Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

17 May 2017*

(Appeal — EAGF and EAFRD — European Commission implementing decision — Notification to the addressee — Subsequent rectification of the print lay-out of the annex — Publication of the decision in the *Official Journal of the European Union* — Time limit for bringing an action — Point from which time starts to run — Delay — Inadmissibility)

In Case C-339/16 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 16 June 2016,

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

appellant,

the other party to the proceedings being:

European Commission, represented by D. Triantafyllou and M. França, acting as Agents,

defendant at first instance,

THE COURT (Sixth Chamber),

composed of E. Regan, President of the Chamber, J.-C. Bonichot (Rapporteur) and A. Arabadjiev, Judges,

Advocate General: E. Sharpston,

Registrar: A. Calot Escobar,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: Portuguese.

Judgment

1 By its appeal, the Portuguese Republic seeks to have set aside the order of the General Court of the European Union of 19 April 2016, *Portugal* v *Commission* (T-556/15, not published, 'the order under appeal', EU:T:2016:239), by which the General Court dismissed as inadmissible its action seeking annulment of Commission Implementing Decision (EU) 2015/1119 of 22 June 2015 excluding from European Union financing certain expenditure incurred by the Member States under the European Agricultural Guarantee Fund (EAGF) and under the European Agricultural Fund for Rural Development (EAFRD) (OJ 2015 L 182, p. 39, 'the decision at issue'), in so far as it excludes certain expenditure incurred by that Member State.

Background to the dispute and the decision at issue

2 On 22 June 2015, the Commission adopted the decision at issue by which, inter alia, it applied a financial correction in the order of EUR 137 million to the Portuguese Republic, as regards the measure 'Other Direct Aids — Surfaces' for the financial years 2010 to 2012.

3 Article 2 of the decision at issue provides, inter alia:

'This Decision is addressed to … the Portuguese Republic ...'

4 On 23 June 2015, the decision at issue was notified to the Permanent Representation of the Portuguese Republic to the European Union, under number C(2015) 4076.

5 On 10 July 2015, the decision at issue was published in the *Official Journal of the European Union*.

6 On 20 July 2015, the Permanent Representation of the Portuguese Republic to the European Union received a communication, together with the following statement in English:

'Due to a technical error, the annex to [the decision at issue] of 22/06/2015 and notified on 23/06/2015 may present print lay-out problems. For this reason, we send you back the annex cleared-out of any print lay-out problems.'

The action before the General Court and the order under appeal

7 By application lodged at the General Court Registry on 23 September 2015, the Portuguese Republic sought annulment of the decision at issue.

8 By separate document, lodged at the General Court Registry on 8 October 2015, the Commission raised a plea of inadmissibility under Article 130(1) of the Rules of Procedure of the General Court. On 20 November 2015, the Portuguese Republic submitted its observations on the plea of inadmissibility raised by the Commission.

9 By a measure of organisation of procedure of 4 February 2016, the General Court asked the Commission to provide information regarding the print lay-out problems referred to in its communication of 20 July 2015. By letter of 17 February 2016, the Commission complied with the General Court's request by providing the information requested.

10 By the order under appeal, the General Court found that the action brought by the Portuguese Republic had manifestly been brought after the expiry of the period prescribed and that it had therefore been brought out of time.

11 In this connection, the General Court found that the period for instituting proceedings against the decision at issue had started to run from its notification to the Portuguese Republic on 23 June 2015. In accordance with the Rules of Procedure of the General Court, the period for instituting proceedings, the extension on account of distance included, had expired, according to the General Court, on 2 September 2015 at midnight.

12 Consequently, the General Court dismissed the action brought by the Portuguese Republic as inadmissible.

Forms of order sought by the parties

13 By its appeal, the Portuguese Republic claims that the Court of Justice should:

— set aside the order under appeal in so far as the General Court held the plea of inadmissibility raised by the Commission to be well founded;

— hold that the proceedings brought against the decision at issue were validly instituted within the period prescribed in Article 263 TFEU; and

— order the Commission to pay all of the costs.

14 The Commission contends that the Court of Justice should:

— declare the appeal brought by the Portuguese Republic inadmissible or, in the alternative, unfounded, and

— order the Portuguese Republic to pay the costs.

The appeal

15 In support of its appeal, the Portuguese Republic relies on three grounds of appeal, alleging errors of law in the application of the sixth paragraph of Article 263 TFEU.

Admissibility

Arguments of the parties

16 The Commission contends that the appeal is inadmissible on the ground that all the grounds of appeal put forward by the Portuguese Republic are inadmissible, since that Member State merely challenges the order under appeal on the basis of the same arguments as those it had relied on before the General Court, without indicating the particulars as to, and reasons, why it is alleged the General Court erred in law.

17 Furthermore, the argument of the Portuguese Republic that, in the absence of any imperative reasons to the contrary, the General Court ought to have favoured an interpretation of Article 263 TFEU that did not result in its action being time-barred is also inadmissible, on the ground that it relates to the assessment of a question of fact.

18 The Portuguese Republic contests the plea of inadmissibility raised by the Commission.

Findings of the Court

19 In so far as the Commission contests the admissibility of the present appeal on the ground that the Portuguese Republic is merely seeking re-examination of arguments previously put forward before the General Court, it should be recalled that it follows, inter alia, from Article 168(1)(d) and Article 169(2) of the Rules of Procedure of the Court of Justice that an appeal must indicate precisely the contested elements of the decision which the appellant seeks to have set aside and the legal arguments specifically advanced in support of the appeal. An appeal which merely repeats or reproduces verbatim the pleas in law and arguments previously submitted to the General Court, including those based on facts expressly rejected by the General Court, does not satisfy the requirement to state reasons under those provisions (judgment of 19 January 2017, *Commission* v *Total and Elf Aquitaine*, C-351/15 P, EU:C:2017:27, paragraph 30 and the case-law cited).

20 However, provided that the appellant challenges the interpretation or application of EU law by the General Court, the points of law examined at first instance may be discussed again in the course of an appeal. Indeed, if an appellant could not thus base his appeal on pleas in law and arguments already relied on before the General Court, an appeal would be deprived of part of its purpose (judgment of 19 January 2017, *Commission* v *Total and Elf Aquitaine*, C-351/15 P, EU:C:2017:27, paragraph 31 and the case-law cited).

21 In the present case, the appeal brought by the Portuguese Republic does not seek a mere re-examination of the application submitted to the General Court, but specifically seeks to challenge the interpretation of the sixth paragraph of Article 263 TFEU made by the General Court and the legal reasoning which led the General Court to hold that the action brought by that Member State had manifestly been brought after the expiry of the period prescribed and that it had therefore been brought out of time.

22 To that end, the Portuguese Republic has identified with sufficient precision the contested elements of the order under appeal and the arguments relied on in support of its claim for annulment.

23 Furthermore, as regards the admissibility of the argument that, in the absence of any imperative reasons to the contrary, the General Court ought to have favoured an interpretation of Article 263 TFEU that did not result in its action being time-barred, it must be stated that that argument does not concern 'the assessment of a question of fact', but relates to the detailed rules for the application of that provision.

24 Consequently, the appeal brought by the Portuguese Republic is admissible.

Substance

The second and third grounds of appeal

– Arguments of the parties

25 The Portuguese Republic claims that the General Court made a number of errors in the interpretation of the sixth paragraph of Article 263 TFEU, in particular, in paragraph 31 of the order under appeal.

26 First, it submits that it is clear from the wording of that provision that the publication of the decision at issue in the Official Journal is decisive as regards the time limit for bringing an action. Thus, the words 'as the case may be' indicate that the starting point of the period prescribed for instituting proceedings must be determined according to the order of the forms of publication referred to in that provision. It follows that notification is subsidiary to publication, even in the case of decisions the

publication of which is not mandatory. That interpretation is supported by the judgment of 10 March 1998, *Germany* v *Council* (C-122/95, EU:C:1998:94), and makes it possible to observe the principle of legal certainty and to avoid any discrimination between the Member States.

27 Second, the Portuguese Republic claims that the General Court ought to have favoured an interpretation of Article 263 TFEU that did not result in its action being time-barred, and refers, to that end, to the judgment of 26 September 2013, *PPG and SNF* v *ECHA* (C-625/11 P, EU:C:2013:594).

28 In support of that argument, the Portuguese Republic also relies on the judgment of 22 January 1997, *Opel Austria* v *Council* (T-115/94, EU:T:1997:3, paragraph 124), from which it is clear that the principle of legal certainty requires that every measure must be brought to the notice of the person concerned in such a way that he can ascertain exactly the time at which the measure in question has legal effects. It submits that it follows from that judgment that that requirement of legal certainty must be observed all the more strictly in the case of a measure liable to have financial consequences in order that those concerned may know precisely the extent of the obligations which that measure imposes on them.

29 Furthermore, the Portuguese Republic claims that the General Court failed, in paragraph 37 of the order under appeal, to have regard to the consequences that flow from the consistent practice of the Commission of publishing, in the Official Journal, the decisions on clearance of expenditure incurred by the Member States under the EAGF and under the EAFRD.

30 It is submitted, in that regard, that it follows from the judgment of 10 March 1998, *Germany* v *Council* (C-122/95, EU:C:1998:94), that the Portuguese Republic could legitimately expect the decision at issue to be published in the Official Journal and that the date of publication would cause the period prescribed for instituting proceedings to start running.

31 Moreover, the General Court failed to have regard to the legal effects that follow from the fact that the Commission publishes the clearance decisions in the L series of the Official Journal.

32 The Portuguese Republic also claims, relying on the order of 27 November 2007, *Diy-Mar Insaat Sanayi ve Ticaret and Akar* v *Commission* (C-163/07 P, EU:C:2007:717, paragraphs 32 and 36), that the Commission's conduct was 'such as to give rise to a pardonable confusion in the mind of a party concerned acting in good faith' and that the Court accepts that certain situations may be treated as equivalent 'to unforeseeable circumstances or *force majeure* with the consequence that no right of the parties concerned should be prejudiced by the expiry of a time limit'.

33 The Commission contends that the second and third grounds of appeal should be rejected.

– *Findings of the Court*

34 Under the sixth paragraph of Article 263 TFEU, an action for annulment is to be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

35 Furthermore, it is apparent from the third subparagraph of Article 297(2) TFEU that, by contrast with acts which must be published in the Official Journal, inter alia, the decisions which specify to whom they are addressed must be notified to those to whom they are addressed and take effect upon such notification.

36 It follows from a combined reading of those two provisions of the FEU Treaty that, so far as actions for annulment are concerned, the date to be taken into account for the purposes of determining the starting point of the period prescribed for instituting proceedings is the date of publication, when such

publication, which is a precondition for the coming into force of the act, is provided for in that Treaty, and the date of notification in the other cases referred to in the third subparagraph of Article 297(2) TFEU, amongst which is that of decisions which specify those to whom they are addressed.

37 The Court has confirmed that interpretation of the sixth paragraph of Article 263 TFEU by holding that, as regards an act specifying those to whom it is addressed, only the text which is notified to those addressees is authentic, even if that act may also have been published in the Official Journal (judgment of 13 July 1966, *Consten and Grundig* v *Commission*, 56/64 and 58/64, EU:C:1966:41, p. 337).

38 It follows that, contrary to what the Portuguese Republic claims, the notification of a measure is not subsidiary to the publication of that measure in the Official Journal for the purposes of determining the starting point of the period prescribed for instituting proceedings applicable to the addressee of that measure.

39 The judgment of 10 March 1998, *Germany* v *Council* (C-122/95, EU:C:1998:94), does not support a different conclusion. In paragraph 35 of that judgment, the Court held that it is clear simply from the wording of the sixth paragraph of Article 263 TFEU that the criterion of the day on which a measure came to the knowledge of an applicant, as the starting point of the period prescribed for instituting proceedings, is subsidiary to the criteria of publication or notification of the measure.

40 In the light of all the foregoing considerations, it must be held that the General Court did not err in law in holding, in particular, in paragraph 36 of the order under appeal, that, for the purposes of calculating the time limit for bringing an action, it was the notification of the decision at issue to the Portuguese Republic that was to be taken into consideration, and not the publication of that decision in the Official Journal.

41 The other arguments raised by the Portuguese Republic in its second and third grounds of appeal do not invalidate that finding.

42 That applies to the claim by the Portuguese Republic that the General Court ought to have favoured an interpretation of the sixth paragraph of Article 263 TFEU that did not result in its action being time-barred, since, in any event, the meaning of that provision, read in the light of the third subparagraph of Article 297(2), is clear, and its wording does not give rise to doubts as regards its interpretation.

43 For that same reason, the Portuguese Republic cannot claim that the Commission's conduct, in publishing the decisions on clearance of expenditure incurred by the Member States under the agricultural funds, was such as to give rise to 'confusion in the mind of a party concerned acting in good faith', that its interpretation of the sixth paragraph of Article 263 TFEU constitutes an excusable error (see, to that effect, order of 17 May 2002, *Germany* v *Parliament and Council*, C-406/01, EU:C:2002:304, paragraph 21), or indeed that the General Court's interpretation of that provision is contrary to the principle of legal certainty.

44 It follows from all the foregoing considerations that the second and third grounds of appeal must be dismissed.

The first ground of appeal

– Arguments of the parties

45 The Portuguese Republic claims that, after the notification to it of the decision at issue on 23 June 2015, which it describes as 'provisional', the decision was 'definitively' notified to it on 20 July 2015. That latter date constitutes the starting point of the period prescribed for instituting proceedings, since, contrary to what is stated in paragraph 42 of the order under appeal, the notification made on 23 June 2015 did not enable it to fully acquaint itself with the decision at issue, a point which the Commission confirmed by conceding that that notification was neither perfect nor complete. Consequently, it submits that its application was made within the time limit.

46 The Commission contends that the first ground of appeal should be rejected.

– Findings of the Court

47 As regards the regularity of the notification of EU acts, the Court has already made it clear that a decision is properly notified provided that it is communicated to the person to whom it is addressed and the latter is put in a position to become acquainted with it (see order of 2 October 2014, *Page Protective Services* v *EEAS*, C-501/13 P, not published, EU:C:2014:2259, paragraph 30).

48 In this connection, it is clear from paragraphs 26 and 27 of the order under appeal that the decision at issue was notified to the Portuguese Republic on 23 June 2015 and that the Portuguese Republic was in a position to become acquainted with the content of that decision and the grounds on which it is based. Furthermore, in paragraph 42 of that order, the General Court found that the sole purpose of the subsequent communication of 20 July 2015 was to amend the print lay-out of the tables of figures in the annex to the decision at issue, and that this did not concern the Portuguese version, that version not having been subject to any amendment to either its content or presentation.

49 As regards the argument of the Portuguese Republic that the General Court distorted the clear sense of the facts and evidence in that regard, suffice it to point out that all the particulars set out in the decision at issue and concerning the Portuguese Republic are set out clearly in the version of that decision notified on 23 June 2015.

50 It follows from the foregoing that the decision at issue was duly notified to the Portuguese Republic on 23 June 2015.

51 As regards the communication of 20 July 2015, it is in any event clear, from the case-law of the Court, that a decision which merely confirms a previous decision, as is manifestly the case in this instance, does not have the effect of creating a new time limit for instituting proceedings since the bringing of an action for annulment against a decision which merely confirms a previous decision not contested within the time limit for instituting the proceedings is inadmissible (see, to that effect, order of 21 November 1990, *Infortec* v *Commission*, C-12/90, EU:C:1990:415, paragraph 10).

52 Having regard to the foregoing considerations, the General Court did not err in law in finding, in paragraph 27 of the order under appeal, that the notification of the decision at issue on 23 June 2015 had enabled the Portuguese Republic to become acquainted with the content of that decision and the grounds on which it was based and, in paragraph 44 of the order under appeal, that the period for instituting proceedings against the decision at issue had started to run from its notification to the Portuguese Republic on 23 June 2015, and not from the communication of 20 July 2015.

53 Consequently, the first ground of appeal must be dismissed.

54 It follows from all the foregoing considerations that the appeal must be dismissed in its entirety.

Costs

55 Under Article 184(2) of the Rules of Procedure of the Court, where the appeal is unfounded, the Court is to make a decision as to the costs.

56 Under Article 138(1) of those Rules of Procedure, applicable to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

57 Since the Commission has applied for costs and the Portuguese Republic has been unsuccessful, the Portuguese Republic must be ordered to pay the costs.

On those grounds, the Court (Sixth Chamber) hereby:

1. **Dismisses the appeal;**

2. **Orders the Portuguese Republic to pay the costs.**

[Signatures]