing for the “Health Check” of the CAP reform’, took the view that the agricultural sector was faced with a number of new and demanding challenges and that there was a need to tackle those new challenges. In the area of agriculture, the EAFRD was an appropriate tool for dealing with them.

- 25 Provision was, therefore, made for additional EAFRD funds to be mobilised, by means of the compulsory modulation procedure, provided for in Article 9(4) and Article 10(3) of Regulation No 73/2009, and of specific transfers under Article 136 of that regulation ('the Health Check funds').
- 26 By Commission Decision 2009/444/EC of 10 June 2009, allocating the amounts resulting from the modulation provided for in Articles 7 and 10 of Regulation No 73/2009 to the Member States for the years 2009 to 2012 (OJ 2009 L 148, p. 29), an amount of EUR 498 100 000 was allocated to the Kingdom of Spain, in accordance with Annex II to that decision, by way of Health Check funds.
- 27 The Health Check funds and the Recovery Plan funds allocated to the Kingdom of Spain thus amounted to EUR 574 396 000. Of that amount, EUR 70 709 037 were allocated to the paying agency of the Autonomous Community of Extremadura ('Extremadura').
- 28 The Spanish authorities submitted a request to the Commission for the revision of the rural development programme relating to Extremadura in order to take account of the allocation to the Kingdom of Spain of Recovery Plan funds and Health Check funds (together 'the additional funds').
- 29 By Decision C(2010) 1729 of 18 March 2010, the Commission approved the revision of the rural development programme relating to Extremadura for the period 2007-2013, which revision took account of the grant of the additional funds ('the first decision approving the revision of the programme').
- 30 The Annex to Decision C(2010) 1729 contained a table setting out the EAFRD's contribution, broken down by year, for the period 2007-2013. That table provided for:
- a total amount of EUR 878 066 742 by way of the EAFRD's contribution in respect of Extremadura, which consisted of:
 - a specific amount of EUR 70 709 037, distributed over the years 2009 to 2013, by way of the additional funds mentioned in Article 69(5a) of Regulation No 1698/2005;
 - a remaining amount of EUR 807 357 705 by way of allocation to regions eligible under the Convergence Objective.
- 31 On 29 May 2013, the Commission carried out the automatic decommitment of a budget commitment of EUR 57 963 282 under the procedure provided for in Article 29 of Regulation No 1290/2005. The portion of the 2010 budget commitment used for the purpose of making a payment or which had been the subject of a declaration of expenditure meeting the specified conditions in relation to expenditure incurred by 31 December 2012 ('the n+2 rule') had been less than the budget commitment for 2010 and the difference amounted to EUR 57 963 282. Consequently, in accordance with Article 29(7) of that regulation and Article 19(2) of Regulation No 1698/2005, the Spanish authorities submitted a revised financing plan in respect of the rural development programme relating to Extremadura.
- 32 By Decision C(2013) 9347 final of 17 December 2013, the Commission approved the revision of the rural development programme relating to Extremadura for the period 2007-2013, which revision took account, inter alia, of the amount automatically decommitted by the Commission ('the second decision approving the revision of the programme').

- 33 The Annex to Decision C(2013) 9347 final contained, inter alia, a table setting out the EAFRD's contribution, broken down by year, for the period 2007-2013. That table provided for:
- a total amount of EUR 828 279 953 by way of the EAFRD's contribution in respect of Extremadura, which consisted of:
 - a specific amount of EUR 64 496 589, distributed over the years 2009 to 2013, by way of the additional funds provided for in Article 69(5a) of Regulation No 1698/2005;
 - a remaining amount of EUR 763 783 364 by way of allocation to regions eligible under the Convergence Objective.
- 34 On 16 and 17 November 2015, a seminar took place at which Commission experts provided Member States with guidelines, adopted by Commission Decision C(2015) 1399 final of 5 March 2015, on the closure of the 2007-2013 rural development programmes ('the guidelines'), and instructions on the method which the Commission intended to follow to carry out the calculation provided for in Article 69(5b) of Regulation No 1698/2005.
- 35 In preparation for the closure of the rural development programme for the period 2007-2013, Extremadura submitted the annual accounts for the last execution year of the programme, that is for the period from 16 October 2014 to 31 December 2015 ('the last year'), with a view to the subsequent clearance of those accounts by the Commission.
- 36 Annex 6 to the annual accounts submitted by Extremadura for the last year contained a table showing the amounts required to carry out the calculation provided for in Article 69(5b) of Regulation No 1698/2005. The left-hand column contained the initial amounts for which provision had been made by way of the EAFRD's contribution. The Spanish authorities stated that, of the total of EUR 828 279 952 of EAFRD funding for which provision had been made, an amount of EUR 64 496 589 resulted from the sum of Recovery Plan funds and Health Check funds and an amount of EUR 763 783 363 corresponded to 'other funds'. The right-hand column contained the amounts of the expenditure declared by those authorities. It was stated that, of a total of EUR 819 397 233.37 of expenditure declared, an amount of EUR 56 765 681.26 had been spent on operations related to the new challenges and an amount of EUR 762 631 552.11 had been allocated to 'other expenditure'.
- 37 By letter of 26 September 2016 to the Spanish authorities, the Commission gave notice of the clearance of the accounts for the last year of the 2007-2013 rural development programme relating to Extremadura. It stated that it was deducting an amount of EUR 5 060 636.11 pursuant to Article 69(5b) of Regulation No 1698/2005 and that it was deducting an amount of EUR 304 046.41 due to the adjustment of the caps applicable to the axes of the programme implemented. Thereafter, Extremadura submitted a report to the Commission in which it set out its observations on that letter and requested that an informal bilateral meeting be held.
- 38 On 30 November 2016, the Commission adopted Implementing Decision (EU) 2016/2113 on the clearance of accounts of the paying agencies of Member States concerning expenditure financed by the EAFRD in the last execution year of EAFRD 2007-2013 programming period (16 October 2014-31 December 2015) (OJ 2016 L 327, p. 79, 'the contested decision'). That decision is based on Article 51 of Regulation No 1306/2013. Article 1 of that decision states that the accounts for the last execution year of that programming period are cleared for the paying agencies listed in Annex I to that decision. The rural development programme relating to Extremadura appears on that list.

- 39 It is apparent from the table attached to Annex I to the contested decision that the Commission considered that an amount of EUR 5 364 682.52, classified as ‘non-reusable’, should be deducted from the final balance payable to Extremadura under the EAFRD on closure of the 2007-2013 rural development programme. At the bottom of that table, there is a note explaining that that amount corresponds to ‘capping and deductions under Article 69(5b) of ... Regulation No 1698/2005’.
- 40 On 31 January 2017, an informal meeting of representatives of the Commission and the Kingdom of Spain was held in Brussels (Belgium). The minutes of that meeting were sent to the Kingdom of Spain on 24 February 2017.

Procedure and forms of order sought

- 41 By application lodged at the Registry of the Court on 13 February 2017, the Kingdom of Spain brought the present action.
- 42 The composition of the Chambers of the Court having been changed, pursuant to Article 27(5) of the Rules of Procedure of the General Court, the present case was reallocated to the Eighth Chamber.
- 43 The Kingdom of Spain claims that the Court should:
- annul in part, with regard to Extremadura, the contested decision in so far as it provides that an amount of EUR 5 364 682.52 will not be reimbursed;
 - order the Commission to pay the costs.
- 44 The Commission contends that the Court should:
- dismiss the action as unfounded;
 - order the Kingdom of Spain to pay the costs.

Law

- 45 In support of the action, the Kingdom of Spain relies on two pleas in law. The first, and principal, plea in law alleges an infringement of Article 69 of Regulation No 1698/2005. The second plea in law alleges a failure, by the Commission, to respect its margin of discretion, and an infringement of the principle of the protection of legitimate expectations.

First plea in law, alleging an infringement of Article 69 of Regulation No 1698/2005

Preliminary observations

- 46 It should be observed that the action seeks the annulment of a clearance decision in respect of the accounts for the last year with regard to Extremadura, in the context of the closure of the programme relating to that paying agency for the 2007-2013 programming period.
- 47 According to paragraph 5.1 of the guidelines, the last clearance of accounts decision preceding the closure determines the amounts of expenditure effected during the last year which shall be recognised as being chargeable to the EAFRD on the basis of, inter alia, the annual accounts.

- 48 In this regard, it should be recalled that, according to case-law, the Commission is not entitled, when managing the common agricultural policy, to commit funds which fail to comply with the rules governing the common organisation of the markets in question and that the rule is of general application (judgments of 9 June 2005, *Spain v Commission*, C-287/02, EU:C:2005:368, paragraph 34; of 28 March 2007, *Spain v Commission*, T-220/04, not published, EU:T:2007:97, paragraph 162; and of 8 October 2015, *Italy v Commission*, T-358/13, EU:T:2015:773, paragraph 68).
- 49 Under Article 33 of Commission Implementing Regulation (EU) No 908/2014 of 6 August 2014 laying down rules for the application of Regulation No 1306/2013 with regard to paying agencies and other bodies, financial management, clearance of accounts, rules on checks, securities and transparency (OJ 2014 L 255, p. 59), the ‘Commission’s decision on the clearance of accounts referred to in Article 51 of Regulation (EU) No 1306/2013 shall determine the amounts of expenditure effected in each Member State during the financial year concerned which shall be recognised as being chargeable to the Funds on the basis of the [annual] accounts’. It follows that the Commission inevitably carries out an assessment of the amounts which are not recognised (see, to that effect, with regard to the clearance of accounts in the context of Article 7(1) of Regulation No 2245/1999, judgment of 9 June 2005, *Spain v Commission*, C-287/02, EU:C:2005:368, paragraph 51).
- 50 It was with a view to the closure of the rural development programme relating to Extremadura that the Commission carried out the calculation provided for in Article 69(5b) of Regulation No 1698/2005 and concluded that the corresponding balance which was required to be reimbursed to the EU budget, within the meaning of the provision in question, amounted to EUR 5 060 636.11 with regard to that programme. Consequently, it deducted that amount from the final balance to be paid to that paying agency, as is apparent from the letter of 26 September 2016 (see paragraph 37 above). That amount was part of the amount of EUR 5 364 682.52 which the Commission classified as ‘non-reusable’ in the clearance of that paying agency’s accounts for the last year, as is apparent from the contested decision.
- 51 In this regard, it should be observed, as the Commission does, that the Kingdom of Spain does not formulate any argument seeking to challenge the deduction from the final balance to be paid to Extremadura of an amount of EUR 304 046.41, corresponding to the adjustment of the caps, as indicated in the second line of the table appearing in Annex I to the letter of 26 September 2016.
- 52 Thus, with regard to the amount of EUR 5 364 682.52, classified as ‘non-reusable’ in the contested decision, only the amount of EUR 5 060 636.11, which results from the calculation carried out by the Commission pursuant to Article 69(5b) of Regulation No 1698/2005, is actually challenged by the Kingdom of Spain.

Validity of the calculation carried out by the Commission pursuant to Article 69(5b) of Regulation No 1698/2005

- 53 The Kingdom of Spain maintains that the Commission infringed Article 69(5b) of Regulation No 1698/2005. For that provision to apply, two conditions must be met, namely, on one hand, the additional funds provided for operations related to the new challenges must have been under-implemented and, on the other, the total allocations available for other operations than those planned for the new challenges must have been exceeded. However, neither of those two conditions is fulfilled in the present case.
- 54 In particular, the Kingdom of Spain argues that the total allocations available for operations other than those planned for the new challenges were not exceeded, since an amount of EUR 762 million, which is not disputed by the Commission, was spent on those other operations, which was lower than the amount of the budget commitments for which provision had been made, which amounted to EUR 763 million.

- 55 Recalling that the rural development programme relating to Extremadura was amended on two occasions, in order to take account, first of all, of the allocation of additional funds for operations related to the new challenges (first decision approving the revision of the programme) and, thereafter, of the automatic decommitment of a certain amount of the budget commitment for 2010 (second decision approving the revision of the programme), the Kingdom of Spain maintains that, for its calculations, under the protocol for closure of that programme, Extremadura could take into account the amounts as approved by the Commission in the latter decision. Thus, Extremadura could take into account, as initial budget commitments, an amount of EUR 64 million by way of additional funds, under Article 69(5a) of Regulation No 1698/2005, for the new challenges, and an amount of EUR 763 million by way of funds for other operations than those planned for those new challenges.
- 56 The Commission challenges all those arguments.
- 57 In particular, with regard to the calculation which it carried out pursuant to Article 69(5b) of Regulation No 1698/2005, the Commission states that it took into account the initial amount of EUR 70 709 037 by way of funding by the additional funds, as shown by the first decision approving the revision of the programme.
- 58 The Commission explains that it found that the expenditure declared for operations related to the new challenges, as shown by the annual accounts provided by Extremadura, amounted to EUR 56 765 681.26, which was EUR 13 943 355.74 less than the initial amount of EUR 70 709 037 by way of additional funds.
- 59 The Commission adds that it found that the under-implementation of the programme at issue as a whole amounted to EUR 8 882 719.63, corresponding to the difference between the amount of the EAFRD's planned total contribution to the programme of EUR 828 279 953 appearing in the second decision approving the revision of the programme, after automatic decommitment, and the amount actually spent, being EUR 819 397 233.37, as shown by the annual accounts provided by Extremadura.
- 60 Finally, the Commission concludes that Extremadura had spent an amount of EUR 5 060 636.11 on operations distinct from those related to the new challenges, representing the difference between the amount of EUR 13 943 355.74, corresponding to the under-implementation of the amounts provided for operations targeting the new challenges, and the amount of EUR 8 882 719.63, corresponding to the under-implementation of the programme at issue as a whole. That amount of EUR 5 060 636.11 was, therefore, required to be reimbursed to the budget of the European Union and, consequently, deducted from the final balance to be paid to Extremadura.
- 61 It must be observed that the parties are not in agreement as to the amounts provided for by way of the EAFRD's financial contribution to the rural development programme relating to Extremadura which should be taken into account in order to carry out the calculation provided for in Article 69(5b) of Regulation No 1698/2005, which amounts were revised following the automatic decommitment procedure which took place in the course of the implementation of that programme. The Kingdom of Spain argues that the Commission was required to rely on the amounts resulting from the second decision approving the revision of the programme, whereas the Commission relied on the amount arising from the first decision approving the revision of the programme with regard to the additional funds and on the amount arising from the second decision approving the revision of the programme with regard to the EAFRD's total contribution.
- 62 It is necessary, therefore, to determine the amounts which the Commission was required to take into account in order to carry out the calculation provided for in Article 69(5b) of Regulation No 1698/2005, before verifying that the Commission did not err in the calculation which it carried out.

– Amounts taken into account by the Commission for the purposes of carrying out the calculation

- 63 First of all, it must be noted that the guidelines do not provide any relevant guidance with regard to the amounts to be taken into consideration in order to carry out the calculation provided for in Article 69(5b) of Regulation No 1698/2005. Whilst the guidelines explain that calculation and provide that there may be a reimbursement on the basis of that provision on closure of the programme, they do not deal with the scenario in which the automatic decommitment of part of the budget commitments has led to the revision of the amounts of the EAFRD's contribution.
- 64 Next, it should be recalled that, under paragraph 5b of Article 69 of Regulation No 1698/2005, where the actual amount of EU contribution spent on operations related to the new challenges is lower than the total of the amounts referred to in paragraph 5a of that article, the difference shall be reimbursed by the Member State to the EU budget up to the amount by which the total allocations available for operations other than those related to the new challenges have been exceeded.
- 65 The reimbursement to the EU budget by the paying agency provided for by Article 69(5b) of Regulation No 1698/2005 is based, therefore, on two premisses.
- 66 First, the amount of the expenditure on operations related to the new challenges must be lower than the total of the amounts referred to in paragraph 5a of Article 69 of Regulation No 1698/2005. That paragraph mentions the amounts referred to in paragraph 2a of that article, corresponding, on one hand, to the Recovery Plan funds as determined for the Kingdom of Spain by Decision 2009/545 (see paragraph 23 above) and, on the other, to the Health Check funds generated by the application of certain provisions of Regulation No 73/2009, as determined for the Kingdom of Spain by Decision 2009/444 (see paragraph 26 above).
- 67 Secondly, it must be found that the 'total allocations available for operations other' than those related to the new challenges have been exceeded. The use of the words 'total allocations available for operations other' suggests that this means all the amounts which are not reserved for operations related to the new challenges and, therefore, all the allocations other than the additional funds. Moreover, the parties agree that, to obtain the amount of the total allocations available, the amount of the additional funds should be deducted from the total amount of the EAFRD's planned financial contribution.
- 68 Finally, it is appropriate to recall the context of the calculation provided for in Article 69(5b) of Regulation No 1698/2005, and to examine its mechanism and purpose.
- 69 According to the preambles of Regulation Nos 73/2009, 74/2009 and 473/2009, the role of support for rural development had to be strengthened in order to allow European agriculture to face new challenges, such as climate change, sustainable water management or the protection of biodiversity.
- 70 New challenges were listed (see paragraphs 15 and 17 above), in relation to which Member States were required to implement certain types of operations under their rural development programmes and were granted additional funds.
- 71 In this regard, it should be observed that the provision of the additional funds was accompanied by an obligation for Member States as to their use. That obligation is found in Article 69(5a) of Regulation No 1698/2005, to which Article 69(5b) of that regulation indirectly refers. The first and fourth subparagraphs of Article 69(5a) of that regulation provide, in essence, that Member States shall spend the amounts generated by the Health Check funds and the Recovery Plan funds exclusively on the types of operations related to the new challenges.

- 72 Article 69(5b) of Regulation No 1698/2005, which provides for reimbursement to the EU budget, assumes that the two premisses set out in paragraphs 65 to 67 above are found to apply, namely that the amounts provided for the implementation of operations related to the new challenges have been under-implemented and that the total allocations available for other operations have been exceeded. As the Commission emphasises, the under-implementation of the additional funds provided for the new challenges is not, therefore, unlawful as long as the allocations available for operations other than those planned for the new challenges are not exceeded. It is only where the amounts spent exceed the allocations available for other operations that a reimbursement to the EU budget is necessary.
- 73 The amounts resulting from the ‘total allocations available for operations other’ than those related to the new challenges being exceeded cannot be accepted as expenditure by way of unused additional funds, given that they have not funded the types of operations related to those new challenges for which Regulation No 1698/2005 expressly makes provision.
- 74 Consequently, the purpose of Article 69(5b) of Regulation No 1698/2005 is to avoid the additional funds being used for other operations than those related to the new challenges.
- 75 It is in light of those considerations that it is necessary to examine whether, in the present case, the Commission could take into consideration the amounts which it indicated for the purposes of carrying out the calculation provided for in Article 69(5b) of Regulation No 1698/2005, without committing an error.
- 76 First, the Commission was correct to take into account, by way of additional funds, the amount initially provided for operations related to the new challenges, which appears in the first decision approving the revision of the programme, namely an amount of EUR 70 709 037.
- 77 That conclusion is based on the wording of Article 69(5b) of Regulation No 1698/2005 in so far as the words ‘total of the amounts referred to in paragraph 5a’ seek to refer to the total of the amounts of the additional funds initially generated to fund operations related to the new challenges. That amount is the one which is set out in the first decision approving the revision of the programme relating to Extremadura, which specifically revises that programme to take into account the grant of the additional funds allocated to the Kingdom of Spain by Decisions 2009/444 and 2009/545.
- 78 Moreover, it should be observed that the additional funds, provision for the grant of which was made to encourage the implementation of certain types of operations over the period 2007-2013, cannot be reduced by the automatic decommitment procedure in respect of a budget commitment not spent in the course of 2010. As the Commission maintains, the effect of the automatic decommitment procedure could not be to exempt the Kingdom of Spain from its obligation to use all the allocations provided by way of additional funds for operations related to the new challenges, within the meaning of Article 69(5a) of Regulation No 1698/2005.
- 79 In this regard, a distinction should be made between, on one hand, the automatic decommitment procedure and, on the other, the procedure to be followed by the Commission in accordance with Article 69(5b) of Regulation No 1698/2005 in the clearance of the accounts for the last year with a view to the closure of the programme.
- 80 On one hand, it is clear from recital 22 of Regulation No 1290/2005 that the automatic decommitment rule was established to help speed up the implementation of programmes and contribute to sound financial management. Accordingly, the Commission is empowered, under Article 29 of that regulation, to automatically decommit any portion of a budget commitment for a rural development programme that has not been used for the purpose of prefinancing or making intermediate payments or for which no correct declaration of expenditure has been presented by 31 December of the second year following that of the budget commitment (judgment of 8 October 2015, *Italy v Commission*, T-358/13, EU:T:2015:773, paragraph 77).

- 81 On the other hand, under Article 69(5b) of Regulation No 1698/2005, a reimbursement to the EU budget is necessary in the context of the verification, on closure of the programme, of compliance with the exclusive use obligation in respect of funds reserved for a specific type of operation, when paying agencies have already paid out the funds to beneficiaries.
- 82 Consequently, whilst the two procedures referred to in paragraph 79 above result in the exclusion of an amount of EU funding, it should be observed that, under the automatic decommitment procedure, the portion of the budget commitment is automatically reduced at point 'n+2' because it has not been spent, whereas, in the context of the calculation carried out pursuant to Article 69(5b) of Regulation No 1698/2005, the Member State must reimburse to the EU budget a certain amount calculated on the basis of the expenditure 'actually incurred' as at the last eligibility date of expenditure.
- 83 It is sufficient to note that, irrespective of the inability, raised by the Kingdom of Spain, to amend the programmed amounts for the benefit of another regional programme, the reduction of the additional funds for Extremadura following the automatic decommitment procedure, as shown by the table appearing in the annex to the second decision approving the revision of the programme, meant that, on closure of the programme, the amounts spent on operations pertaining to the additional funds no longer corresponded to the allocations initially provided for that Member State, contrary to the relevant provisions of Regulation No 1698/2005.
- 84 Secondly, with regard to the amount of the 'total allocations available for operations other' than those related to the new challenges, calculated by deducting the amount of the additional funds from the total amount of the EAFRD's financial contribution (see paragraph 67 above), the Commission was also right to take into account, for the total amount of the EAFRD's contribution, the amount appearing in the second decision approving the revision of the programme, after the automatic decommitment procedure.
- 85 As recalled in paragraph 82 above, the automatic decommitment procedure led to the automatic release of the unused budget commitments for 2010, at point 'n+2', in so far as they had not been used to make a payment or had not been the subject of a correct declaration of expenditure. It follows that, on closure of the programme, in the procedure for the clearance of the accounts for the last year, on the basis of the expenditure actually incurred, the Commission was required to take into account the amount of the EAFRD's total contribution reduced by the amount automatically decommitted.
- 86 Furthermore, Article 2 of the second decision approving the revision of the programme expressly states the amount of the EAFRD's total contribution to be taken into account following the automatic decommitment, namely EUR 828 279 953. That amount is repeated in the annual accounts submitted by Extremadura and is not disputed by the parties.
- 87 Consequently, the amount available for other operations, obtained after deduction of the amount of EUR 70 709 037 corresponding to the additional funds, from the abovementioned total amount of EUR 828 279 953, was EUR 757 570 916, as the Commission emphasises in the rejoinder.
- 88 The Kingdom of Spain's argument seeking to maintain that, for the purposes of the calculation provided for in Article 69(5b) of Regulation No 1698/2005, it was necessary to take into account the amounts appearing in the second decision approving the revision of the programme cannot succeed.
- 89 In this regard, it should be observed that, in Article 2 of the second decision approving the revision of the programme, the Commission refers to the annex containing the tables corresponding to the revised financing plan, submitted by the Spanish authorities in accordance with Article 29(7) of Regulation No 1290/2005 and Article 19(2) of Regulation No 1698/2005, which provide, following an automatic decommitment, for a reduction of both the additional funds and the other funds available by way of the EAFRD's planned financial contribution (see paragraph 33 above). As the Commission rightly

maintains, Article 29(7) of Regulation No 1290/2005, which provides that, in the event of automatic decommitment, the 'EAFRD contribution to the ... programme' shall be reduced 'for the year in question', does not distinguish between the sources of funding.

- 90 The amounts at issue were indeed approved by the Commission in the second decision approving the revision of the programme. According to the second paragraph of Article 23 of Regulation No 1290/2005, the Commission decision adopting each rural development programme submitted by a Member State shall constitute a financing decision and, once notified to the Member State concerned, a legal commitment.
- 91 However, assuming that the second paragraph of Article 23 of Regulation No 1290/2005 also applies to Commission decisions approving the revision of a rural development programme following an automatic decommitment, it should be observed that, given that the calculation provided for in Article 69(5b) of Regulation No 1698/2005 is carried out by the Commission on closure of the programme, the Commission could not anticipate, when it approved the revised financing plan following the automatic decommitment procedure, the amount of the expenditure which was actually going to be incurred by Extremadura in the implementation of that programme. As the Commission maintains, if the amount spent by Extremadura on operations related to the new challenges had in the end been as indicated in the revised financing plan, lower than the initial amount allocated by way of those funds, but, furthermore, the amount of the total allocations available had not been exceeded in the context of other expenditure, a reimbursement under the latter provision would not have been necessary.
- 92 In addition, it should be observed that the approval, by the Commission, of a revised financing plan which provides for the splitting of resources following an automatic decommitment for a rural development programme does not confer on that document greater legal value than that of a regulation (see, to that effect, judgments of 25 February 2015, *Poland v Commission*, T-257/13, not published, EU:T:2015:111, paragraph 53, and of 3 December 2015, *Poland v Commission*, T-367/13, not published, EU:T:2015:933, paragraph 44).
- 93 Consequently, both the Commission and the Kingdom of Spain were obliged to comply with the provisions of Regulation No 1698/2005 and with the obligation, described in paragraph 74 above, to avoid resources made available to Member States to implement certain priorities being used for purposes not provided for by that regulation.
- 94 The Commission, therefore, did not commit an error in considering that a reimbursement was necessary by taking into account, in order to carry out the calculation provided for in Article 69(5b) of Regulation No 1698/2005, the amounts which it indicated (see paragraphs 57 to 60 above).

– *Calculation carried out by the Commission*

- 95 It follows from the foregoing considerations that the amount of the EAFRD's total contribution to Extremadura which the Commission was required to take into account was EUR 828 279 953. The amount corresponding to the additional funds was EUR 70 709 037, as observed in paragraph 76 above, and the amount corresponding to the total allocations available for other types of operations was EUR 757 570 916, as observed in paragraph 87 above. Given that the amount of the expenditure actually incurred in connection with operations targeting the new challenges was EUR 56 765 681.26 and that the amount of the expenditure actually incurred in connection with other operations than those related to the new challenges was EUR 762 631 552.11, as shown by the annual accounts provided by Extremadura, the Commission was correct to find that the additional funds for operations targeting the new challenges had been under-implemented and that the total allocations available for

other operations had been exceeded. The Commission could, therefore, conclude that a reimbursement was necessary up to the amount by which the total allocations available had been exceeded, namely an amount of EUR 5 060 636.11.

96 Consequently, the Commission was correct to consider that that amount was required to be deducted from the final balance of the commitment to be paid to Extremadura on closure of the programme and to classify it as a 'non-reusable amount' in the clearance of the accounts for the last year.

97 It follows that the first plea in law must be rejected.

Second plea in law, alleging a failure, by the Commission, to respect its margin of discretion and an infringement of the principle of the protection of legitimate expectations

98 The Kingdom of Spain argues that the Commission failed to respect the margin of discretion available to it and infringed the principle of the protection of legitimate expectations.

99 The second plea in law raised by the Kingdom of Spain is based, in essence, on two lines of argument which must be examined in turn.

Arguments alleging arbitrary conduct on the part of the Commission and that the amounts used for the calculation carried out were incoherent

100 The Kingdom of Spain maintains that, although the Commission has a margin of discretion in areas giving rise to complex economic assessments, the Courts of the European Union must not only verify that the evidence invoked is materially accurate, reliable and coherent, but also check whether that evidence constitutes all the relevant information to be taken into consideration. The Commission acted in an arbitrary manner in so far as it used incoherent information for the calculation carried out pursuant to Article 69(5b) of Regulation No 1698/2005.

101 The Commission challenges those arguments.

102 It follows from the considerations set out in the context of the examination of the first plea in law that the Commission was correct to take into account the amounts which it indicated. The fact that those amounts are those provided for in the first decision approving the revision of the programme with regard to the EAFRD's contribution by way of additional funds and those provided for in the second decision approving the revision of the programme with regard to the EAFRD's total contribution does not make that information incoherent for the purposes of the calculation provided for in Article 69(5b) of Regulation No 1698/2005.

103 Moreover, the method used in the present case by the Commission to carry out the calculation provided for in Article 69(5b) of Regulation No 1698/2005 is compliant with both the wording and the purpose of that provision. The Commission could not accept, in the clearance of the accounts for the last year, expenditure incurred in breach of the obligation to use the additional funds exclusively for operations targeting the new challenges.

104 Consequently, as the Commission was obliged to comply with the provisions of Regulation No 1698/2005 with regard to the calculation of the reimbursement to be made by the Kingdom of Spain and it did not have any margin of discretion in this regard, it cannot be validly argued that it acted in an arbitrary manner in adopting the contested decision.

Arguments alleging an infringement of the principle of the protection of legitimate expectations

- 105 The Kingdom of Spain claims that the Commission infringed the principle of the protection of legitimate expectations by amending the relevant calculation criterion. It relies, in this regard, on a presentation by the coordination committee of the managing authorities given on 4 May 2009 in Madrid, from which it was clear that, in the event of automatic decommitment, all the available amounts were to be reduced, including the additional funds for the new challenges. Extremadura could, therefore, under the second decision approving the revision of the programme, have deducted part of the amount automatically decommitted from the additional funds. The Commission, however, amended that method of calculation in November 2015, that is a month before the closure of the programme, through the working group of experts (see paragraph 34 above), without providing any justification and without leaving Extremadura any margin of discretion. The Kingdom of Spain adds that, until December 2015, the date of closure of the programme, the Commission gave no indication that it would revisit the amounts indicated in the second decision approving the revision of the programme.
- 106 The Commission challenges those arguments.
- 107 According to settled case-law, the right to rely on the principle of the protection of legitimate expectations extends to any person whom an institution of the European Union has caused, by giving him precise assurances, to entertain justified hopes. Information which is precise, unconditional and consistent, in whatever form it is given, constitutes such assurances. By contrast, a person may not plead breach of that principle unless he has been given those precise assurances (see judgment of 13 September 2017, *Pappalardo and Others v Commission*, C-350/16 P, EU:C:2017:672, paragraph 39 and the case-law cited). It is common ground that that principle can also be invoked by a Member State (see, to that effect, judgment of 22 April 2015, *Poland v Commission*, T-290/12, EU:T:2015:221, paragraph 57 and the case-law cited).
- 108 The Kingdom of Spain bases its claims on a presentation by the coordination committee of the managing authorities given on 4 May 2009 in Madrid and appearing in Annex 13 to the application in PowerPoint format, and on the second decision approving the revision of the programme.
- 109 First, it should be observed that the Kingdom of Spain cannot take from the presentation in question any precise assurance, within the meaning of the case-law cited in paragraph 107 above, given by the Commission, with regard to the amounts to be taken into account for the purposes of the calculation carried out pursuant to Article 69(5b) of Regulation No 1698/2005.
- 110 The presentation in question was merely used for a meeting with the Spanish authorities in preparation for the insertion in the relevant regulations of provisions related to the additional funds and the amendments to be made by the Member States to their rural development programmes.
- 111 Moreover, whilst the presentation in question mentions Article 69(5a) of Regulation No 1698/2005, no reference is made to the calculation to be carried out under Article 69(5b) of that regulation.
- 112 Contrary to what the Kingdom of Spain argues, neither does the presentation in question provide any instructions as to the type of funds which may be the subject of an automatic decommitment within the meaning of Article 29 of Regulation No 1290/2005.
- 113 Secondly, the Kingdom of Spain cannot rely on the second decision approving the revision of the programme as a basis from which to deduce the method of calculation used by the Commission.
- 114 Whilst the tables annexed to the second decision approving the revision of the programme show a reduction, following the automatic decommitment, of both the amount by way of additional funds and the amount by way of funds available for operations other than those related to the new challenges

(see paragraph 33 above), they nevertheless cannot reflect a precise assurance, within the meaning of the case-law cited in paragraph 107 above, on the part of the Commission with regard to the amounts which it was going to take into account for the purposes of the calculation of the reimbursement to be carried out under Article 69(5b) of Regulation No 1698/2005 on closure of the programme.

- 115 In addition, the tables in question correspond to the revised financing plan issued by the Spanish authorities following the automatic decommitment and, although it was approved by the Commission, its approval did not prejudice the amount of the expenditure which was actually going to be incurred by Extremadura, on the basis of which it was necessary to evaluate, on closure of the programme, whether or not a reimbursement was required under Article 69(5b) of Regulation No 1698/2005 (see paragraph 91 above).
- 116 Moreover, it is apparent from paragraph 92 above that the second decision approving the revision of the programme cannot be given a greater legal value than that of the regulation applicable in the present case.
- 117 Finally, the Commission emphasises that precise and coherent guidance on the method of calculation under Article 69(5b) of Regulation No 1698/2005 was given to Member States at the meeting of the group of experts (see paragraph 34 above) as part of the work relating to the closure of the programmes. Moreover, it is apparent from the application that Extremadura and the Commission also entered into correspondence, in May 2016, in which the Commission explained the method of calculation which it intended to follow. Furthermore, whilst the guidelines do not deal with the effect of an automatic decommitment of certain budget commitments in the course of the programme on the method of calculation under that provision, they do, however, mention, in paragraph 5.2, the requirement for a reimbursement in the scenario where the amounts exclusively reserved for operations related to the new challenges have been under-used, which was, in any event, true of Extremadura. Thus, contrary to what the Kingdom of Spain maintains, the Commission cannot be considered to have failed to set out the method which it intended to follow for the calculation to be carried out under that provision.
- 118 In view of the foregoing, it must be found that the Commission did not infringe the principle of the protection of legitimate expectations.
- 119 It follows that the second plea in law must be rejected and, consequently, the action must be dismissed in its entirety.

Costs

- 120 Under Article 134(1) of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs if they have been applied for in the successful party's pleadings.
- 121 Since the Kingdom of Spain 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,

THE GENERAL COURT (Eighth Chamber)

hereby:

- 1. Dismisses the action;**
- 2. Orders the Kingdom of Spain to pay the costs.**

Collins

Kancheva

De Baere

Delivered in open court in Luxembourg on 5 July 2018.

[Signatures]