JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

3 March 2011 *

In Case T-387/07,

Portuguese Republic, represented by L. Inez Fernandes, S. Rodrigues and A. Gattini, acting as Agents,

applicant,

v

European Commission, represented by P. Guerra e Andrade and L. Flynn, acting as Agents,

defendant,

APPLICATION for partial annulment of Commission Decision C (2007) 3772 of 31 July 2007 reducing the financial assistance granted by the European Regional Development Fund (ERDF) towards the global grant for local development in Portugal pursuant to Commission Decision C (95) 1769 of 28 July 1995,

* Language of the case: Portuguese.

THE GENERAL COURT (Eighth Chamber),

composed of M.E. Martins Ribeiro, President, S. Papasavvas and A. Dittrich (Rapporteur), Judges,

Registrar: N. Rosner, Administrator,

having regard to the written procedure and further to the hearing on 18 June 2010,

gives the following

Judgment

Legal framework

1 Council Regulation (EEC) No 2052/88 of 24 June 1988 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 185, p. 9), as amended by Council Regulation No 2081/93 of 20 July 1993 (OJ 1993 L 193, p. 5) ('Regulation No 2052/88'), defines the rules relating to the implementation of the policy of economic and social cohesion set out in Article 158 EC.

2 Under Article 4(1) of Regulation No 2052/88, Community operations are to complement or contribute to corresponding national operations. They are to be established through close consultations between the Commission, the Member State concerned and the competent authorities and bodies — including, within the framework of each Member State's national rules and current practices, the economic and social partners — designated by the Member State at national, regional, local or other level, with all parties acting as partners in pursuit of a common goal. Those consultations are referred to as 'the partnership'. The partnership is to cover the preparation and financing, as well as the *ex ante* appraisal, monitoring and *ex post* evaluation, of operations.

3 Point (c) of the first subparagraph of Article 5(2) of Regulation No 2052/88 provides, inter alia, that in the case of the Structural Funds, financial assistance may be provided in the form of the provision of global grants, as a general rule managed by an intermediary designated by the Member State in agreement with the Commission and allocated by the intermediary in the form of individual grants to final beneficiaries. Under the second subparagraph of Article 5(2), the forms of assistance may only be those established by the Member State or the competent authorities designated by the Member State and submitted to the Commission by that Member State or any other body it may, should the need arise, designate to do so.

4 Under the first subparagraph of Article 13(3) of Regulation No 2052/88, the Community contribution granted under the ERDF is limited to a maximum of 75 % of the total cost of public expenditure.

5 Provisions concerning the Structural Funds are also laid down in Council Regulation (EEC) No 4253/88 of 19 December 1988 laying down provisions for implementing Regulation No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 374, p. 1), as

amended by Council Regulation (EEC) No 2082/93 of 20 July 1993 (OJ 1993 L 193, p. 20) ('Regulation No 4253/88'), and Council Regulation (EEC) No 4254/88 of 19 December 1988 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards the ERDF (OJ 1988 L 374, p. 15), as amended by Council Regulation (EEC) No 2083/93 of 20 July 1993 (OJ 1993 L 193, p. 34) ('Regulation No 4254/88').

6 Article 14(4) of Regulation No 4253/88 provides that the respective commitments of the partners, in the framework of an agreement within the partnership, are to be reflected in the Commission's decisions to grant assistance.

7 The first sentence of Article 16(1) of Regulation No 4253/88 states that, in the case of global grants, the intermediaries to be designated by the Member State concerned in agreement with the Commission must provide appropriate guarantees of solvency and have the necessary administrative capability to manage the operations envisaged by the Commission.

8 Under the second sentence of Article 21(1) of Regulation No 4253/88, payments of financial assistance may take the form either of advances or of final payments in respect of expenditure actually incurred. The second subparagraph of Article 21(3) provides that the payments must be made to the final beneficiaries without any deduction or retention which could reduce the amount of financial assistance to which they are entitled.

9 Article 24 of Regulation No 4253/88 provides that financial assistance granted by the ERDF may be reduced if irregularities are detected in the implementation of the subsidised operation, and that any sum received unduly and to be recovered is to be repaid to the Commission and interest on account of late payment is to be charged on sums not repaid.

10 Regulations No 2052/88 and No 4253/88 were repealed by Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds (OJ 1999 L 161, p. 1). Article 52(1) of Regulation No 1260/1999 states, inter alia, that that Regulation does not affect the continuation or modification, including the total or partial cancellation, of assistance approved by the Commission on the basis of Regulations No 2052/88 and No 4253/88.

11 Under the first sentence of Article 6(1) of Regulation No 4254/88, the Commission may entrust the management of global grants to appropriate intermediaries. Article 6(2) of that regulation governs the procedures for the use of global grants which are the subject of an agreement concluded, in agreement with the Member State concerned, between the Commission and the intermediary. Those procedures are to specify, inter alia, the types of measure to be carried out, the criteria for choosing beneficiaries, the conditions and rates of ERDF assistance and the arrangements for monitoring the use of the global grants.

Background to the dispute

Decision to grant Community support

12 By Decision C (95) 1769 of 28 July 1995, as subsequently amended by Decision C (98) 2796 of 12 October 1998, and by Decision C (99) 3694 of 15 November 1999 ('the grant decision'), addressed to the Portuguese Republic, the Commission granted a global grant for local development ('the SGAIA') to the Caixa Geral de Depósitos SA ('the Caixa'), the intermediary body entrusted with its management, for the period

from 1 January 1994 to 31 December 1999, in relation to the priority axe 'Strengthen the regional economic base' of the Community support framework for Portugal. The maximum amount of assistance from the ERDF to the SGAIA was EUR 25 million.

13 The SGAIA consisted in an interest rate subsidy on medium- and long-term loans taken out by local authorities for carrying out co-financed investments in accordance with the operational programmes of the Community support framework for Portugal for the 1994-1999 programming period. Under that action, the sum of EUR 20 million was paid by the Commission as an advance.

14 Article 1(2) of the grant decision provides that the detailed arrangements for granting the SGAIA are to be the subject of an agreement concluded, in agreement with the Member State concerned, between the Commission and the Caixa. Under Article 2(2) of that decision, the detailed arrangements for the grant of the assistance are set out in the financing plan of the SGAIA and in the agreement annexed to that decision.

15 Article 5 of the grant decision provides:

'The Community support shall relate to expenditure on operations under the [SGAIA] which, in the Member State, are the subject of legally binding commitments and for which the requisite finance has been specifically authorised no later than 31 December 1999. The final date for acceptance of expenditure on these measures is 31 December 2001.'

16 Under Article 7 of the grant decision, the SGAIA must be carried out in accordance with: Community law and, in particular, Articles 6, 30, 48, 52 and 59 of the EC Treaty (now, after amendment, Articles 12 EC, 28 EC, 39 EC, 43 EC and 49 EC); the Community Directives for coordinating contract award procedures; and the Structural Funds Regulations.

Agreement between the Commission and the Caixa

17 On 15 November 1995, an agreement was concluded between the Commission and the Caixa ('the agreement'), Article 1(1) of which sets out the conditions governing the payment and use of the SGAIA, delegated by the Commission to the Caixa, with the aim of contributing to the interest subsidy on medium- and long-term loans granted by the Caixa.

18 Article 1(2) of the agreement provides that it is to remain valid until 31 December 1999 for undertakings entered into, that is to say, for contracts concluded with the beneficiaries. Under that provision, payments, releases or disbursements of loans may be made up to 31 December 2001 and the closure of accounts, the final report, the final certification and the final payment claim to the Commission must be completed no later than 30 June 2002.

19 Article 4(2) of the agreement provides that interest rate subsidies co-financed by the ERDF are to be granted for a maximum period of eight years.

20 Article 7 of the agreement is entitled 'Undertakings and payments'. Under Article 7(2), the final certification of the Caixa for the closure of the SGAIA, postponed until 31 December 2001, must include, inter alia, the final payment claim by the Caixa to the Commission and the final certification of the costs calculated in accordance with Article 8(5) of the agreement, setting out in a specific table the global subsidies actually paid to the beneficiaries up to 31 December 2001 and the global subsidies payable, calculated and updated on 31 December 2001, on the interest relating to the amounts of the loans taken on and actually made available in the context of the SGAIA. Under Article 7(3) and (4) of that agreement, to implement the SGAIA, the Caixa is supposed to open a special account in which the advances are to be deposited.

21 Article 8 of the agreement governs the calculation of the subsidies. Under Article 8(1), the interest subsidies financed by the Commission must, provided that all the other conditions are observed, be granted during a maximum period corresponding to the first eight years of the loans granted by the Caixa to the beneficiaries.

22 Article 8(5) of the agreement provides:

'When implementing the loan contract, the Caixa shall carry out a provisional calculation, for guidance, of the aggregate amount of the ERDF subsidies to be granted, which shall constitute the maximum amount of the subsidies, for the purposes of internal provisional programming of the use of the [SGAIA], and under no circumstances may these subsidies be debited yet from the special account in [euro]; nor may they be certified to the Commission as actually incurred expenditure.

The subsidies shall be definitively granted, converted and debited from the special account in [euro] referred to in Article 7(4) [of the agreement] on the interest payment dates, in accordance with the actual use of the loan already released, using the monthly rate of exchange published by the Commission concerning the value date recorded by the Caixa …

The technical assistance expenditure shall be debited from this account, in accordance with the same procedure and method, up to the established limit.

On the value date of 31 December 2001, the reckonable date, the Caixa shall carry out a definitive calculation of the balance amount of the remaining ERDF subsidies for each loan, update it …, convert it and debit it to the special account in [euros].

The entries in the special account in [euro] shall include a communication identifying the contract with the beneficiary, technical assistance, advances, interest or any other movement such as reverse entries or corrections.

The debits thus made from the special account in [euro] may be certified to the Commission as ERDF expenditure actually incurred and paid. The national counterpart of the subsidy, which does not appear on that account, shall be calculated and converted into [euro] on 31 December 2001 for the certification, separately and in accordance with the same procedure and method.

Where the debited and certified ERDF subsidy is not used by the beneficiary for any reason such as, inter alia, early repayment of the loan or failure to perform the contract, the Caixa undertakes to credit the special account in [euro] using the rate of exchange of the debit concerned on the value date of the event and to reimburse the

Commission within the following six months, even if this agreement has already expired and the [SGAIA] has been discharged and closed.'

23 Under Article 8(6) of the agreement, '[u]p to 31 December 2001, only subsidies that the beneficiaries have actually received on the interest payment dates may be certified to the Commission as expenditure actually incurred which can give rise to a new advance and disbursement of the final balance … During the six-month period following 31 December 2001, the remainder of future subsidies shall also be calculated, updated and may be certified as payments, with a view to closure and discharge of the [SGAIA] by the Commission. The ERDF subsidies shall thus be debited from the special account in [euro].'

24 Under the terms of Article 17(5) of the agreement, any supplement or amendment made to the agreement, or connected to it, agreed in advance by the parties, is to be made in writing and signed by both parties.

25 Article 18 of the agreement states as follows:

'The parties agree that the law applicable to this agreement is Portuguese law. They undertake, moreover, to refer to the Court …, in accordance with Article [238] EC, any complaint or dispute that may be addressed to them concerning the validity, interpretation or execution of this agreement.'

Procedure for closure of the global grant

26 On 30 July 2002, the Caixa sent the documents necessary for closure of the assistance, in accordance with Article 7(2) of the agreement. It applied to the Commission for payment of the final balance of the SGAIA, in the amount of EUR 1 992 330.28 and quantified the value of the subsidies payable in the amount of EUR 8 834 657.94.

27 By letter of 23 October 2002, the Commission informed the Caixa that the balance could not be paid owing to problems raised by the Portuguese General Tax Inspectorate.

28 By letter of 27 November 2002, the Caixa informed the Commission that the Portuguese General Tax Inspectorate was in the course of carrying out an audit of the SGAIA and submitted comments on the observations of the Commission.

29 On 7 March and 20 October 2003, the Caixa corrected its application for closure of the SGAIA, indicating to the Commission the amount of EUR 1 925 858.61 as the final balance of the SGAIA and the sum of EUR 8 768 186.27 by way of outstanding subsidies payable by the ERDF.

30 On 25 May 2004, the Commission informed the Portuguese authorities that it could not make payment of the balance relating to the SGAIA. The Portuguese Republic responded by letter of 29 June 2004.

31 By letter of 16 December 2004, the Commission advised the Portuguese authorities that the amount of the ERDF financial assistance to be recovered was EUR 8 086 424.04.

32 By letter of 21 February 2005, the Portuguese authorities reiterated their disagreement with regard to the position of the Commission and challenged the amount of the balance calculated by the Commission.

33 By letter of 18 November 2005, the Commission repeated to the Portuguese authorities that the amount to be recovered in relation to the SGAIA was EUR 8 086 424.04 and suggested that it should organise a meeting with the Portuguese authorities. The latter replied by letter of 9 January 2006.

34 A meeting was held on 3 May 2006, and was attended by representatives of the Commission, the Portuguese authorities and the Caixa.

Contested decision

35 On 31 July 2007, the Commission adopted Decision C (2007) 3772 ('the contested decision'), addressed to the Portuguese Republic, reducing the assistance granted by the ERDF with regard to the SGAIA pursuant to the grant decision.

36 Recitals 3 to 11 of the contested decision make detailed reference to the procedure for closing the financial assistance of the ERDF (see paragraphs 26 to 34 above).

37 In recitals 12 to 19 of the contested decision, the Commission analyses the nature of the irregularities that it claimed to have detected. Recitals 14 to 16 of that decision refer to Article 5 of the grant decision and to Articles 1(2) and 4(2) of the agreement.

38 According to recital 17 of the contested decision, on the basis of the final declaration submitted by the Caixa, the ERDF assistance funded 82 % of the total of the interest rate subsidies paid up to 31 December 2001. That situation was found to be contrary to Article 13(3) of Regulation No 2052/88, under which the financial assistance of the Community must not exceed 75 % of the total cost.

39 In recital 18 of the contested decision, the Commission notes that, under Article 21(1) of Regulation No 4253/88, the Member State can obtain an ERDF assistance payment from the Commission only for expenditure actually incurred. The Commission adds in that recital that, in the present case, a part of the interest subsidies did not have to be paid until after 31 December 2001, the final date for payments made under the SGAIA and that, in consequence, that part of the expenditure had not yet been incurred on that date. For the expenditure to have been actually incurred in its entirety before that date, the Member State would have had to carry out the following operations before 31 December 2001:

— to have deposited, in a special bank account, the amount of the interest subsidies not yet due, calculated and updated, payable after 31 December 2001, or

— to have paid to the final beneficiaries the amount equivalent to the subsidised interest payable in the future.

40 In recital 19 of the contested decision, the Commission refers to its guidance note of 29 May 2002, relating to the payment of subsidies at the end of the programming period by way of preferential loan schemes ('the guidance note'), in which it is stated that the alternative procedures mentioned in recital 18 of the contested decision were used by the Member States with the approval of the Commission for the period from 1994 to 1999 and even before that date.

41 In recital 27 of the contested decision, the Commission finds that the part of the ERDF assistance relating to calculated and updated interest subsidies not yet due is not payable and that the total amount of those interest subsidies payable after 31 December 2001, corresponding to EUR 15 968 612, is ineligible. In the light of the declared costs and authorisations of the ERDF, as defined in its letter of 16 December 2004, the amount of the ERDF assistance to be recovered is, according to the Commission, EUR 8 086 424.04.

42 According to recital 36 of the contested decision, the agreement does not provide any exception to the general rule regarding the deadline applicable to the eligible payments.

43 The Commission claims, in recital 37 of the contested decision, that it 'detected an irregularity concerning the amount of the expenditure declared during the closure of the … SGAIA, as set out above.'

44 The enacting terms of the contested decision are worded as follows:

'*Article 1*

The financial assistance of the [ERDF] granted pursuant to the [grant decision] for the [SGAIA] is reduced by the amount of EUR 8 086 424.04. The amount of EUR 8 086 424.04 already paid must be repaid to the Commission.

The maximum amount of the ERDF assistance for the [SGAIA] is EUR 11 913 575.96.

Article 2

The Portuguese Republic must take the necessary measures to inform the final beneficiaries of this decision.

Article 3

This Decision is addressed to the Portuguese Republic.'

45 By application lodged at the Registry of the Court of First Instance (now 'the General Court') on 2 November 2007, the Caixa brought an action for partial annulment of the contested decision and an order that the Commission pay the final balance of the SGAIA under Article 238 EC (Case T-401/07).

Procedure and forms of order sought

46 By application lodged at the Registry of the General Court on 11 October 2007, the Portuguese Republic brought the present action.

47 Acting upon a report of the Judge-Rapporteur, the General Court (Eighth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure under Article 64 of its Rules of Procedure, to put written questions to the Commission, to which the Commission replied within the period prescribed.

48 By order of the President of the Eighth Chamber of the General Court of 17 May 2010, Cases T-387/07 and T-401/07 were joined for the purposes of the oral procedure, in accordance with Article 50 of the Rules of Procedure.

49 At the hearing on 18 June 2010, the parties presented oral argument and answered the questions put by the Court.

50 The Portuguese Republic claims that the General Court should:

— annul Article 1 of the contested decision;

— order the Commission to pay the costs.

51 The Commission contends that the General Court should:

— exonerate it with regard to the form of order sought in the application initiating proceedings, declaring the action to be unfounded;

— order the Portuguese Republic to pay the costs.

Law

52 The Portuguese Republic raises two pleas in law. The first concerns the statement of reasons for the contested decision. The second alleges the non-existence of the irregularity noted by the Commission and infringement of the agreement.

The first plea: failure to state adequate reasons in the contested decision

Arguments of the parties

53 The Portuguese Republic argues that only one reason is given in the contested decision, which is set out in recital 37, in which the Commission states that it had noted an irregularity concerning the amount of the expenditure declared at the closure of the SGAIA 'as set out above'. The rule that the Portuguese authorities are said to have infringed is not clearly identified.

54 According to the Portuguese Republic, the only irregularity alleged against the Portuguese authorities seems to be that they considered certain expenditure 'not incurred' to be 'eligible', as provided for at the end of Article 21(1) of Regulation No 4253/88. In the contested decision, the funding reduction decided by the Commission is based on the fact that the Portuguese authorities committed an irregularity by submitting, in the application for payment of the balance with a view to closure of the SGAIA, expenditure 'not actually incurred'.

55 In the light of that alleged irregularity, the infringement of the first subparagraph of Article 13(3) of Regulation No 2052/88 is no more than the corollary of the declaration that part of the expenditure submitted by the Portuguese authorities was ineligible.

56 The Portuguese Republic adds that the term 'irregularity', in the context in which it was used in the contested decision, cannot be construed broadly and that the Commission cannot, in the defence, submit the argument relating to infringement of the rule laid down in Article 13(3) of Regulation No 2052/88, that is to say, an argument which is not set out in the contested decision.

57 The Commission disputes the arguments of the Portuguese Republic.

Findings of the Court

58 It is settled law that the statement of reasons required by Article 253 EC must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraphs 15 and 16; Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63; and Case T-272/02 *Comune di Napoli* v *Commission* [2005] ECR II-1849, paragraph 71).

59 As is clear from paragraphs 37 to 43 above, the Commission analysed, to the requisite legal standard, the nature of the irregularity alleged against the Portuguese Republic in recitals 12 to 19 of the contested decision, to which recital 37 of that decision makes reference.

60 More specifically, in recital 17 of the contested decision, the Commission states that, on the basis of the final declaration presented by the Caixa, the ERDF assistance financed 82 % of the total of the subsidies. The Commission states in that recital that this situation is contrary to Article 13(3) of Regulation No 2052/88, under which Community assistance must not exceed 75 % of the total cost. In recital 18 of the contested decision, the Commission points out that a part of the interest subsidies did not have to be paid until after 31 December 2001 — the final date for payments made under the SGAIA — and that, in consequence, that part of the expenditure had not yet been incurred on that date. According to that recital, under Article 21(1) of Regulation No 4253/88, the Member State can obtain an ERDF assistance payment only for expenditure actually incurred.

61 Moreover, it can be seen from the reasoning of the Portuguese Republic in support of this plea that it fully understood that the Commission was alleging infringement of Article 13(3) of Regulation No 2052/88 and of Article 21(1) of Regulation No 4253/88, owing to the fact that a part of the subsidies had not yet been paid on 31 December 2001 (see paragraphs 54 and 55 above).

62 In those circumstances, the first plea must be rejected.

The second plea: non-existence of the irregularity noted by the Commission and infringement of the agreement

63 This plea is in two parts, respectively claiming that the irregularity noted by the Commission did not exist and concerning the arbitration clause of the agreement.

The first part, concerning the non-existence of the irregularity

— Arguments of the parties

64 The Portuguese Republic claims that the agreement, which is appended to the grant decision and therefore forms an integral part of it, is an agreement concluded between the Commission and the Caixa by which the two parties regulate individual legal situations which arise, in this case, from the award of the ERDF co-financing under the grant decision. The agreement, obtained by consensus, was approved by the Commission under the same administrative measure as the grant decision.

65 According to the Portuguese Republic, Article 14(4) of Regulation No 4253/88 means that the clauses of a contract which, under the general rules of law, embody one or more undertakings agreed between the partners are to be reflected in the content of a Commission decision to grant assistance. It adds that, since Regulation No 4253/88 leaves the signatory parties free to lay down detailed rules of implementation, as well

as any specific rules, a legal status is thereby conferred on the agreement that must be taken into account in any decision of the Commission. Thus, it would be possible to provide for exceptions to the rules set out in that decision, because that decision is intended to establish the detailed rules of implementation of the co-financing awarded and because it was drafted by the parties, who play a predominant role in the application of the global subsidy.

66 The Portuguese Republic states that the agreement is the key legal document. It follows from recital 36 of the contested decision, according to the Portuguese Republic, that the Commission confers on the parties to the agreement discretion to set another deadline for deciding on the eligibility of the SGAIA payments.

67 According to the Portuguese Republic, the Commission did not take into account the aspects specific to the implementation of interest subsidy co-financing for a period, pursuant to Article 4(2) of the agreement, of 'a maximum of the first eight years of the loan'.

68 During the administrative phase, the Commission requested that measures be taken to monitor the declared expenditure, including the calculation of subsidies not yet due, in accordance with Article 8(5) of the agreement. However, in order to adapt the SGAIA for 31 December 2001 (the eligibility deadline set), the Commission overlooked the specific procedure laid down in Article 8(5) of the agreement and further developed in Article 8(6). That procedure makes it possible for expenditure which relates to interest not yet due and which is inevitably going to be incurred under the SGAIA to be certified and accordingly treated as incurred expenditure before the eligibility deadline, in accordance with Article 21(1) of Regulation No 4253/88.

69 The specific nature of the SGAIA results from the fact that a loan granted, approved and signed by the Caixa, for example, on the last working day (31 December 1999), could benefit from the co-financing of interest subsidies for a maximum period of the first eight years of that loan. According to the Portuguese Republic, therefore, and given that the eligibility deadline only extended over the following two years, it was necessary to find a mechanism that enabled the subsidies to be co-financed for the six years that potentially remained. The Portuguese Republic adds that, if the Commission had wanted to amend the agreement, it should have done so in accordance with Article 17(5) of that agreement.

70 In the reply, the Portuguese Republic adds that, in contractual matters, the Commission has the powers necessary to adapt the grant of ERDF assistance to reality and to agree to specific clauses. The Commission, it is argued, took the decision to grant, approved the specific procedure at the same time and exercised its powers of negotiation in agreement with the other parties.

71 According to the Portuguese Republic, Article 8(5) and (6) of the agreement cannot simply be regarded as establishing rules for calculating future subsidies. First, it is argued, there is no answer as to why such a rule is set out in the agreement. Second, the rules set out in Article 8(5) and (6) of the agreement follow up the provisions laid down in Article 7, which is entitled 'Undertakings and payments' and paragraph 2 of which lays down the procedures to be implemented and the documents to be submitted during the closure of the SGAIA by means of the application for payment of the final balance. Article 7(2) sets out the requirement of final certification, which must include, inter alia, the global subsidies not yet due, calculated and updated on 31 December 2001, on the interest relating to the loan amounts actually made available and the balance payable. To obtain the final total amount, it is provided that Commission advances and remaining interest balances only are to be deducted. According to the Portuguese Republic, the purpose of Article 7(2) and of Article 8(5) and (6) of the agreement was to include the future interest subsidies in the balance payment submitted.

72 The proposal of the Commission to pay, up to 31 December 2001, by means of an advance to the final beneficiaries, an amount equivalent to the subsidies that they would be entitled to receive under the loan contracts is in breach of the principles of the execution of public expenditure and of public financial law and could constitute unjust enrichment in favour of the municipalities. That proposal is inadmissible, it is claimed, because it would involve the national counterpart and not the payment of funds from the Community budget. In reality, it is claimed, this proposal is nothing other than a fiction.

73 The Portuguese Republic argues that the deposit of the national counterpart in a special account simply simulates the actual payment and does not guarantee that the expenditure — which must be incurred within the foreseeable future but which is not usually incurred for some time — was actually incurred. It is a fiction, given that the amount equivalent to the subsidies not yet due, debited from a special account, continues to be available to the Portuguese Republic and the Caixa.

74 According to the Portuguese Republic, it could not make the one-off payment of the entirety of the national counterpart established up to the year 2007. Such expenditure has to be included in the budget. The Portuguese Republic cannot make a payment if the necessary budget has not been duly provided for. The budget is prepared on an annual basis only. The Portuguese Republic, it is argued, could do nothing more than undertake to make provision in its budget, on an annual basis, for expenditure relating to the subsidies not yet due. The proposal of the Commission would have obliged the Portuguese authorities to act *contra legem*. According to the Portuguese Republic, the agreement provides for the subsidiary application of Portuguese law to resolve such situations.

75 The Commission disputes the arguments of the Portuguese Republic.

— Findings of the Court

76 The documents on file show that, by letter of 30 July 2002, amended by letter of 7 March and renewed by letter of 20 October 2003, the Caixa sent to the Commission the final certification for the closure of the SGAIA (see paragraphs 26 to 29 above). That certification included an application for payment of the final balance of the SGAIA as well as the final certification of the costs, which sets out, inter alia, the global subsidies actually paid to the beneficiaries up to 31 December 2001 and the global subsidies not yet due, calculated and updated on 31 December 2001, on interest relating to the amounts actually made available from loans concluded in the framework of the SGAIA.

77 In the contested decision, the Commission indicated that ERDF financial assistance could be obtained only for expenditure actually incurred up to 31 December 2001, the final date for payments made under the SGAIA pursuant to Article 5 of the grant decision. Accordingly, it reduced the ERDF financial assistance to the SGAIA by excluding from the Community financing the amounts of the interest subsidies payable after 31 December 2001. In that regard, the Commission relied mainly on Article 21(1) of Regulation No 4253/88 and claimed that those subsidies did not constitute actual expenditure incurred up to the deadline for acceptance of expenditure by the Commission, set out in Article 5 of the grant decision.

78 The Portuguese Republic disputes that position, relying mainly on the agreement. It argues, in essence, that the agreement lays down a specific procedure which made it possible also to include interest subsidies payable after 31 December 2001.

79 It must therefore be determined whether, pursuant to the regulatory provisions applicable in the present case or the agreement, the ERDF financial assistance should also cover interest subsidies payable after 31 December 2001.

80 First of all, in relation to the order of precedence of the rules in question, which must be observed by virtue of the principle of legality, it must be held that the Community regulations concerned take precedence over the decisions of the Commission and over the agreement. The preamble to the agreement states, in this regard, that that agreement is concluded pursuant to the grant decision, which is drawn up in accordance with Regulations No 2052/88 and No 4253/88. Furthermore, Article 7 of the grant decision provides that the SGAIA must be executed in accordance with Community law. It should be noted that the grant decision regulates the relations between the Commission and the Portuguese Republic in relation to the implementation of the SGAIA, whereas the agreement concluded between the Commission and the Caixa, the text of which is appended to the grant decision, sets out in Article 1(1) the conditions for the payment and use of the SGAIA pursuant to Article 6(2) of Regulation No 4254/88.

81 It follows from the foregoing that the agreement concluded between the Commission and the Caixa, as intermediary, in agreement with the Portuguese Republic, cannot be interpreted as contravening the Community rules governing the SGAIA. However, the agreement may be a factor which enables those rules to be interpreted for the purposes of applying them to the present case.

82 First, as regards Article 21(1) of Regulation No 4253/88, which constitutes the main provision relied on by the Commission to exclude the interest subsidies payable after 31 December 2001, it is clear from its wording that the payment of the financial assistance must relate exclusively to expenditure actually incurred. In that regard, it should be noted that the concept of 'expenditure actually incurred', in the context of a

global subsidy, can be defined by specific provisions in the Community framework of the Structural Funds (see, to that effect, the judgment of the General Court of 8 July 2008 in Case T-176/06 *Sviluppo Italia Basilicata* v *Commission*, not published in the ECR, paragraphs 9 to 12, 51 and 52). As a consequence, it is a question of identifying the specific conditions that must be fulfilled, in the interest subsidy scheme in question, in order for the interest subsidies to be treated as expenditure actually incurred.

83 In that regard, it should be pointed out that, in such a scheme, the intermediary pays a subsidised loan to the final beneficiary. The interest subsidies represent the amounts resulting from the difference between the interest at the market rate and the interest actually paid by the final beneficiaries. Accordingly, the interest subsidies are actually incurred at the time when the interest payments fall due, which may take several years. Thus, the interest subsidies follow the payment of the interest by the final beneficiaries for the duration of the loans. This means that the expenditure actually incurred in relation to the interest subsidies does not yet exist at the time when the loan contracts are concluded. At the time of such conclusion, all that exist are the obligations between the parties to the loan contract, which must be distinguished from the expenditure actually incurred in order to fulfil those obligations. Consequently, in the light solely of Article 21(1) of Regulation No 4253/88, the interest subsidies may be treated as expenditure actually incurred when the interest instalments relating to them are paid.

84 Secondly, as regards the grant decision, the first sentence of Article 5 provides that the Community support is to relate to operations under the SGAIA which, in the Member State, are the subject of legally binding commitments and for which the requisite finance has been specifically authorised no later than 31 December 1999. In

the second sentence, it is indicated that the final date for acceptance of expenditure on those measures is 31 December 2001.

85 Article 5 of the grant decision therefore distinguishes between legally binding commitments in the Member State; the authorisation of finance; and the acceptance of expenditure.

86 With regard to the legally binding commitments, it is established that those correspond to the loan contracts concluded between the Caixa and the final beneficiaries. In relation to the authorisation of finance, it is common ground that this refers to the authorisation provided for by the Commission with regard to the loan contracts.

87 With regard, lastly, to the acceptance of expenditure on those measures, it should be noted that the first sentence of Article 5 of the grant decision defines the loan contracts authorised up to 31 December 1999 by the Commission as subjects of Community support. In the second sentence of Article 5, it was appropriate, therefore, to define the deadline for acceptance of the expenditure resulting from those loan contracts. In this regard, it should be noted that the term 'acceptance' cannot simply mean actually assuming liability for the expenditure concerned: that liability already arises from the loan contracts, which had to be authorised up to 31 December 1999 and which are mentioned in the first sentence of Article 5 of the grant decision. Accordingly, the acceptance of expenditure does not relate to the liabilities arising from the loan contracts, but rather to the actual expenditure incurred as a result of those contracts. It relates, therefore, to the interest subsidies actually incurred at the time of payment of the interest instalments by the final beneficiaries. Consequently, under the second sentence of Article 5 of the grant decision, the deadline for expenditure actually incurred in relation to the interest subsidies resulting from the loan contracts authorised by the Commission is fixed as 31 December 2001.

88 It follows that, subject to examination of the agreement and solely on the basis of Article 21(1) of Regulation No 4253/88 and Article 5 of the grant decision, it seems that the interest subsidies payable after 31 December 2001 cannot represent expenditure actually incurred.

89 Thirdly, as regards the agreement, it is appropriate to determine whether the application of that agreement within the framework of the regulatory provisions concerned and the grant decision makes it possible for interest subsidies payable after 31 December 2001 to be included also, as the Portuguese Republic claims.

90 In that regard, it should be noted that Article 4(2) and Article 8(1) of the agreement provided that the interest subsidies co-financed by the ERDF could be granted for a maximum period of eight years. In that context, it should be noted that, under Article 1(1) of the grant decision, referred to in Article 1(1) of the agreement, the SGAIA was granted for the period between 1 January 1994 and 31 December 1999. Furthermore, under the first sentence of Article 5 of the grant decision and the first sentence of Article 1(2) of the agreement, the loan contracts between the Caixa and the final beneficiaries which fall within the scope of the agreement could be authorised by the Commission up to 31 December 1999. It follows that those loan contracts could be concluded up to 31 December 1999 with a potential period of validity extending to 31 December 2007. Given that, under the second sentence of Article 5 of the grant decision, the deadline for acceptance of expenditure was 31 December 2001 — eight years after the first possible conclusion of a loan contract — it is probable that many loan contracts authorised up to 31 December 1999 were ongoing after 31 December 2001.

91 It should also be noted that, under Article 7(2) of the agreement, the final certification that the Caixa must submit to the Commission, deferred to 31 December 2001, must include the application for payment of the balance and the final certification of the

costs calculated in accordance with Article 8(5) of the agreement: that is to say, in the present case, the subsidies actually paid to the beneficiaries up to 31 December 2001 and the subsidies payable, calculated and updated on 31 December 2001, on interest relating to the loan amounts actually made available.

92 The fourth subparagraph of Article 8(5) of the agreement states that, on the value date of 31 December 2001, the payment deadline, the Caixa had to carry out the definitive calculation of the balance amount of the remaining ERDF subsidies for each loan, update it, convert it and debit it from the special account. Under the sixth subparagraph of Article 8(5), the debits thus made from the special account could be certified to the Commission as expenditure actually incurred and paid by way of the ERDF assistance.

93 Under Article 8(6) of the agreement, up to 31 December 2001, only subsidies that the beneficiaries had actually received on the interest payment dates could be certified to the Commission as expenditure actually incurred which could give rise to a new advance and disbursement of the final balance. During the six-month period following 31 December 2001, the remainder of future subsidies also had to be calculated, updated and could be certified as payments, with a view to closure and discharge of the SGAIA by the Commission. The ERDF subsidies thus had to be debited from the special account.

94 It should therefore be noted that Article 8(5) and (6) of the agreement set out a special scheme under which the interest subsidies payable after 31 December 2001 could, in principle, also be eligible under the SGAIA. These provisions covered the interest subsidies that the final beneficiaries had actually received up to 31 December 2001 and, in addition, the subsidies payable after 31 December 2001 which had to be calculated and updated up to 30 June 2002. The two items also had to be included in

the final certification that the Caixa had to submit to the Commission before 30 June 2002 and, thus, debited from the special account.

95 In the light of Article 21(1) of Regulation No 4253/88 and of Article 5 of the grant decision, the measures taken in the present case by the Caixa and the Portuguese Republic on the basis of that special scheme were not sufficient to fulfil the conditions set out in those provisions, which means that the interest subsidies payable after 31 December 2001 could not constitute expenditure actually incurred on that date.

96 It is common ground that, in the present case, the subsidies payable after 31 December 2001 were calculated and updated up to 30 June 2002. They were also included in the final certification submitted to the Commission. However, as the Caixa admitted at the hearing, those interest subsidies were not subject to any other measure taken by the Caixa or the Portuguese Republic up to 31 December 2001 in order to fulfil the conditions set out in Article 21(1) of Regulation No 4253/88 and Article 5 of the grant decision. Those interest subsidies, in particular, were not debited from the special account.

97 It follows that the Portuguese Republic regarded the interest subsidies payable after 31 December 2001, in essence, as eligible expenditure under the SGAIA solely on the basis of the financial obligations resulting from the loan contracts concluded between the Caixa and the final beneficiaries.

98 As has already been stated in the context of examining Article 21(1) of Regulation No 4253/88, in order to meet the requirements of the terms 'expenditure actually

incurred', the mere existence of the financial obligations resulting from the loan contracts concluded between the Caixa and the final beneficiaries is not sufficient for the interest subsidies payable after 31 December 2001 to be treated as expenditure actually incurred (see paragraph 82 above). Likewise, it follows from the examination of Article 5 of the grant decision that the acceptance of the expenditure does not relate to the liabilities of the Caixa to the final beneficiaries resulting from the loan contracts (see paragraph 87 above).

99 In that regard, it should be noted that it is also clear from the first subparagraph of Article 8(5) of the agreement that the mere existence of the financial obligations resulting from the loan contracts, as a basis for enabling interest subsidies to be classified as expenditure actually incurred, is not sufficient. Indeed, that provision merely states that, when implementing the loan contract, the Caixa had to carry out a provisional calculation, for guidance, of the aggregate amount of the interest subsidies to be granted, which cannot under any circumstances be debited yet from the special account or certified as actually incurred expenditure. It follows that the parties to the agreement concurred that the financial obligations alone, relating to the interest subsidies and existing when the loan contract was entered into, could not enable those payable subsidies to be treated as actually incurred expenditure.

100 The sixth subparagraph of Article 8(5) of the agreement supports the findings in paragraphs 98 and 99 above, in that it provides that the transfers from the special account must include a communication identifying, in particular, any account movement. Accordingly, that provision emphasises that transfers from the special account must be based on supporting account movements. It follows that the debit from the special account of interest subsidies payable after 31 December 2001, which had not been carried out on that date, should nevertheless have been based on an account movement made on that date. The mere existence of the financial obligations arising from the loan contracts could not, therefore, be regarded as evidence of such a debit.

101 Furthermore, the claim that the calculation, updating and inclusion in the final certification of the interest subsidies payable after 31 December 2001 are not sufficient for them to be treated as actually incurred expenditure is not at odds with Article 8(6) of the agreement: it does not follow from that provision that the interest subsidies payable after 31 December 2001 would necessarily be considered as payments. On the contrary, under that provision, those subsidies could be certified as payments, which does not preclude the requirement of other preconditions. That provision also states that those subsidies had to be debited from the special account, which would have required, under the fifth subparagraph of Article 8(5) of the agreement, account movements attesting to the transfers from that account (see paragraph 100 above).

102 In that regard, moreover, it should be noted that, under Article 1(2) thereof, the agreement only remained valid for loan contracts up to 31 December 1999 and that the payments, releases or disbursements of loans could be made up to 31 December 2001. It is scarcely conceivable that the Community action remained available until 31 December 2007, that is to say, a long time after the expiry of the agreement concluded between the Commission and the Caixa, in agreement with the Portuguese Republic, to define its grant arrangements and after the Caixa had submitted the report of its expenditure (see, to that effect, *Sviluppo Italia Basilicata* v *Commission*, paragraph 82 above, paragraph 49).

103 Rather, it is apparent from the agreement that it only exceptionally regulates those cases arising after its expiry and after the closure of the SGAIA. Indeed, the agreement sets out the obligation incumbent upon the Caixa — under the seventh subparagraph of Article 8(5) — in those cases where a debited and certified ERDF subsidy is not used by the beneficiary for some reason, to credit the special account and reimburse the Commission 'even if this agreement has already expired and the [SGAIA] has been discharged and closed'.

104 According to the Commission, the alternative procedures set out in recital 18 of the contested decision would have enabled interest subsidies payable after 31 December 2001 to be accepted, either by depositing in a special bank account the amount of the interest subsidies not yet due, calculated and updated and payable after 31 December 2001, or by payment to the final beneficiaries of the amount equivalent to the subsidised interest payable in the future.

105 In that regard, it should be noted that there is no need for the Court to rule on the question whether those alternative procedures are sufficient, given that it follows from the above that the measures taken by the Portuguese Republic and the Caixa were not sufficient to fulfil the conditions set out in Article 21(1) of Regulation No 4253/88 and Article 5 of the grant decision.

106 Lastly, it should be noted, the fact that the Commission failed to refer to the irregularities alleged in the contested decision during the implementation of the assistance — assuming that it had detected them at the time — has no bearing on the legality of the contested decision even if, in view of the partnership system underlying the scheme established by Regulation No 4253/88, the Commission should bring it to the attention of the competent authorities when it discovers irregularities (see, to that effect, Case C-414/08 P *Sviluppo Italia Basilicata* v *Commission* [2010] ECR I-2559, paragraphs 102 and 103).

107 In the light of all of the foregoing, the first part of the second plea must be rejected.

The second part, concerning the arbitration clause of the agreement

— Arguments of the parties

108 The Portuguese Republic states that the arbitration clause of the agreement, under which an application must be made to the Court in accordance with Article 238 EC, should have been applied by the Commission when it made the allegation that the Caixa had committed irregularities concerning the performance of the agreement.

109 In the reply, the Portuguese Republic adds that the allegation that it is not a signatory to the agreement cannot be upheld, given that the clauses of that agreement had been approved with the agreement of the Member State in the framework of the partnership.

110 The fact that the Commission excluded actual expenditure concerning interest not yet due, without referring to an infringement of the agreement, gives rise to a dispute, it is argued, that relates to the interpretation of the agreed clauses.

111 The Commission disputes the arguments of the Portuguese Republic.

— Findings of the Court

112 It should be noted that the claims of the Portuguese Republic are based on the arbitration clause set out in Article 18 of the agreement, which was concluded between the Caixa and the Commission in agreement with the Portuguese Republic.

113 The second sentence of Article 18 of the agreement provides that the parties to the agreement are to undertake to refer to the Community judicature, in accordance with Article 238 EC, any complaint or dispute that may be addressed to them concerning the validity, interpretation or execution of the agreement (see paragraph 25 above).

114 It should be noted from the outset that it follows from the wording of that clause that a complaint or a dispute falling within the scope of that clause must be between the Caixa and the Commission, given that they are the parties to the agreement. As the Portuguese Republic is not a party to the agreement, it cannot rely on the fact that the Commission has not applied to the Community judicature in accordance with the arbitration clause.

115 Moreover, the present dispute does not come within the scope of the arbitration clause. As is clear from Article 20(1) and Article 21(1) of Regulation No 4253/88, the payment of the financial assistance is made in accordance with the budgetary commitments made on the basis of the decision approving the measure concerned. Since the amount of the assistance in question results from the grant decision, it should be noted that the agreement, intended to establish certain procedures for its use, in accordance with Article 6(2) of Regulation No 4254/88, cannot give rise to a financial obligation on the part of the Community (see, to that effect, the judgment of 27 June

2007 of the General Court in Case T-65/04 *Nuova Gela Sviluppo* v *Commission*, not published in the ECR, paragraphs 104 and 105).

116 In the light of all of the foregoing, the second part of the second plea and, accordingly, the second plea as a whole, must be rejected and the action in its entirety must be dismissed.

Costs

117 Under Article 87(2) 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. Since the Portuguese Republic has been unsuccessful, it must be ordered to bear its own costs and pay the costs incurred by the Commission, as applied for in the latter's pleadings.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

1. Dismisses the action;

2. Orders the Republic of Portugal to bear its own costs and to pay those of the European Commission.

Martins Ribeiro Papasavvas Dittrich

Delivered in open court in Luxembourg on 3 March 2011.

[Signatures]