



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Ninth Chamber)

22 November 2018*

(EAGF — Expenditure excluded from financing — Specific measures for the outermost regions — Article 12(c) of Regulation (EC) No 247/2006 — Technical assistance — Checks — Procedural safeguards — Legitimate expectations)

In Case T-31/17,

Portuguese Republic, represented by L. Inez Fernandes, M. Figueiredo, J. Saraiva de Almeida and A. Tavares de Almeida, acting as Agents,

applicant,

v

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

defendant,

APPLICATION pursuant to Article 263 TFEU for annulment of Commission Implementing Decision (EU) 2016/2018 of 15 November 2016 excluding from EU financing certain expenditure incurred by the Member States under the European Agricultural Guarantee Fund (EAGF) and under the European Agricultural Fund for Rural Development (EAFRD) (OJ 2016 L 312, p. 26), in so far as it excludes from that financing as regards the Portuguese Republic the sums of EUR 460 202.73 and EUR 200 000 (budget item 6701),

THE GENERAL COURT (Ninth Chamber),

composed of S. Gervasoni, President, K. Kowalik-Bańczyk (Rapporteur) and C. Mac Eochaidh, Judges,

Registrar: I. Dragan, Administrator,

having regard to the written procedure and further to the hearing on 3 May 2018,

gives the following

* Language of the case: Portuguese.

Judgment

Background to the dispute

- 1 Under the programme of options specific to the remote and insular nature of Madeira and the Azores (Poseima), the autonomous regions of the Azores and Madeira (Portugal) have, since 1992, benefited from specific measures to assist with local agricultural production. With effect from the 2007 financial year, those measures were brought together in a support programme established in accordance with the provisions of Article 9 of Council Regulation (EC) No 247/2006 of 30 January 2006 laying down specific measures for agriculture in the outermost regions of the Union (OJ 2006 L 42, p. 1). To that end, the Portuguese Republic drew up an overall programme, which was evaluated and approved by the European Commission pursuant to Article 24(1) and (2) of that regulation ('the overall programme').
- 2 On 30 September 2008, the Portuguese Republic submitted to the Commission, on the basis of Article 49 of Commission Regulation (EC) No 793/2006 of 12 April 2006 laying down certain detailed rules for applying Regulation No 247/2006 (OJ 2006 L 145, p. 1), a draft amendment of the overall programme. That draft, which was revised on 27 January 2009, provided inter alia for the introduction, within the sub-programme for the autonomous region of the Azores, of a new measure relating to the financing of studies, demonstration projects, training or technical assistance operations.
- 3 By Decision C(2009) 1364 final of 3 March 2009 ('the decision of 3 March 2009'), the Commission approved the amendments to the overall programme submitted by the Portuguese Republic.
- 4 As a result, Annex I to the sub-programme for the autonomous region of the Azores included a new point 4.6, which reads as follows:

'4.6. Financing of studies, demonstration projects, training or technical assistance measures

Legal context

Article 50 of Regulation ... No 793/2006 ... provides for the financing of studies, demonstration projects, training or technical assistance measures ...

Objectives

The purpose of this measure is to create the conditions to ensure that the preparation, coordination, information, management, control, monitoring and assessment activities of the sub-programme [for] the autonomous region of the Azores are carried out effectively.

Description

The measure shall include the eligible activities to be performed by those bodies with responsibilities in the various functions necessary for the sound management and the implementation of the [sub-programme for the autonomous region of the Azores].

...

On the basis of that provision, the autonomous region of the Azores seeks to obtain the funds necessary to meet the needs of all the stakeholders in the [sub-programme for the autonomous region of the Azores].

Beneficiaries

- The management authorities.

Eligible expenditure and support scheme

The costs relating to expenditure associated with:

- acquiring and maintaining goods and equipment;
- acquiring services;
- conducting studies and audits;
- producing and disseminating information and advertising

and directly attributable to the preparation, coordination, information, management, control, monitoring and assessment activities of the [sub-programme for the autonomous region of the Azores] shall be regarded as eligible and shall be 100% financed.'

- 5 As part of that measure, the Portuguese authorities incurred various expenses, financed by the European Union, totalling EUR 460 202.73 for the 2012 financial year and EUR 200 000 for the 2013 financial year.
- 6 In the case of the 2012 financial year, the expenditure at issue related to the acquisition of four all-terrain vehicles (EUR 94 407.56), the salaries of the personnel responsible for on-the-spot checks (EUR 69 977.11), the costs associated with the information system, the access system, the fire safety system and one all-terrain vehicle (EUR 53 059.65), the acquisition of 22 computers and screens as well as three laptops (EUR 14 446) and, lastly, the remuneration of eleven technicians and one director of services (EUR 228 312.41).
- 7 In the case of the 2013 financial year, the expenditure at issue corresponded to the remuneration of 10 technicians and one director of services (EUR 199 095.92) as well as allowances covering the travel costs of that director (EUR 904.08).
- 8 Following an inquiry, the Commission initiated a conformity clearance procedure under Article 31 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).
- 9 By letter of 5 December 2013 ('the letter of 5 December 2013'), the Commission communicated its findings to the Portuguese authorities pursuant to Article 11(1) of Commission Regulation (EC) No 885/2006 of 21 June 2006 laying down detailed rules for the application of Regulation 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). In that letter, the Commission found that the purpose of all the expenditure at issue was to finance the personnel and equipment necessary for the inspections conducted by the Portuguese authorities under the overall programme. Accordingly, the Commission took the view that, since it was consistent neither with the provisions of Article 13 of Regulation No 1290/2005, on the one hand, nor with those of Article 12(c) and Article 25 of Regulation No 247/2006, on the other, that expenditure could not be borne by the European Agricultural Guarantee Fund (EAGF).
- 10 By letter of 7 April 2014, the Portuguese authorities made clear that they disagreed with the position taken by the Commission since, in their view, the expenditure at issue was eligible for EU financing under Article 12(c) of Regulation No 247/2006.

- 11 At a bilateral meeting which took place on 4 June 2014, the Commission and the Portuguese authorities maintained their respective positions. After that meeting, the Commission informed the Portuguese authorities that, in its view, the decision of 3 March 2009 could not have created legitimate expectations on their part as regards the eligibility of the expenditure at issue.
- 12 By letter of 22 December 2014, the Portuguese authorities stated that they no longer disagreed with the position adopted by the Commission.
- 13 On 12 July 2016, the Commission formally communicated its conclusions to the Portuguese authorities, in accordance with Article 11(2) of Regulation No 885/2006. In that communication, the Commission again found the expenditure at issue to be ineligible under Article 13 of Regulation No 1290/2005 and Article 12(c) of Regulation No 247/2006. It therefore proposed excluding the total amount of EUR 660 202.73 from EU financing.
- 14 On 15 November 2016, the Commission adopted Implementing Decision (EU) 2016/2018 excluding from EU financing certain expenditure incurred by the Member States under the EAGF and under the European Agricultural Fund for Rural Development (EAFRD) (OJ 2016 L 312, p. 26, 'the contested decision'). With regard to the Portuguese Republic, the Commission *inter alia* excluded from EU financing the amounts of EUR 460 202.73 and EUR 200 000 (budget item 6701), which correspond to the expenditure at issue.

Procedure and forms of order sought by the parties

- 15 The Portuguese Republic brought the present action by application lodged at the Registry of the Court on 20 January 2017.
- 16 The Commission lodged the defence at the Registry of the Court on 27 March 2017.
- 17 The Portuguese Republic lodged the reply on 16 May 2017 and the Commission lodged the rejoinder on 28 June 2017.
- 18 By measures of organisation of procedure, adopted on the basis of Article 89(3)(a) and (d) of its Rules of Procedure, the Court put questions to the parties and asked them to produce certain documents. The parties complied with that request within the prescribed period.
- 19 The Portuguese Republic claims that the Court should:
- annul the contested decision in so far as it excludes from EU financing in its regard the amounts of EUR 460 202.73 and EUR 200 000;
 - order the Commission to pay the costs.
- 20 The Commission contends that the Court should:
- dismiss the action;
 - order the Portuguese Republic to pay the costs.

Law

- 21 In support of its action, the Portuguese Republic puts forward three pleas in law, alleging infringement, first, of the principle of the protection of legitimate expectations; second, of Article 12(c) of Regulation No 247/2006; and, third, of Article 11(1) of Regulation No 885/2006.
- 22 The Court takes the view that consideration should first be given to the third plea in law, which concerns the infringement of essential procedural requirements, then to the second plea in law, which alleges infringement of a substantive rule of secondary EU law, and, lastly, to the first plea in law, which alleges infringement of a general principle of EU law.

The third plea in law, alleging infringement of Article 11(1) of Regulation No 885/2006

- 23 The Portuguese Republic submits that the Commission infringed Article 11(1) of Regulation No 885/2006 by addressing to it an initial written communication which was insufficiently reasoned. First, the letter of 5 December 2013 does not set out the reasons why the Commission took the view that the expenditure at issue had been incurred for the purposes of carrying out checks. Second, that letter does not state why each item of expenditure at issue, taken individually, is not eligible for financing under the EAGF.
- 24 The Commission contests the arguments advanced by the Portuguese Republic.
- 25 As a preliminary point, it should be made clear that, under Article 23(1) of Regulation No 247/2006, the specific measures for agriculture in the outermost regions adopted on the basis of that regulation constitute intervention measures intended to regulate agricultural markets within the meaning of Article 3(1)(b) of Regulation No 1290/2005. Accordingly, the expenditure financed by the European Union on the basis of Regulation No 247/2006 comes under the EAGF expenditure listed in Article 3 of Regulation No 1290/2005 and is, therefore, subject to all the provisions of that regulation which apply to expenditure under that fund.
- 26 It follows that, if the Commission plans to exclude from EU financing certain expenditure incurred by a Member State on the basis of Regulation No 247/2006, it must follow the conformity clearance procedure laid down in Article 31 of Regulation No 1290/2005; the detailed rules for the application of that procedure are defined in Article 11 of Regulation No 885/2006.
- 27 In this regard, it must be observed that the final and conclusive decision on the clearance of accounts must be taken at the conclusion of a specific procedure giving effect to the *audi alteram partem* rule, during which the Member States concerned must be provided with all the guarantees necessary for them to present their point of view (see, by analogy, judgment of 14 December 2000, *Germany v Commission*, C-245/97, EU:C:2000:687, paragraph 47 and the case-law cited).
- 28 Thus, the first subparagraph of Article 11(1) of Regulation No 885/2006 provides that, when, as a result of any inquiry, the Commission considers that expenditure was not effected in compliance with EU rules, it is to communicate its findings to the Member State concerned.
- 29 In accordance with case-law, the communication written pursuant to that provision must inform the Member State concerned fully about the Commission's reservations, so that it can fulfil the warning function given to it by the provision (see, by analogy, judgment of 3 May 2012, *Spain v Commission*, C-24/11 P, EU:C:2012:266, paragraph 27 and the case-law cited).

- 30 It follows that Article 11(1) of Regulation No 885/2006 requires that the irregularity which the Member State concerned is alleged to have committed should be stated with sufficient precision in the written communication provided for in the first subparagraph of that provision (see, by analogy, judgment of 3 May 2012, *Spain v Commission*, C-24/11 P, EU:C:2012:266, paragraph 28).
- 31 In those circumstances, it is necessary to examine whether the letter of 5 December 2013 satisfies the requirements of Article 11(1) of Regulation No 885/2006 and therefore constitutes a lawful communication in accordance with that provision.
- 32 In the present case, it should be observed that, as the Commission argues, first, the letter of 5 December 2013 cites the legislation applied by it, namely Article 13 of Regulation No 1290/2005, on the one hand, and Article 12(c) and Article 25 of Regulation No 247/2006, on the other. Second, that letter restates the purpose of the measure provided for in point 4.6 of Annex I to the sub-programme for the autonomous region of the Azores and the categories of expenditure eligible for EU financing listed by that measure. Third, the same letter identifies the expenditure examined by the Commission stating, in relation to each item of that expenditure, the financial year in question, the authority responsible for the expenditure and both the purpose and the amount of that expenditure. Fourth, the letter states that ‘all the expenditure [at issue] was used to finance the personnel and equipment necessary for the inspections conducted by the [Portuguese authorities] in connection with the [support] programme’. Fifth, the letter explains that the expenditure incurred by the authorities of the Member States within the context of their administrative and control obligations are connected with the primary activity of the paying agencies, with the result that that expenditure cannot be borne by the EAGF. Sixth, that letter finds the expenditure at issue to be ineligible for financing under the EAGF because it does not comply with the provisions of Article 13 of Regulation No 1290/2005, on the one hand, and with Article 12(c) and Article 25 of Regulation No 247/2006, on the other.
- 33 In those circumstances, the letter of 5 December 2013 sets out with sufficient precision the nature of and the reasons for the irregularity which the Portuguese Republic is alleged to have committed and informs that Member State fully about the Commission’s reservations. Accordingly, in the present case, that letter fulfils its warning function within the context of the conformity clearance procedure.
- 34 That conclusion cannot be called into question by the two complaints specifically raised by the Portuguese Republic in relation to the letter of 5 December 2013.
- 35 First, with regard to the complaint alleging that that letter does not set out the reasons why the Commission took the view that the expenditure at issue had been incurred for the purposes of carrying out checks, it must be observed that it is apparent from the very wording of one of the items of expenditure at issue — namely the amount of EUR 69 977.11 corresponding to the ‘salaries of the personnel responsible for the on-the-spot checks’ paid in the course of the 2012 financial year — that that expenditure was linked to the performance of checks. In addition, since the Portuguese Republic was fully aware of the nature of the expenditure at issue and it subsequently acknowledged, inter alia at the bilateral meeting of 4 June 2014, that that expenditure had been incurred in the context of its control activity, the lack of more detailed explanations in the letter of 5 December 2013, inter alia as regards the amounts other than that of EUR 69 977.11 mentioned above, did not, in the present case, in any way prevent the Portuguese Republic from presenting its point of view and contesting the validity of the financial correction proposed by the Commission.
- 36 Second, with regard to the complaint alleging that the letter of 5 December 2013 does not specify the reasons why each of the items of expenditure at issue, taken individually, is not eligible for financing under the EAGF, it should be stated in response that, where the same ground of ineligibility is given for a category or group of expenditure, the Commission may use only general reasoning for all the expenditure concerned (see, to that effect and by analogy, judgment of 15 February 2007, *BVBA Management, Training en Consultancy*, C-239/05, EU:C:2007:99, paragraph 37). It must be observed that, in the letter of 5 December 2013, the Commission took the view that the purpose of all the

expenditure at issue was to finance the personnel and equipment necessary for the performance of checks and that, since that expenditure formed part of the principal activity of the national authorities, it was not eligible for EU financing. In those circumstances and in the light of the fact that, according to the letter of 5 December 2013, the purpose of all the expenditure at issue is the same, the Commission cannot be criticised for having provided general reasoning for its reservations vis-à-vis the financing of that expenditure by the European Union.

37 It follows from the foregoing that the letter of 5 December 2013 satisfies the requirements of Article 11(1) of Regulation No 885/2006.

38 The third plea in law must therefore be dismissed.

The second plea in law, alleging infringement of Article 12(c) of Regulation No 247/2006

39 The Portuguese Republic submits that the contested decision infringes Article 12(c) of Regulation No 247/2006, which allows the financing of technical assistance operations relating to the implementation of a support programme. In addition, checks are, first, a type of technical assistance operations and, second, necessary for the implementation of any support programme. It follows that, by way of derogation from Article 13 of Regulation No 1290/2005, the expenditure borne by the national authorities relating to administrative and personnel costs are eligible for EU financing where, as in the present case, they are incurred in relation to a control activity and within the context of a support programme.

40 The Commission contests the arguments advanced by the Portuguese Republic.

41 As a preliminary point, it must be noted that it is common ground between the parties that the expenditure at issue was incurred in order to finance the personnel and equipment necessary for the Portuguese authorities to perform checks, consisting inter alia in inspections carried out under the sub-programme for the autonomous region of the Azores. Furthermore, it is clear both from the documents before the Court, and in particular from the letter of 5 December 2013 and from the letter from the Portuguese authorities of 7 April 2014, as well as from the oral explanations provided by the parties at the hearing, that the Portuguese authorities which performed those checks and benefited from the expenditure at issue were not the paying agency located in Lisbon (Portugal) but other administrative authorities situated in the Azores.

42 Thus, the debate between the parties relates not to the nature or the purpose of the expenditure at issue but solely to the — purely legal — question whether that expenditure is eligible for EU financing on the basis of Article 12(c) of Regulation No 247/2006.

43 In that regard, it should be recalled that Regulations Nos 247/2006 and 793/2006 provide for specific measures for agriculture in the outermost regions.

44 In particular, it should be observed, first of all, that Article 12(c) of Regulation No 247/2006 provides that a support programme is to contain, inter alia, ‘a description of the measures contemplated, and in particular aid schemes for implementing the programme, and, where appropriate, information on the needs for any studies, demonstration projects, training or technical assistance operations relating to the preparation, implementation or adaptation of the measures concerned’.

45 Next, the third indent of Article 25 of Regulation No 247/2006 provides for the adoption of implementing rules for that regulation in relation to ‘the studies, demonstration projects, training and technical assistance operations referred to in Article 12(c) [of the Regulation]’.

- 46 Lastly, Article 50 of Regulation No 793/2006, which lays down the implementing rules provided for in the third indent of Article 25 of Regulation No 247/2006, states that ‘the amount required to finance studies, demonstration projects, training and technical assistance measures provided for in a programme approved under Article 24(2) of Regulation ... No 247/2006 ... may not exceed 1% of the total amount of financing allocated to each programme’.
- 47 It follows from all those provisions that the studies, demonstration projects, training and technical assistance operations referred to in Article 12(c) of Regulation No 247/2006 and provided for in a support programme for an outermost region are, in principle, eligible for EU financing, provided, *inter alia*, that they relate to the preparation, implementation or adaptation of support measures.
- 48 However, it must be observed that Regulations Nos 247/2006 and 793/2006 do not contain any provision which defines the various types of measures to which they refer. In particular, those regulations do not specify whether or not the ‘technical assistance operations relating to the ... implementation [of support measures]’ referred to in Article 12(c) of Regulation No 247/2006 include the checks performed by the national authorities.
- 49 In those circumstances, it is necessary to examine whether, as the Portuguese Republic submits and the Commission contests, checks, such as those carried out by the Portuguese authorities, constitute technical assistance operations relating to the implementation of a support measure for the purposes of Article 12(c) of Regulation No 247/2006.
- 50 In the first place, consideration must be given as to whether it is possible, in order to address the lack of precision in Regulations Nos 247/2006 and 793/2006, to apply in these proceedings a provision of EU law containing a definition of the concept of ‘technical assistance’ or, at the very least, to derive from EU law a general and transversal definition of that concept which may be transposed to the present dispute.
- 51 In this regard, the Portuguese Republic refers, first, to Article 5(a) of Regulation No 1290/2005 and, second, to Article 186 of Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union (OJ 2012 L 362, p. 1). According to the Portuguese Republic, it is clear from those provisions that the concept of ‘technical assistance’ includes the checks necessary for the implementation of a support programme.
- 52 However, although it is true that each of the two provisions relied on by the Portuguese Republic does provide clarifications as regards the concept of ‘technical assistance’ and refers, *inter alia*, to control activities, neither of those two provisions is applicable in these proceedings.
- 53 First, although it does concern technical assistance operations financed by the EAGF and the EAFRD, Article 5(a) of Regulation No 1290/2005 governs only those technical assistance operations financed on a centralised basis at the request of the Commission or on its behalf. It follows that that provision cannot apply to technical assistance operations such as those envisaged by point 4.6 of Annex I to the sub-programme for the autonomous region of the Azores which, as they are implemented at the request of the Member States, are financed on a decentralised basis by the EAGF.
- 54 Second, the sole purpose of Article 186 of Delegated Regulation No 1268/2012 is to define, within the context of public procurement and the award of grants by the European Union, the concepts of ‘grants [and] contracts for technical assistance concluded with the [European Investment Bank (EIB)] or the European Investment Fund [(EIF)]’ and ‘grants ... awarded ... to the EIB or the [EIF] for actions of technical assistance’ contained, respectively, in Article 101(3) and Article 125(7) 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). It follows that that provision is unrelated to the financing under the EAGF of technical assistance expenditure incurred by the Member States within the context of Regulation No 247/2006.

- 55 In those circumstances, the potential inclusion of checks amongst the technical assistance operations referred to in Article 12(c) of Regulation No 247/2006 cannot follow simply from the application of Article 5(a) of Regulation No 1290/2005 or of Article 186 of Delegated Regulation No 1268/2012.
- 56 In addition, examination of the two provisions relied on by the Portuguese Republic and of Article 12(c) of Regulation No 247/2006 reveals that there are provisions in EU law which provide a different description of measures in the area of technical assistance.
- 57 In particular, it is clear from the comparison between those different provisions that checks are not systematically mentioned amongst the measures in the area of technical assistance.
- 58 Thus, although Article 186 of Delegated Regulation No 1268/2012 specifically defines the concept of 'technical assistance' and, in so doing, makes explicit reference to the evaluation, audit and checks necessary for the implementation of a programme or an action, the same is not true of Article 5 of Regulation No 1290/2005 or Article 12(c) of Regulation No 247/2006.
- 59 First, Article 5 of Regulation No 1290/2005, which is entitled 'Other financing, including technical assistance', merely lists various types of measures without expressly defining the concept of 'technical assistance'. In addition, that article refers both to 'preparatory, monitoring, administrative and technical support' measures and to 'evaluation, audit and inspection' measures. Moreover, that article mentions, under point (a), both measures relating to 'technical and administrative assistance' and those relating to 'the implementation of control systems'. Accordingly, not only does Article 5 of Regulation No 1290/2005 not expressly refer to checks amongst the measures in the area of technical assistance but on the contrary, on two occasions, presents technical assistance measures, construed in the narrow sense of administrative and technical support measures, on the one hand, and control measures, on the other, as constituting two separate types of measures.
- 60 Second, as far as concerns Article 12(c) of Regulation No 247/2006, that provision refers only to studies, demonstration projects, training and technical assistance operations. The same is true of the third indent of Article 25 of Regulation No 247/2006 and of Article 50 of Regulation No 793/2006. Thus, the relevant provisions of Regulations Nos 247/2006 and 793/2006, the only provisions applicable in these proceedings, make no mention of evaluation, audit and control measures.
- 61 In those circumstances, in the light of the inconsistency between the abovementioned provisions of Regulations Nos 1290/2005 and 247/2006 and of Delegated Regulation No 1268/2012, it appears, within EU law and in particular in relation to the EAGF, first, that there is no general and transversal definition of the concept of 'technical assistance' which may be applied to the present dispute and, second, that, contrary to the Portuguese Republic's claim, the expression 'technical assistance' does not necessarily designate a series of measures including control measures.
- 62 In the second place, since there is no definition of the concept of 'technical assistance' which may be applied or transposed to the present dispute, Article 12(c) of Regulation No 247/2006 should be interpreted taking into account not only the wording of that provision but also the context in which it occurs and the objectives pursued by the legislation of which it is part (see, to that effect and by analogy, judgments of 17 November 1983, *Merck*, 292/82, EU:C:1983:335, paragraph 12, and of 10 March 2005, *easyCar*, C-336/03, EU:C:2005:150, paragraph 21).
- 63 In that regard, it is worth reiterating that, as has already been observed in paragraph 25 above, the measures adopted to support the outermost regions on the basis of Regulation No 247/2006 constitute EAGF expenditure within the meaning of Regulation No 1290/2005.

- 64 In that context, it must be observed that, although Article 5(a) of Regulation No 1290/2005 does provide for the financing of technical and administrative assistance measures implemented at the request of the Commission or on its behalf, it does not however contain any provision under which technical assistance operations implemented at the request of the Member States may be financed.
- 65 It therefore appears that, in so far as they provide for the financing of technical assistance operations relating to the implementation of a support programme at the request of the Member States in the outermost regions, the provisions of Article 12(c) of Regulation No 247/2006 establish specific rules derogating from the general EAGF rules laid down in Regulation No 1290/2005 and must therefore be interpreted strictly.
- 66 In addition, first, it must be stated that, as has already been noted in paragraph 60 above, neither Article 12(c) of Regulation No 247/2006 nor the other relevant provisions of Regulations Nos 247/2006 and 793/2006 mentions evaluation, audit and control measures.
- 67 Second, it was similarly observed in paragraph 59 above that, as far as concerns the EAGF, the words ‘technical assistance’ may not refer, in certain circumstances and in particular within the context of Article 5(a) of Regulation No 1290/2005, to a series of measures including checks, but rather designate merely administrative and technical support measures *stricto sensu*.
- 68 Third, it must be recalled that, pursuant to Article 11 of Regulation No 1290/2005, payments relating to the financing provided for under that regulation are, save provision to the contrary, to be disbursed in full to the beneficiaries.
- 69 It is clear from those provisions that the appropriations allocated to the EAGF, and in particular those allocated to the Member States, must, in principle, be used to finance operational expenditure by means of payments to beneficiaries.
- 70 It follows that, save as otherwise provided, those appropriations cannot be used to assist national authorities to perform administrative activities for which they are ordinarily responsible.
- 71 Furthermore, it must be noted that monitoring compliance with the conditions for the grant of aid and premiums is ordinarily a matter for the Member States, regardless of the existence of a technical assistance measure.
- 72 In particular, with regard to specific measures for agriculture in the outermost regions, Member States are required to conduct administrative and on-the-spot checks pursuant to Article 27 of Regulation No 247/2006 and to Articles 30 to 33 of Regulation No 793/2006.
- 73 It should be added that those checks, and in particular the on-the-spot checks, fall to the competent national authorities, which may be separate authorities from the paying agency, such as the Portuguese administrative authorities mentioned in paragraph 41 above.
- 74 In those circumstances, and having regard to all the considerations set out in paragraphs 63 to 73 above, it follows from a literal, systematic and teleological interpretation of Article 12(c) of Regulation No 247/2006 that the ‘technical assistance operations relating to the ... implementation [of support measures]’ to which it refers do not include the checks performed by the national authorities.
- 75 That interpretation cannot be called into question by the line of argument advanced by the Portuguese Government alleging, first, that the implementation of a support programme necessarily includes checks and, second, that provision was expressly made in the sub-programme for the autonomous region of the Azores for expenditure relating to such checks to be borne.

- 76 In the first place, the fact that checks would be necessary for a support programme to be executed properly does not mean that they can be regarded as technical assistance operations or linked to the ‘implementation’ of that programme.
- 77 In this regard, it must be observed, first, that, since they are not administrative and technical support measures *stricto sensu*, the checks do not constitute technical assistance operations within the meaning of Article 12(c) of Regulation No 247/2006.
- 78 Second, a distinction can be drawn, both chronologically and conceptually, amongst the operations referred to in Article 12(c) of Regulation No 247/2006, between, first, the preparatory operations for a measure; next, the operations relating to the actual implementation of that measure; and, lastly, the operations intended to check that that measure is being executed properly.
- 79 In the second place, it must be recalled that, pursuant to Article 11(1) of Regulation No 247/2006, measures taken under support programmes for the outermost regions must comply with EU law. Thus, the provisions of a support programme, even those approved by the Commission, cannot, in accordance with the principle of the hierarchy of norms, allow derogation from provisions of EU law, or even be relied on successfully for the purposes of the interpretation of the latter provisions. It follows that the fact that point 4.6 of Annex I to the sub-programme for the autonomous region of the Azores provides that expenditure directly attributable to the checks of that sub-programme are to be borne has no bearing on whether the checks conducted by national authorities are included amongst the actions eligible for EU financing under Article 12(c) of Regulation No 247/2006.
- 80 In those circumstances, the checks which gave rise to the expenditure at issue are not technical assistance operations relating to the implementation of a support measure within the meaning of Article 12(c) of Regulation No 247/2006.
- 81 It follows from the foregoing that the expenditure at issue is not eligible for EU financing on the basis of Article 12(c) of Regulation No 247/2006.
- 82 The second plea in law must therefore be dismissed.

The first plea in law, alleging infringement of the principle of the protection of legitimate expectations

- 83 The Portuguese Republic submits that the contested decision infringes the principle of the protection of legitimate expectations. First, in the decision of 3 March 2009, the Commission approved a support measure which explicitly identified as eligible expenditure those expenses directly attributable to checks. Second, the assurances given by the Commission comply with the relevant rules. In those circumstances, the decision of 3 March 2009 created, on the part of the Portuguese authorities, a legitimate expectation vis-à-vis the eligibility of the expenditure at issue.
- 84 The Commission contests the arguments advanced by the Portuguese Republic.
- 85 As a preliminary point, it should be recalled that, in accordance with well-established case-law, the principle of the protection of legitimate expectations is one of the fundamental principles of the European Union (see judgments of 5 May 1981, *Dürbeck*, 112/80, EU:C:1981:94, paragraph 48, and of 7 June 2005, *VEMW and Others*, C-17/03, EU:C:2005:362, paragraph 73 and the case-law cited).
- 86 It also follows from the case-law that any individual is entitled to rely on that principle in a situation in which an institution of the European Union, by giving that person precise assurances, has led him to entertain well-founded expectations. Such assurances, in whatever form they are given, constitute precise, unconditional and consistent information. The assurances given must, moreover, comply with

the relevant rules (see judgments of 18 July 2007, *EAR v Karatzoglou*, C-213/06 P, EU:C:2007:453, paragraph 33 and the case-law cited, and of 16 December 2010, *Kahla Thüringen Porzellan v Commission*, C-537/08 P, EU:C:2010:769, paragraph 63 and the case-law cited).

- 87 Furthermore, it is established that the principle of the protection of legitimate expectations may also be relied on by a Member State (see, to that effect, judgment of 26 June 2012, *Poland v Commission*, C-335/09 P, EU:C:2012:385, paragraphs 180 and 181).
- 88 It is in the light of those considerations that it is necessary to examine whether, in the present case, the principle of the protection of legitimate expectations precluded the Commission from excluding the expenditure at issue from EU financing.
- 89 In the first place, consideration must be given as to whether the decision of 3 March 2009 contains precise, unconditional and consistent assurances as regards the eligibility for EU financing of the expenditure referred to in point 4.6 of Annex I to the sub-programme for the autonomous region of the Azores.
- 90 In this regard, it appears worth recalling the legal context surrounding the decision of 3 March 2009 approving the amendments to the overall programme submitted to the Commission by the Portuguese Republic.
- 91 For the purposes of implementing specific measures for agriculture in the outermost regions, Article 24 of Regulation No 247/2006 provides for a procedure for the evaluation and approval by the Commission of drafts of overall programmes proposed by the Member States. Similarly, Article 49 of Regulation No 793/2006 lays down a procedure for approval by the Commission of amendments which the Member States wish to make to those overall programmes.
- 92 It is clear from those provisions that approval by the Commission of the support measures contained in the overall programmes is an essential prerequisite for the financing of those measures under the EAGF.
- 93 However, overall programmes are provisional in nature, with the result that, by approving them, the Commission is not, in principle, taking a definitive view on the compatibility of the measures contained therein with all the applicable rules of EU law and, therefore, on the eligibility of those measures for EU financing. Accordingly, it cannot be inferred from the mere fact that the Commission approves an overall programme either that the measures contained in that programme necessarily comply with all the relevant rules of EU law or that the eligibility of those measures for EU financing can no longer be called into question by the Commission, in particular as part of the conformity clearance procedure provided for in Article 31 of Regulation No 1290/2005 (see, to that effect and by analogy, Opinion of Advocate General Kokott in *Czech Republic v Commission*, C-4/17 P, EU:C:2018:237, points 48, 49, 52 and 59).
- 94 In the present case, it is established that point 4.6 of Annex I to the sub-programme for the autonomous region of the Azores, inserted into the overall programme by the decision of 3 March 2009, first, mentions, amongst the eligible expenditure, certain expenses directly attributable to ‘control ... activities’ and, second, designates the ‘management authorities’ as beneficiaries of the measure.
- 95 However, it should be noted, first of all, that the operative part of the decision of 3 March 2009 simply approves the amendments to the overall programme submitted by the Portuguese Republic on the basis of Article 49 of Regulation No 793/2006 and does not give an express ruling on the eligibility for EU financing of the expenditure which will be incurred in the context of that programme.

- 96 Next, although it is true that, in recital 2 of the decision of 3 March 2009, the Commission stated, in general terms, that ‘the amendment [of the overall programme] compl[ied] with the objectives and the requirements of Regulation ... No 247/2006’, it did not, however, specifically rule in that decision on the compatibility of the measure inserted into point 4.6 of Annex I to the sub-programme for the autonomous region of the Azores with the provisions of Article 12(c) of Regulation No 247/2006, and nor did it expressly set out its view on the compatibility of that measure with all the applicable EAGF-related provisions.
- 97 Lastly, the operative part of the decision of 3 March 2009 specifies that the approval given by that decision ‘does not cover the control arrangements and the penalties, which will be examined as part of the EAGF audits’.
- 98 In those circumstances, having regard to the wording of the decision of 3 March 2009 and to the legal context in which it was adopted, the Commission cannot be regarded as having given the Portuguese authorities, on the adoption of that decision, precise, unconditional and consistent information as regards the eligibility for EU financing of the expenditure relating to the checks mentioned in point 4.6 of Annex I to the sub-programme for the autonomous region of the Azores.
- 99 In the second place, it must be recalled that it is clear from the response given to the second plea in law that, pursuant to Article 12(c) of Regulation No 247/2006, the expenditure incurred by the national authorities as part of checks is not eligible for EU financing.
- 100 It follows that, even if it were accepted that, in approving, by the decision of 3 March 2009, the insertion into the overall programme of a new technical assistance measure, the Commission gave the Portuguese authorities precise assurances that certain expenditure incurred as part of checks conducted by the Portuguese authorities would be borne by the EAGF, such assurances would in any event have been contrary to the applicable rules and, therefore, could not have created, on the part of the Portuguese Republic, legitimate expectations as to the eligibility of the expenditure at issue for EU financing.
- 101 It follows from the foregoing that the Portuguese Republic is not entitled to rely on infringement of the principle of the protection of legitimate expectations.
- 102 Accordingly, the first plea in law must be rejected and, consequently, the action must be dismissed.

Costs

- 103 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings.
- 104 Since the Portuguese Republic 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 (Ninth Chamber)

hereby:

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

Gervasoni

Kowalik-Bańczyk

Mac Eochaidh

Delivered in open court in Luxembourg on 22 November 2018.

[Signatures]