JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)

10 September 2008 *

In Case T-370/05,

French Republic, represented initially by G. de Bergues and A. Colomb, and subsequently by G. de Bergues and A.-L. During, acting as Agents,

applicant,

v

Commission of the European Communities, represented by M. Nolin, acting as Agent,

defendant,

ACTION for annulment of Commission Decision 2005/579/EC of 20 July 2005 excluding from Community financing certain expenditure incurred by the Member States under the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) (OJ 2005 L 199, p. 84), in so far as it excludes from Community financing certain expenditure in respect of a correction relating to determination of the areas eligible for support for restructuring and conversion of vineyards for the 2001–2003 accounting period,

* Language of the case: French.

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fourth Chamber),

composed of O. Czúcz, President, J.D. Cooke and I. Labucka (Rapporteur), Judges,

Registrar: C. Kristensen, Administrator,

having regard to the written procedure and further to the hearing on 14 May 2008,

gives the following

Judgment

Legal context

1 The basic rules relating to the financing of the common agricultural policy (CAP) are constituted, in respect of expenses incurred from 1 January 2000, by Council Regulation (EC) No 1258/1999 of 17 May 1999 on the financing of the common agricultural policy (OJ 1999 L 160, p. 103).

2 Article 7(4) of Regulation No 1258/1999 lays down the following:

'The Commission shall decide on the expenditure to be excluded from the Community financing referred to in Articles 2 and 3 where it finds that expenditure has not been effected in compliance with Community rules.

Before a decision to refuse financing is taken, the results of the Commission's checks and the replies of the Member State concerned shall be notified in writing, after which the two parties shall endeavour to reach agreement on the action to be taken.

If no agreement is reached, the Member State may ask for a procedure to be initiated with a view to mediating between the respective positions within a period of four months, the results of which shall be set out in a report sent to and examined by the Commission, before a decision to refuse financing is taken.

The Commission shall evaluate the amounts to be excluded having regard in particular to the degree of non-compliance found. The Commission shall take into account the nature and gravity of the infringement and the financial loss suffered by the Community …'

3 Article 8(1) of Commission Regulation (EC) No 1663/95 of 7 July 1995 laying down detailed rules for the application of Regulation (EEC) No 729/70 regarding

the procedure for the clearance of the accounts of the EAGGF Guarantee Section (OJ 1995 L 158, p. 6), states:

'1. If, as a result of an enquiry, the Commission considers that expenditure has not been effected according to Community rules, it shall notify the Member State concerned of the results of its checks and indicate the corrective measures to be taken to ensure future compliance.

The communication shall refer to this Regulation. The Member State shall reply within two months and the Commission may modify its position in consequence. In justified cases, the Commission may extend the period allowed for reply.

After expiry of the period allowed for reply, the Commission shall invite the Member State to a bilateral discussion and the parties shall endeavour to reach agreement on the measures to be taken and on an evaluation of the gravity of the infringement and the financial loss to the Community. Following that discussion and any deadline after the discussion fixed by the Commission, after consultation of the Member States, for the provision of further information or, where the Member State does not accept the invitation to a meeting before the deadline set by the Commission, after that deadline has passed, the Commission shall formally communicate its conclusions to the Member State, referring to Commission Decision 94/442/EC. Without prejudice to the fourth subparagraph of this paragraph, that communication shall include an evaluation of any expenditure the Commission intends to exclude under Article 5(2)(c) of Regulation (EEC) No 729/70.

The Member State shall inform the Commission as soon as possible of the corrective measures adopted to ensure compliance with Community rules and the date of their entry into force. The Commission shall, as appropriate, adopt one or more Decisions under Article 5(2)(c) of Regulation (EEC) No 729/70 to exclude expenditure affected by non-compliance with Community rules up to the date of entry into force of the corrective measures.'

4 Council Regulation (EC) No 1493/1999 of 17 May 1999 on the common organisation of the market in wine (OJ 1999 L 179, p. 1), states, inter alia:

'Article 11

1. A system for the restructuring and conversion of vineyards is hereby established.

2. The objective of the system shall be the adaptation of production to market demand.

3. The system shall cover one or more of the following measures:

(a) varietal conversion, including by means of grafting-on;

(b) relocation of vineyards;

(c) improvements to vineyard management techniques related to the objective of the system.

The system shall not cover the normal renewal of vineyards which have come to the end of their natural life.

...

Article 13

1. Support for restructuring and conversion shall only be granted in relation to plans which have been drawn up and, where necessary, approved by Member States. Support shall take the following forms:

(a) compensation of producers for the loss of revenue due to implementation of the plan, and

(b) contribution to the costs of restructuring and conversion.

2. The compensation of producers for loss of revenue may take either of the following forms:

(a) permission for the coexistence of both old and new vines for a fixed period which shall not exceed three years, notwithstanding the provisions of Chapter I of this Title; or

(b) financial compensation, which shall be funded by the Community.

3. The Community contribution to the costs of restructuring and conversion shall not exceed 50% of those costs. However, in regions classified as Objective 1 in accordance with Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds, the Community contribution shall not exceed 75%. Without prejudice to Article 14(4), Member States may not contribute to the cost in either case.

…

Article 15

Detailed rules for the implementation of this Chapter shall be adopted according to the procedure laid down in Article 75.

These rules may in particular include:

(a) a minimum size for the vineyard concerned;

(b) provisions governing the use of replanting rights in general and of new planting rights awarded within the framework of material improvement plans and to young farmers, in the implementation of programmes;

(c) provisions aiming to prevent an increase in production potential arising out of this Chapter;

(d) maximum amounts of support per hectare.'

5 Article 13(1), (2) and (4) of Commission Regulation (EC) No 1227/2000 of 31 May 2000 laying down detailed rules for the application of Council Regulation (EC) No 1493/1999 on the common organisation of the market in wine, as regards production potential (OJ 2000 L 143, p. 1) states, inter alia, the following:

'1. The competent authorities of the Member States shall lay down a minimum size of parcel which may qualify for support for restructuring and conversion, and a minimum size of parcel resulting from restructuring and conversion.

2. The competent authorities of the Member States shall lay down:

(a) definitions of the measures to be contained in plans;

(b) time-limits for their implementation, which shall not exceed five years;

(c) a requirement that all plans shall state, for each financial year, the measures to be implemented in that financial year, and the area concerned by each measure;

(d) procedures for monitoring such implementation …

4. The competent authorities of the Member States shall adopt rules governing the specific scope and the levels of support to be granted. Subject to Chapter III of Title II of Regulation … No 1493/1999 and this Chapter, those rules may provide in particular for the payment of flat-rate amounts, maximum levels of support per hectare and differentiation of support on the basis of objective criteria. The rules shall in particular provide for appropriately higher levels of support in cases where replanting rights arising from grubbing-up under the plan are used in implementing the plan.'

6 Article 15a of Regulation No 1227/2000, introduced by Commission Regulation (EC) No 1342/2002 of 24 July 2002 (OJ 2002 L 196, p. 23), amending Regulation No 1227/2000, states:

'1. As an exception to Article 15, the Member States may provide that the support is to be paid after verification that all the measures covered by the support application have been implemented. If checks show that all the measures covered by the support application have not been fully implemented, but have nevertheless been implemented on more than 80% of the area concerned within the time-limit laid down, then the support shall be paid minus an amount equal to twice the additional support which would have been granted if the measure had been implemented on the entire area.

2. As an exception to paragraph 1, the Member States may provide for support for all the measures covered by the support application to be advanced to producers before those measures have been implemented, provided that implementation has begun and the beneficiary has lodged a security equal to 120% of the support. For the

purposes of Regulation (EEC) No 2220/85, the obligation shall be to implement all the measures by the end of the second wine year following payment of the advance.

That period may be adjusted by the Member State in cases where:

(a) the areas concerned are part of an area which has suffered a natural disaster recognised by the competent authorities of the Member State concerned;

(b) the planned measure cannot be implemented because the plant material suffers health problems which have been certified by a body recognised by the Member State concerned.

If checks show that all the measures covered by the support application, and for which an advance has been paid, have not been fully implemented, but have nevertheless been implemented on more than 80% of the area concerned within the time-limit laid down, then the security shall be released minus an amount equal to twice the additional support which would have been granted if all the measures had been implemented on the entire area.

Where a producer opts, before a deadline set by the Member State concerned, against support being paid in advance, 95% of the security shall be released. The Member States shall notify the Commission of the deadline they set to implement this subparagraph.

Where a producer decides, before a deadline set by the Member State concerned, not to implement all the measures covered by the support application, that producer shall repay any advance which has already been paid, after which 90% of the security shall be released. The Member States shall notify the Commission of the deadline they set to implement this subparagraph.

3. For the purpose of this Article, a tolerance of 5% shall be applied when the areas concerned are checked.'

Background to the dispute

Method used by the French Republic to calculate the aid

7 Financial corrections were imposed on the French Republic by Commission Decision 2005/579/EC of 20 July 2005 excluding from Community financing certain expenditure incurred by the Member States under the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) (OJ 2005 L 199, p. 84, 'the contested decision') because the Commission was of the view that the French Republic had included ineligible areas in calculating the costs of operations for the restructuring and conversion of vineyards.

8 As is apparent from the case file and, in particular, from the report of the Conciliation Body and the inter-ministerial orders on the conditions for awarding support for restructuring and conversion of vineyards for the wine years 2000/2001 and

2001/2002 (see *Journal officiel de la République française* of 24 May 2001 and 5 April 2002), the French authorities opted for the payment of flat-rate amounts. The support was paid per hectare of parcel area restructured (euros per hectare).

9 The calculation of the costs takes into account the area of vines including headland, in other words, the strips of land between and at the end of the rows necessary for vineyard machinery, such as tractors and grape harvesters, to pass and turn.

10 That calculation was thus made on the basis of a description of a standard parcel defined as a vineyard of one hectare, rectangular in shape and flat, including headland necessary for agricultural machinery to manoeuvre up to 10% of the area, namely six metres at the bottom of the rows.

11 In order to take account of different parcel shapes and specific topographies, a nomograph — a table of margins — was established for the purpose of calculating the areas. It lays down the maximum area which may be left unplanted with vines, which is, for example, 30% for parcels where the area planted with vines is less than 0.35 hectares and 5% for parcels where the area planted with vines is more than 15 hectares.

12 The various costs of a vine planting were itemised under headings such as the purchase of plants, plant protection treatments and labour. Moreover, only systematic costs — those which are not ad hoc — were included in the calculation of the flat rate. The data concerning the costs were sent by the Chambers of Agriculture and updated as necessary.

13 The rate of compensation varies in relation to four criteria: membership of a group of producers, young farmer status, entering into a territorial farming contract and the origin of the planting rights. The maximum rate corresponds to a planting, with rights deriving from a grubbing-up on the holding after 31 July 2000, by a young farmer belonging to a group of producers who has entered into a territorial farming contract.

14 In order to ensure that, in accordance with Article 13(3) of Regulation No 1493/1999, support does not exceed 50% of restructuring costs, the flat rates were set so as to guarantee that the highest rate of support did not exceed 50% of the lowest cost of a planting.

The procedure which led to the contested decision

15 From 23 to 27 September 2002, the Commission conducted an audit in France concerning the system of awarding support for the restructuring and conversion of vineyards.

16 On 10 February 2003, following that audit, the Commission sent the French authorities a communication pursuant to Article 8(1) of Regulation No 1663/95.

17 On 20 May 2003, the French authorities replied to that communication.

18 On 30 September 2003, the Commission organised a bilateral meeting with the French authorities.

19 On 22 July 2004, following that meeting, the Commission sent the French authorities a formal communication pursuant to Article 8 of Regulation No 1663/95 in which it confirmed its position that the grant of support for the restructuring and conversion of vineyards for the years 2001 and following was not compliant with the Community rules. The Commission referred, in particular, to the results of the verification carried out at its request of a random sample of 50 files which benefited from a payment for the wine year 2001, which demonstrated that the area actually under vines represented on average only 90% of the area recognised as eligible. The Commission was thus of the view that the 10% difference in area constituted a non-eligible part of the expenditure incurred for the restructuring of the vineyards. Consequently, the Commission decided that a 10% financial correction must be applied to the expenditure declared during the period subject to the Community audit.

20 On 4 October 2004, the French authorities referred the matter to the Conciliation Body, which met on 2 March 2005 and issued its report on 21 March 2005. The Conciliation Body found that it was possible, particularly in the case of small vineyards, for support to be awarded to areas for which no restructuring expenditure had been incurred. Moreover, it found that it was not possible in the time allowed it to reconcile the positions of the two parties.

21 Following the meeting of the Conciliation Body, but too late for that body to take that information into account, the French authorities communicated additional information concerning the alleged risk of exceeding the Community financing threshold. That information concerned, in particular, the results of calculations showing that, even taking an extreme example under the French support system, the maximum amount of the cost overrun for the whole French territory was EUR 2 294 and, for the wine year 2000/2001, the average rate of support was EUR 4 751 per hectare,

an amount well below the EUR 7 716 per hectare corresponding to 50% of the cost of a restructuring operation. For the wine years 2001 and 2002, the figures were EUR 6 197 per hectare and EUR 8 371 per hectare, respectively.

22 On 4 May 2005, the Commission sent a letter to the French authorities, in which it set out its final position.

23 On 20 July 2005, the Commission adopted the contested decision, imposing inter alia on the French Republic a specific adjustment of 10% for that part of the area restructured or converted.

Procedure and forms of order sought

24 By application lodged at the Registry of the Court of First Instance on 30 September 2005, the French Republic brought the present action.

25 On hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber) decided to open the oral procedure.

26 At the hearing, on 14 May 2008, the parties presented oral argument and answered the oral questions put by the Court.

27 The French Republic claims that the Court should:

— annul the contested decision inasmuch as it excludes from Community financing the sum of EUR 13 519 122.05 in respect of a correction relating to determination of the areas eligible for support for restructuring and conversion of vineyards for the 2001–2003 accounting period;

— order the Commission to pay the costs.

28 The Commission contends that the Court should:

— dismiss the action as unfounded;

— order the French Republic to pay the costs.

Law

Arguments of the parties

29 The French Republic relies on two pleas in law, the first of which alleges infringement of Regulation No 1258/1999 and the second, breach of the duty to state reasons.

30 With regard to the first plea alleging infringement of Regulation No 1258/1999, the French Republic claims that the Commission excluded from Community financing

expenditure which had, however, been effected in compliance with the Community rules and that, in any event, that expenditure resulted in no loss to the Community budget. In so doing, the Commission infringed Article 7(4) of Regulation No 1258/1999.

31 At the hearing and consistent with the findings of the Conciliation Body, the Commission contended that the main issue in this case relates to the calculation method used by the French Republic, the risk of loss to the Community budget being restricted to one or two specific cases which might lead to Community financing limits being exceeded.

The allegation that expenditure was incurred in compliance with Community rules

32 The French Republic claims that, according to settled case-law concerning clearance of the accounts of Member States' expenditure financed by the EAGGF, Guarantee Section, although it is for the Commission to prove the existence of an infringement of Community rules, once that infringement is established, it is for the Member State to demonstrate, where appropriate, that the Commission has erred as to the financial consequences to be drawn therefrom. In the present case, the Commission has not proved the existence of an infringement of Community rules.

33 The French Republic is of the view that the definition of the eligible area on which the Commission relies, according to which the area to take into account for Community financing is the area under vines, cannot be deduced from the Community legislation. Accordingly, the Member State's only duty is to ensure that Community

participation in financing the costs of restructuring and conversion does not exceed 50% of those costs.

34 The French Republic claims that Article 13(4) of Regulation No 1227/2000 authorises Member States to provide for the payment of flat-rate amounts. Moreover, the Community legislation does not specify the method for calculating those amounts, nor does it define eligible area. It therefore falls to the Member States to lay down those definitions, subject to the sole condition that support for the reconstruction and conversion of vineyards does not exceed 50% of those costs. The French Republic is of the view that it has defined eligible area in a way which is coherent with the body of provisions governing the common organisation of the market in wine.

35 The French Republic disputes the Commission's allegation that it reduced the amount of flat-rate support and offset that reduction by awarding support to an ineligible area, by unlawfully taking into account the headland when only the areas occupied by vine plants were eligible. It also claims that neither does the financing system seek to establish any set-off between recipients. On the contrary, it calculated a flat-rate amount based on actual costs, which it applied to areas which it considered were eligible by reference to the body of provisions applicable to the common organisation of the market in wine.

36 As regards the practical considerations, the French Republic claims that, of the different items of expenditure for a planting operation, only the provision of vine plants depends exclusively on the areas under vines. The other items, such as preparing the soil, which involves drainage and terracing, also relate to the headland.

37 It adds that human and technical resources employed, and thus the total costs per hectare, increase in inverse proportion to the reduction in area and that the proportion of headland increases as that area decreases.

38 The French Republic also claims that, if, for the restructuring of vineyards, only the area under vines were to be taken into account, wine-growers would be tempted to reduce non-productive land as much as possible by adding vine plants, which would lead to an increase in production potential.

39 Moreover, not taking the headland into account for the purposes of granting support would not necessarily translate into a reduction in expenditure. The support flat-rate, which is calculated by reference to the costs of restructuring a parcel of one hectare, headland included, would henceforth be attached to a smaller area. The reduction in the compensated area would then be offset by the increase in the compensation rate.

40 Contrary to the Commission's contention, although the support for restructuring takes the form of a contribution to the costs of the restructuring, it is not possible to dissociate it from the concept of 'area of vines carrying planting rights'. It follows from Article 15 of Regulation No 1493/1999 and Article 13 of Regulation No 1227/2000 that Member States are responsible for establishing the dimensions of the minimum area capable of benefiting from support for reconstruction and conversion. Article 15a of Regulation No 1227/2000 defines the financial consequences of partial implementation of the measures covered by the support application, establishing a threshold, for the purpose of making payments, of works implemented on more than 80% of the territory.

41 Similarly, there is clearly a link between the support system and the vineyard register. Both for the register and for the award of support for the conversion and restructuring of the vineyards, the planted area is taken into account. With regard to the establishment of the register, a parcel of vines is defined in Article 2(f) of Commission Regulation (EEC) No 649/87 of 3 March 1987 laying down detailed rules for the establishment of a Community vineyard register (OJ 1987 L 62, p. 10), as 'a continuous plot of land as defined in the land register'.

42 According to the French Republic, it follows from all of the foregoing that the Commission was wrong to exclude from Community financing the sum of EUR 13 519 122.05, since that sum corresponds to expenditure incurred in compliance with Community rules.

43 The Commission replies that different independent criteria exist for determining the amount of support and whether areas are eligible for that support. It is of the view that the fact that the French authorities have reduced the amount of flat-rate support does not entitle them to increase in the same proportion the eligible areas, since those two stages of the procedure are governed by very specific criteria and 'different rules'. In order to support that assertion, the Commission refers, by analogy, to the distinction between selection criteria and award criteria in the field of public procurement (Case C-315/01 *GAT* [2003] ECR I-6351).

44 On a practical level, the Commission recalls that, in certain cases, the support was granted for the whole area claimed by the producer, although the area actually under vines represented only 70% of that whole area. That very clearly constitutes 'over-compensation', going much further than what the French authorities have put forward.

45 The Commission also disputes the placing of planting rights on the same footing as the restructuring and conversion system and, consequently, the use of the same accounting method for areas benefiting from planting rights and areas benefiting from support. It refers in that regard to Article 13(1)(b) of Regulation No 1493/1999, which lays down that support for restructuring and conversion may take the form of a contribution to the costs of restructuring and conversion, although support expressed in replanting rights makes reference to an area.

46 The same applies to placing the computerised vineyard register on the same footing as that system, particularly since, pursuant to Article 2(f) of Regulation No 649/87, a parcel is defined as a continuous plot of land as defined in the land register, the headland thus being included. The Commission cites Article 5(1) of Commission Regulation (EC) No 2729/2000 of 14 December 2000 laying down detailed implementing rules on controls in the wine sector (OJ 2000 L 316, p. 16), which lays down, inter alia, that permanent abandonment and restructuring and conversion receiving a contribution from the Community is to be systematically verified on the spot. According to the Commission, that provision introduced a formal and express distinction between general aspects of production potential and the specific measures concerning the abandonment and the restructuring and conversion. For those latter, for which a Community financial contribution exists, on-the-spot systematic verification is obligatory. That verification concerns two substantive elements of the system, namely, the measuring of the areas and the reality of the actions benefiting from a financial contribution.

47 With regard to the French Republic's claim concerning the risk of an increase in the quantities actually harvested, the Commission states that the Community legislation requires Member States to ensure that there is no overall increase in production potential. The Commission also dismisses the French Republic's argument alleging the risk of an increase in expenditure, arguing that every year it adopts a decision setting indicative financial allocations to Member States and that that initial allocation limits the repayment by the EAGGF.

The allegation that the calculation method used by the French authorities does not result in loss to the Community budget

48 The French Republic is of the view that the Commission has not presented serious evidence establishing that the method used by France might result in loss to the Community budget. The French Republic disputes that Commission allegation, contained in the note of 17 February 2005 presented to the Conciliation Body, according to which, in one case, support paid was 51.6%, thus representing excess support of 1.6%.

49 The French Republic states that, in order for support under no circumstances to exceed 50% of the costs of restructuring and conversion, the flat rates were set so as to ensure that the highest rate of support does not exceed 50% of the lowest cost of a planting. Thus, for the wine year 2000/2001, as the lowest cost recorded for reconstruction and conversion was EUR 15 432, the ceiling not to be exceeded was raised to EUR 7 716 and the maximum rate of compensation was set at EUR 7 170. For the wine year 2001/2002, as the lowest cost recorded was EUR 16 743, the ceiling not to be exceeded was raised to EUR 8 371 and the maximum amount of compensation was set at EUR 8 000. Consequently, as a result of the flat-rate nature of the support, the vast majority of wine-growers who undertook restructuring or conversion of their vineyard received support which did not attain 50% of the costs incurred.

50 The French Republic adds that, even taking the extreme example of a maximum rate of EUR 7 170 per hectare, when compared with the costs of planting in Languedoc-Roussillon, which has the lowest planting cost of all the French regions for a parcel of less than 0.8 hectares of which the headland constitutes 25%, the risk of exceeding the ceiling of 50% of the costs of restructuring may be estimated at 3.2%, on average, and concerns only 10 hectares for the whole French territory. Consequently, the maximum cost overrun for the whole of that territory is the result of the following formula: 10 hectares x 0.032 x EUR 7 170 per hectare = EUR 2 294.

51 According to the French Republic, that low amount must be placed in perspective by comparing it to the support lower than 50% which might have been paid in different circumstances. Consequently, it is of the view that, even if that extreme example put forward by the Commission is to be taken into consideration, the financial consequences on the Community budget are, in any event, non-existent.

52 The Commission counters by saying that it is completely immaterial that the maximum amount of compensation was set below the lowest cost of a planting. In its view, the fact that the French authorities minimised the amount of the flat-rate support does not, in consequence, entitle them to finance non-eligible areas. In support of its arguments, the Commission relies on Case T-221/04 *Belgium* v *Commission* [2006], not published in the ECR, stating that, in that judgment, it was held that any irregular payment of support results in an overpayment and, thus, a loss to the EAGGF.

53 The Commission contends that the example which it gave, showing a rate of subsidy for a parcel of 51.6%, was merely illustrative and that, in no circumstances was it possible for the French authorities to prove, on the basis of that example, that there was no loss to the Community budget. Consequently, the Commission is of the view that the calculation of the loss set out in the application, which is based on an overrun of 1.6%, may not be taken into account.

54 The Commission states that, on the contrary, on the basis of the sample of 50 files in which each restructured parcel was remeasured by the French authorities, at its request, it was found that approximately 10% of non-eligible areas benefited from support. Unquestionably that resulted in loss to the Community budget.

Findings of the Court

— The definition of the eligible area

55 It should be pointed out that the Community legislation, more specifically Article 13 of Regulation No 1227/2000, expressly states that Member States have competence to lay down rules governing the detailed scope and the levels of support to be granted, in particular those providing for the payment of flat-rate amounts, the maximum levels of support per hectare and the modulation of support on the basis of objective criteria.

56 It follows from the description of the method used by the French authorities to calculate the support for restructuring and conversion (see paragraphs 8 to 15 above) that those authorities introduced a system which completely fulfils the abovementioned legislative criteria. Moreover, it should be observed that the Community legislation does not define 'eligible area', as the Commission does not dispute.

57 Consequently, there is no legal basis to prohibit the French Republic from including headland in the reference areas for the purpose of determining the payments. Contrary to what the Commission is essentially contending, Article 13(1)(b) of Regulation No 1493/1999 in no way regulates that question.

58 That being so, it remains to be examined whether the French system actually created a risk of loss to the Community budget.

— The risk of exceeding the Community financing threshold

59 At the outset, with regard to the Commission's reference to the judgment in *Belgium* v *Commission* (paragraph 86 above) in which it was held that any irregular payment of support results in an overpayment and thus a loss to the EAGGF, it must be pointed out that, since the system established in France for awarding support for the restructuring and conversion of vineyards was not contrary to Community legislation, as is apparent from paragraphs 56 and 57 above, the decision in that judgment does not apply to the present case.

60 Likewise, with regard to the results of the verification of the random sample of 50 files benefiting from a payment for the 2001 financial year, which showed that the eligible area including the planting width, in other words a width equal to half the distance between the vine rows, represents on average only 90% of the eligible area, it must be observed that, as stated above, the Community legislation does not require Member States to exclude headland from reference areas for the purpose of determining payments. The Commission's argument relies on the results of the verification carried out for the purpose of establishing whether the Community financing threshold was exceeded is thus not in itself relevant.

61 It follows that, since an automatic presumption of unlawfulness of expenditure incurred in the context of the French payment system is excluded, it is necessary to assess the true risk to the EAGGF of the threshold of Community financing being exceeded.

62 At the hearing, the Commission maintained, principally, that the Community legislation provides for the financing of costs, with the result that the headland, which creates no restructuring and conversion expenses, is not eligible for Community financing.

63 With regard to that argument, it is necessary to point out that it is not apparent from the case-file that the parties examined in detail the question whether the headland might in fact lead to certain costs which could be the subject of compensation from Community funds in the context of restructuring and conversion operations.

64 Moreover, in the communication of 10 February 2003, sent pursuant to Article 8(1) of Regulation No 1663/95 to the French authorities (see paragraph 17 above), the Commission stated that 'in analysis of the costs necessary for operations for the restructuring and conversion of vineyards show that the flat-rate support permitted is primarily linked to the area actually under vines'. The same finding is contained in the Commission's letter of 22 July 2004 which constitutes the formal communication within the meaning of Article 8(1) of Regulation No 1663/95 and Article 1(1)(a) of Commission Decision No 94/442/EC of 1 July 1994 setting up a conciliation procedure in the context of the clearance of the accounts of the EAGGF, Guarantee Section (OJ 1994 L 182, p. 45).

65 It is thus apparent from the two letters cited above that, in adopting the contested decision, the Commission did not rule out that the headland might lead to expenditure in the context of the restructuring and conversion process.

66 Even though the Commission defended a different position at the hearing, denying that the headland might lead to expenditure eligible for the support in question, it cannot be ruled out that the costs of preparing the soil, which involves drainage and terracing, to which the French Republic referred, might relate equally to the headland. Those works, and consequently the costs which they imply, may be linked to measures covered by the system of restructuring and conversion of vineyards within the meaning of Article 11 of Regulation No 1493/1999.

67 Since it is only at the hearing stage that the Commission disputed the existence of expenses linked to the headlands, the French Republic cannot be criticised for not presenting detailed evidence capable of demonstrating the contrary. In view of the fact that it cannot be excluded that the headlands may lead to expenditure which is eligible for support for restructuring and conversion, that Commission argument must, consequently, be rejected.

68 In addition, on a practical level, it is unlikely that the individual wine-grower, runs his vineyard in the light of the various functions of the different parcels. It is much more likely for the gross amount of the costs incurred by the wine-grower to be divided by the number of hectares in his ownership. The French Republic was thus correct when it stated that the exclusion of the headland for the grant of support does not necessarily translate into a reduction in expenditure. The flat-rate support, which is calculated by reference to the costs of restructuring of a parcel of one hectare, including headland, would henceforth be attached to a smaller area. The reduction in the compensated area would then be offset by the increase in the compensation rate.

69 Consequently, by putting forward a strict distinction between the different areas of the vineyard, the Commission is seeking to create an artificial and pointless concept, which, moreover, does not result from the applicable Community legislation.

70 In addition, with regard to the question whether the French payment system affords the necessary guarantees in order to ensure that the Community financing threshold is not exceeded, it is necessary to point out the following.

71 First, it is apparent from the case file that the costs taken into account by the French Republic for the purpose of establishing the amounts to pay to wine-growers are real, the respective data having been collected by regional farming organisations.

72 Second, the French Republic adopted two measures in order to guarantee that the Community contribution to the costs of restructuring and conversion do not exceed 50% of those costs, namely that only systematic costs are included in calculating the flat-rate, thereby excluding all ad hoc costs incurred by the wine-growers, and that the flat rates are set so as to guarantee that the highest rate of support awarded does not exceed 50% of the lowest cost of a planting.

73 It should be pointed out that, in adopting the flat-rate payment method, the existence of a certain difference between actual expenditure and the support allowed is inevitable. The headlands are dependent not on the size of the parcel but on its shape and the constraints on cultivation and the passage of farm machinery. Accordingly, the smaller the parcel, the greater the percentage area not under vines. It is possible for the owner of a small vineyard of irregular shape to receive an amount proportionally higher than the owner of a large vineyard which is rectangular and flat including headland representing 5% of its area or less. None the less, Regulation No 1493/1999 expressly recognises the lawfulness of flat-rate payments, which necessarily implies a certain approximation of the compensation paid to different wine-growers, each of whom finds himself in a different situation. That lack of precision, which is inevitable in the context of the calculation of flat-rate amounts may not, in itself, be interpreted as causing a loss to the Community budget.

74 With regard to the risk of exceeding the Community financing threshold, the French Republic submitted exhaustive information concerning two aspects which are relevant to this case.

75 First, the French authorities informed the Conciliation Body that, for the wine year 2000/2001, the rate of support for restructuring and conversion operations varied from EUR 1 680 per hectare to EUR 7 170 per hectare, depending on criteria applying to the applicant and the origin of the planting rights used. The average rate was EUR 4 751 per hectare, namely an amount considerably lower than EUR 7 716

per hectare (an amount corresponding to 50% of the cost of a restructuring operation estimated at EUR 15 432). With regard to the wine year 2001/2002, the rate of support varied from EUR 2 170 to EUR 8 000 per hectare and the average rate was EUR 6 197 euros per hectare, namely an amount lower than EUR 8 371 per hectare (an amount corresponding to 50% of the cost of a restructuring operation estimated at EUR 16 743 per hectare). Consequently, according to the data presented by the French Republic, the average amount of support awarded is well below the maximum rate of 50% laid down in Regulation No 1493/1999.

76 Second, the French authorities have demonstrated that, in the hypothetical situation of the application of near-extreme criteria, namely the maximum rate of support granted for the wine year 2000/2001 compared to the lowest planting cost of all the French regions in Languedoc-Roussillon for a parcel less than 0.8 hectares of which the headland constitutes 25% of the area, the risk of maximum cost overrun is extremely low and corresponds to an amount of EUR 2 294 for the whole French territory.

77 With regard to the Commission's objections as to the admissibility of that argument (see paragraph 53 above), it should be pointed out that the French Republic transmitted the information concerned in response to a calculation presented as an example by the Commission in a note addressed to the Conciliation Body. Moreover, in view of the fact that near-extreme criteria were used to characterise the French payment system in order to perform that calculation, the example thus provided by the parties is sufficiently indicative to be taken into consideration.

78 For the sake of completeness, it is necessary to state that, even if that information were communicated to the Conciliation Body late, the Commission was in possession of it when it adopted the contested decision. In any event, according to Article 1 of Decision 94/442 'the position of the [Conciliation] Body shall be without prejudice to the Commission's final decision'. Thus, the Commission was in a position to take that information into account.

79 It should additionally be pointed out that the Commission itself concedes that the exceeding of the Community financing threshold, if it occurred, would only apply to one or two specific cases.

80 Lastly, since it has already been demonstrated to the requisite legal standard that the French system complies with Article 13(1)(b) of Regulation No 1493/1999 and Article 13 of Regulation No 1227/2000, the arguments raised by the parties concerning the alleged placing of the planting rights on the same footing as the restructuring and conversion system are not relevant in view of the solution to the present case.

81 Having regard to the foregoing, the Court finds that the French system of awarding support for the restructuring and conversion of vineyards complies with the Community legislation and that no real risk exists of exceeding the Community financing threshold within the meaning of Article 13 of Regulation No 1493/1999.

82 Consequently, by removing from Community financing expenditure incurred pursuant to Community rules, the Commission has infringed Article 7(4) of Regulation No 1258/1999.

83 The present plea in law must thus be upheld.

84 Consequently, without it being necessary to examine the second plea in law, the contested decision must be annulled.

Costs

85 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, 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 Commission has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the French Republic.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber),

hereby:

1. Annuls Commission Decision 2005/579/EC of 20 July 2005, excluding from Community financing certain expenditure incurred by the Member States under the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) inasmuch as it excludes from Community financing the sum of EUR 13 519 122.05 in respect of a correction imposed on the French Republic relating to determination of the areas eligible for support for restructuring and conversion of vineyards for the 2001–2003 accounting period;

2. Orders the Commission to pay the costs.

Czúcz Cooke Labucka

Delivered in open court in Luxembourg on 10 September 2008.

Registrar President

E. Coulon O. Czúcz