Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fifth Chamber)

28 January 2016*

(EAGGF — Guarantee Section — EAGF and EAFRD — Expenditure excluded from financing — Verification of small parcels — Lack of evidence of serious and reasonable doubt — Extrapolation of results of on-the-spot checks)

In Case T-667/14,

Republic of Slovenia, represented by L. Bembič, acting as Agent,

applicant,

v

European Commission, represented by B. Rous Demiri and D. Triantafyllou, acting as Agents,

defendant,

APPLICATION for partial annulment of Commission implementing decision 2014/458/EU of 9 July 2014 on excluding from European Union financing certain expenditure incurred by the Member States under the 'Guarantee' Section of the European Agricultural Guidance and Guarantee Fund (EAGGF), under the European Agricultural Guarantee Fund (EAGF) and under the European Agricultural Fund for Rural Development (EAFRD) (OJ 2014 L 205, p. 62), in so far as it excludes certain expenditure incurred by the Republic of Slovenia,

THE GENERAL COURT (Fifth Chamber),

composed of A. Dittrich (Rapporteur), President, J. Schwarcz and V. Tomljenović, Judges,

Registrar: S. Bukšek Tomac, Administrator,

having regard to the written procedure and further to the hearing on 21 October 2015,

gives the following

* Language of the case: Slovene.

Judgment

Background to the dispute

1 From 3 to 7 October 2011, the European Commission undertook a checking exercise in Slovenia, under Article 37(1) of Council Regulation (EC) No 1290/2005 of 21 June 2005 on the financing of the common agricultural policy (OJ 2005 L 209, p. 1). The primary purpose of that checking exercise was to assess the application of the direct support schemes for the claim years 2009 to 2011, which corresponded to the financial years 2010 to 2012.

2 By letter of 21 November 2011, the Commission informed the Republic of Slovenia of the results of its checking exercise, in accordance with the first paragraph of Article 11(1) of Commission Regulation (EC) No 885/2006 of 21 June 2006 laying down detailed rules for the application of Regulation No 1290/2005 as regards the accreditation of paying agencies and other bodies and the clearance of the accounts of the EAGF and of the EAFRD (OJ 2006 L 171, p. 90). The Commission found that the expenditure had not been incurred in compliance with EU law.

3 The Republic of Slovenia replied to the Commission's observations by letter of 20 January 2012.

4 By letter of 22 May 2013, the Commission invited the Slovenian authorities to a bilateral meeting, in accordance with the third paragraph of Article 11(1) of Regulation No 885/2006. The Republic of Slovenia sent further information to the Commission by letter of 5 June 2013 and the bilateral meeting took place on 12 June 2013.

5 By letter of 16 July 2013, the Commission sent to the Slovenian authorities the minutes of the bilateral meeting and the list of further information requested during the meeting, in accordance with the first paragraph of Article 11(2) of Regulation No 885/2006. The Republic of Slovenia responded by letter of 16 September 2013.

6 On 3 January 2014, the Commission sent its official conclusions to the Republic of Slovenia, in accordance with the third paragraph of Article 11(2) of Regulation No 885/2006. The Commission therein maintained its position that the implementation of area aid in Slovenia was not in compliance with EU rules for the claim years 2009 to 2011. The Commission therefore proposed that a sum of EUR 347661.10 should be excluded from EU financing. In particular, the Commission noted the following:

— weaknesses in the verification of small parcels in terms of compliance with the definition of agricultural parcels, for which reason a flat-rate correction of 5% of direct payments was made in the sum of EUR 85780.08 for the financial year 2010, of EUR 115956.46 for the financial year 2011 and of EUR 131269.23 for the financial year 2012;

— non–extrapolation of control results when the difference was less than 3%, for which reason an ad hoc correction of direct payments was made in the sum of EUR 1771.90 for the financial year 2010, of EUR 6376.67 for the financial year 2011 and of EUR 6506.76 for the financial year 2012.

7 By letter of 13 February 2014, the Republic of Slovenia applied for proceedings to be opened before the Conciliation Body, in accordance with Article 16 of Regulation No 885/2006. On 25 March 2014, the Conciliation Body dismissed that application as inadmissible.

8 The Commission maintained its position on the basis of the grounds outlined in the summary report relating to the results of the checks carried out in the context of the clearance of accounts ('the summary report').

9 By Commission Implementing Decision 2014/458/EU of 9 July 2014 on excluding from European Union financing certain expenditure incurred by the Member States under the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF), under the European Agricultural Guarantee Fund (EAGF) and under the European Agricultural Fund for Rural Development (EAFRD) (OJ 2014 L 205 p. 62, 'the contested decision'), the Commission rejected the expenditure in question due to its non-compliance with EU rules.

Procedure and forms of order sought

10 By application lodged at the Court Registry on 12 September 2014, the Republic of Slovenia brought this action.

11 On hearing the report of the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral part of the procedure.

12 By way of measures of organisation of procedure pursuant to Article 89 of its Rules of Procedure, the Court requested the Republic of Slovenia to produce a document. The Republic of Slovenia did so within the prescribed time limit.

13 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 21 October 2015. During the hearing, the parties produced certain photographs, which were placed on the file. In accordance with Article 85(4) of the Rules of Procedure, the President gave the parties the opportunity to comment on this evidence.

14 The Republic of Slovenia submits that the Court should:

— annul the contested decision in so far as it refers to the Republic of Slovenia and in so far as it excludes from EU financing the sum of EUR 347661.10, corresponding to expenditure declared for the financial years 2010 to 2012;

— in the alternative, accept the flat-rate correction of 5% of direct payments due to the weaknesses in verification of small parcels amounting to only EUR 172876.39, corresponding to expenditure declared for the financial years 2010 to 2012;

— Order the Commission to pay the costs.

15 The Commission contends that the Court should:

— dismiss the action as unfounded;

— order the Republic of Slovenia to pay the costs.

Law

Admissibility of the evidence presented at the hearing

16 Since the photographic evidence was produced by the parties only during the oral part of the procedure, without any reason being given to justify the delay, it must be rejected as inadmissible, under Article 85(3) of the Rules of Procedure.

Substance

17 In support of its action, the Republic of Slovenia relies on two pleas in law. The first plea, which alleges a manifest error of assessment, failure to state reasons and breach of the principle of legality, relates to the verification of small parcels in terms of the definition of agricultural parcels. The second plea, which relates to the sample size for parcels and to the extrapolation of the results of the on-the-spot checks, alleges that there was a failure to state reasons and a breach of the principle of legality.

First plea in law, alleging a manifest error of assessment, failure to state reasons and breach of the principle of legality in relation to the verification of small parcels

18 The Republic of Slovenia maintains that the Commission made a manifest error of assessment and breached its obligation to state reasons as well as breaching the principle of legality by applying a financial correction due to the fact that it did not have an effective system for verifying the minimum eligible area. Slovenia has a great many inclines and karst areas and farmers have always cultivated each plot of land however small it may be. EU legislation does not set any limits on the shape or the diminution in size of a piece of agricultural land and the disputed areas noted during the inspection in question satisfy all the conditions necessary for the definition of an agricultural parcel. In addition, those areas were not artificially created in order to satisfy the conditions needed to benefit from payments under the support schemes. The Republic of Slovenia maintains that it showed that all the areas that were definitely ineligible had been excluded from the total area declared and that the Slovenian system for reference parcels was such as to ensure an efficient system for updating and monitoring the areas. During its inspections, the Commission found no concrete evidence of the alleged breach.

19 In paragraph 12.9.1 of the summary report, the Commission stated that the Slovenian system allowed farmers to add to their declaration of parcels long thin strips of meadow surrounding arable crops, in particular, so that the areas shown in the graphical units of agricultural land in a holding become eligible. According to the report, this could give rise to measuring inaccuracies and thus lead to the acceptance of parcels of less than the minimum surface area for an agricultural parcel, which in Slovenia is 0.1 hectare, in accordance with Article 14(4) of Commission Regulation (EC) No 796/2004 of 21 April 2004 laying down detailed rules for the implementation of cross-compliance, modulation and the integrated administration and control system provided for in Council Regulation (EC) No 1782/2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers (OJ 2004 L 141, p. 18) and with Article 13(9) of Commission Regulation (EC) No 1122/2009 of 30 November 2009 laying down detailed rules for the implementation of Council Regulation (EC) No 73/2009 as regards cross-compliance, modulation and the integrated administration and control system, under the direct support schemes for farmers provided for that regulation, as well as for the implementation of Council Regulation (EC) No 1234/2007 as regards cross-compliance under the support scheme provided for the wine sector (OJ 2009 L 316, p. 65). In order to illustrate the artificial shape of a graphical unit of agricultural land, the Commission referred to parcel number 127810, named ‘Medja’ (‘the Medja parcel’). The Commission also stated that the difficulty did not lie in the small parcels themselves, but in the unsuitable nature of the process followed to identify farmers who included land in their declaration in order to ensure that parcels not meeting the required minimum became eligible. According to the summary report, in view of the requirements of Article 30 of Council Regulation (EC) No 73/2009 of 19 January 2009 establishing common rules for direct support schemes for farmers under the common agricultural policy and establishing certain support schemes for farmers, amending Regulations No 1290/2005, (EC) No 247/2006, (EC) No 378/2007 and repealing Regulation (EC) No 1782/20003 (OJ 2009 L 30, p. 16), and in the absence of an appropriate control procedure for finding and rejecting the said agricultural parcels, the Commission found that there was a risk to the agricultural funds in question. Finally, in paragraph 12.9.3 of the summary report, the Commission

found that, given that the Slovenian authorities had not been able to prove their assertion that the long thin strips existed only in permanent pasture, all the graphical units of agricultural land relating to areas comprising between 0.10 and 0.15 hectare presented a risk.

20 It should be noted that, under Article 31(1) of Regulation No 1290/2005, if the Commission finds that expenditure under the European Agricultural Guarantee Fund (EAGF) as indicated in Article 3(1) of that regulation or under the European Agricultural Fund for Rural Development (EAFRD) as indicated in Article 4 of that regulation has been incurred in a way that has infringed EU rules, it shall decide what amounts are to be excluded from EU financing. Under Article 38(2) of Regulation No 1290/2005, expenditure by Member States from 16 October 2006 under the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF), other than on rural development, shall follow the rules laid down in that regulation.

21 It should be recalled that, according to settled case-law, the European Agricultural Funds finance only interventions undertaken in accordance with EU provisions within the framework of the common organisation of agricultural markets (judgments of 24 February 2005 in *Greece* v *Commission*, C-300/02, ECR, EU:C:2005:103, paragraph 32, and 27 February 2013 in *Poland* v *Commission*, T-241/10, EU:T:2013:96, paragraph 20).

22 In addition, in order to prove a breach of the rules concerning the common organisation of the agricultural markets, the Commission is not required to demonstrate exhaustively that the checks carried out by the national administrations are inadequate or that the figures presented by them are irregular, but only to provide evidence of the serious and reasonable doubt it entertains about such checks and figures. The reason for this mitigation of the burden of proof on the Commission is that it is the Member State which is best placed to collect and verify the data required for the clearance of accounts of the European Agricultural Funds; consequently, it is for that State to adduce the most detailed and comprehensive evidence that its checks have been carried out and its figures are accurate and, if appropriate, that the Commission's assertions are incorrect (see judgment in *Greece* v *Commission*, cited in paragraph 21 above, EU:C:2005:103, paragraphs 33 to 36 and the case-law cited, and judgment of 12 July 2011 in *Slovenia* v *Commission*, T-197/09, EU:T:2011:348, paragraph 39 and the case-law cited).

23 The Member State concerned, for its part, cannot rebut the Commission's findings by mere assertions which are not substantiated by evidence of a reliable and operational supervisory system. Therefore, if the Member State is not able to show that the Commission's findings are inaccurate, those findings can give rise to serious doubts as to the existence of an adequate and effective series of supervisory measures and inspection procedures (see judgments of 28 October 1999 in *Italy* v *Commission*, C-253/97, ECR, EU:C:1999:527, paragraph 7 and the case-law cited, and in *Slovenia* v *Commission*, cited in paragraph 22 above, EU:T:2011:348, paragraph 40 and the case-law cited).

24 Contrary to the situation alleged by the Republic of Slovenia, in order for a financial correction to be applied, it is not necessary for there to be a serious deficiency in the application of explicit EU rules. It is admittedly the case that, according to the guidelines on flat-rate financial corrections set out in Annex 2 to Commission Document No VI/5330/97 of 23 December 1997, entitled 'Guidelines for the calculation of financial consequences when preparing the decision regarding the clearance of the accounts of EAGGF Guarantee' ('Document VI/5330/97'), a flat-rate financial correction requires there to be a serious deficiency in the application of explicit EU rules. However, it has been held that the definition of the burden of proof given in case-law, as referred to in paragraphs 22 and 23 above, is not affected by the condition laid down in Document VI/5330/97, first because the condition should be read within its context and, secondly, because that definition under case-law has been maintained since the adoption of Document VI/5330/97 (see, to that effect, judgment of 25 July 2006 in *Belgium* v *Commission*, T-221/04, EU:T:2006:223, paragraph 33 and the case-law cited).

25 In the present case, it is clear from paragraph 12.9.1 of the summary report that, to support its finding that there were weaknesses in the verification of small parcels in terms of compliance with the definition of agricultural parcels, the Commission relied on the check results for the Medja parcel, which, according to the Commission, was artificial in shape. According to the Commission, the 0.12 hectare meadow area declared consisted of a strip of land, approximately 50 metres long and no more than 1.9 metres wide. The strip of land made the parcel eligible, which would not have been the case had the strip of land not been taken into account. In addition, part of that area, namely 0.02 hectare, amounted to a non-cultivated slope covered in nettles and shrubs. According to the summary report, the exclusion of that part could have led to the entire agricultural parcel being rejected, since the minimum surface area of an agricultural parcel as defined by the Republic of Slovenia, pursuant to Article 13(9) of Regulation No 1122/2009, would not have been met.

26 As a preliminary point, given that the claim years at issue in the present case are 2009 to 2011, it should be pointed out that, under Article 86(1) of Regulation No 1122/2009, Regulation No 796/2004 was repealed with effect from 1 January 2010, but continued to apply in respect of aid applications relating to marketing years or premium periods starting before 1 January 2010. In accordance with the second paragraph of Article 87 of Regulation No 1122/2009, that regulation applies to aid applications relating to marketing years or premium periods starting as of 1 January 2010.

27 The Republic of Slovenia asserts that the Commission's findings in respect of the Medja parcel do not constitute evidence of serious and reasonable doubt capable of proving the existence of a breach of the rules concerning the common organisation of the agricultural markets, in accordance with the case-law referred to in paragraph 22 above.

28 First, it is certainly true that, according to the letter of 21 November 2011, in which the Commission informed the Republic of Slovenia of the results of its checking exercise, the Commission noted the matters mentioned in paragraph 12.9.1 of the summary report in relation to the Medja parcel. However, in their letter of 20 January 2012, the Slovenian authorities disputed those findings. Paragraph 1.2.1 of the Commission's letter of 16 July 2013 states that, given that the Slovenian authorities had visited the parcel following the check carried out by the Commission and had found that the entire area was being used for agricultural production, the Commission closed the matter of the eligibility of the parcel in question. Accordingly, the Commission did not find the Medja parcel to be ineligible. In the light of the foregoing, the Commission could not legitimately hold that the state of that parcel was evidence of weaknesses in the Slovenian system for checking the eligibility of agricultural areas.

29 Secondly, with specific reference to the Commission's finding in paragraph 12.9.1 of the summary report, according to which the Medja parcel should equally have been rejected in its entirety since it did not meet the minimum surface area for an agricultural parcel, as defined by the Republic of Slovenia, in accordance with Article 14(4) of Regulation No 796/2004 and Article 13(9) of Regulation No 1122/2009, this cannot be accepted either. It is clear from paragraph 12.9.1 of the summary report that the ineligible part of the parcel in question was only 0.02 hectare. Given that the parcel had, according to the Commission's findings, a declared area of 0.12 hectare and that the minimum surface area for an agricultural parcel in Slovenia was 0.1 hectare, even on the assumption that the 0.02 part was not ineligible, it could not be held that the minimum area of 0.1 hectare had not been met.

30 Thirdly, with regard to the Commission's findings concerning the supposedly artificial shape of the Medja parcel, consisting of a strip of land approximately 50 metres long and no more than 1.9 metres wide, it must be noted that nowhere does the Commission state that an agricultural area must be of a particular shape in order to be eligible. In addition, as asserted by the Republic of Slovenia, the definition of the terms 'agricultural area' and 'agricultural parcel' in EU law do not require an area or a parcel to have a particular shape. Under Article 2(h) of Regulation No 73/2009, the term 'agricultural area' is defined as any area taken up by arable land, permanent pasture or permanent crops. Under Article 2(1a) of Regulation No 796/2004, as amended by Regulation (EC) No 972/2007 of

20 August 2007 (OJ 2007 L 216, p. 3), and under Article 2(1) of Regulation No 1122/2009, an agricultural parcel is defined, in principle, as a continuous area of land. Even though, according to the definition in Article 2(1) of Regulation No 1122/2009, Member States may lay down additional criteria for further delimitation of an agricultural parcel, there is nothing to indicate that in Slovenia a particular shape was prescribed for an agricultural area. In addition, it should be noted that long, narrow strips of land are unquestionably eligible, according to the Commission, if they form an integral part of parcels greater than 0.15 hectare in size. Indeed, it appears from paragraph 12.9.3 of the summary report that the Commission considered only graphical units of agricultural land with areas of between 0.10 and 0.15 hectare to present a risk (see paragraph 19 above).

31 In the absence of any other evidence produced by the Commission of a serious and reasonable doubt, it cannot be held that the Commission has proven the existence of a breach of the rules concerning the common organisation of the agricultural markets due to the existence in Slovenia of weaknesses in the verification of small parcels, in terms of compliance with the definition of agricultural parcels in Article 14(4) of Regulation No 796/2004 and in Article 13(9) of Regulation No 1122/2009. The Commission was therefore wrong to apply a financial correction based on such a breach of the rules of EU law.

32 In relation to the Commission's finding in paragraph 12.9.1 of the summary report that there was also a risk for the agricultural funds in question in view of the requirements of Article 30 of Regulation No 73/2009, it should be pointed out that, as stated by the Commission and as appears from paragraph 12.9.1 of the summary report, the financial correction applied was not adopted on the basis of that provision. In addition, it is clear from the Commission's letter of 16 July 2013 that the Commission referred to Article 30 of Regulation No 73/2009 only in order to highlight its wording, which prohibits the artificial creation of the conditions required to benefit from payments.

33 In the light of the foregoing, since the Commission applied a financial correction in the absence of any evidence of a breach of the rules of EU law, the first plea in law must be upheld, without there being any need to rule on the complaint alleging breach of the obligation to state reasons.

Second plea in law, alleging a failure to state reasons and breach of the principle of legality in relation to the sample size for the parcels and to the extrapolation of the results of the on-the-spot checks

34 The Republic of Slovenia submits that the Commission breached its obligation to state reasons and breached the principle of legality by applying a financial correction as it did not extrapolate the results of the on-the-spot checks when the difference found was less than 3%. The parcels chosen for the checks were not chosen at random. The sample selection of graphical units of agricultural land met the requirements to be representative and reliable under Regulation No 1122/2009. According to the Republic of Slovenia, when anomalies were noted in the sample of graphical units of agricultural land selected for the on-the-spot checks, the Slovenian authorities increased the size of the sample, taking into account guidelines from the Commission's Joint Research Centre. The guidelines set a threshold of 3% for the finding of an anomaly and require the sample to be increased only above that threshold, on the basis of Articles 33 and 58 of Regulation No 1122/2009. However, contrary to the guidelines, extrapolation from an error found in the sample to the whole of the crop group has no legal basis either under Regulation No 796/2004 for claim year 2009 or under Regulation No 1122/2009 for claim years 2010 and 2011. In addition, the Republic of Slovenia maintains that the contested decision does not contain sufficient grounds given that the Commission found there to be a breach of the obligation to extrapolate contained in Recital 44 in the preamble to Regulation No 1122/2009 for claim year 2009. What is more, according to the Republic of Slovenia, any requirement to extrapolate from the error infringes the principle of *audi alteram partem* and the right of the farmer concerned to be heard. Moreover, extrapolation in compliance with fundamental rights would entail the compulsory measuring of all the areas, which would be contrary to the purpose of simplification expressed in Recital 44 of Regulation No 1122/2009 and contrary to the aim of reducing unnecessary

administration costs and expenses. In any event, since the Slovenian authorities had acted in accordance with the guidelines of the Joint Research Centre, the Commission should have entirely withdrawn the financial correction under Document VI/5330/97.

35 According to paragraph 12.9.1 of the summary report, the check established that the Slovenian authorities selected the agricultural parcels in a random manner for measurement purposes, whilst ensuring the inclusion of at least one graphical unit of agricultural land from each crop group. If errors had been discovered in relation to those parcels, not exceeding 3% or two hectares, they would have been accepted as such and it would have been assumed that there were no anomalies among the agricultural parcels not included in the measurements. According to the summary report, in Slovenia, the anomaly threshold which would require the sample size to be increased is set at 3%, with reference to Articles 33 and 58 of Regulation No 1122/2009. As set out in Recital 44 of that regulation, the sample should however be reliable and representative and should be increased in the case of anomalies. The recital states that the results of the sample should be extrapolated to the rest of the population. According to the summary report, the possibility of limiting the measuring to 50% of the parcels declared pursuant to Article 29 of Regulation No 796/2004 and Article 33 of Regulation No 1122/2009 constitutes an exception to the rule that all of the agricultural parcels should be checked. It is thereby possible to ensure that the check has a reliable and representative result by extrapolating the check results, in particular when the sample size is not increased to a level ensuring that there are no over-declarations.

36 In the first place, the argument that the contested decision does not contain sufficient grounds, since the Commission found there to be a breach of the obligation to extrapolate contained in Recital 44 of Regulation No 1122/2009 for claim year 2009 but did not indicate a valid legal basis for this, must be rejected. It is true that the Commission referred to that recital in paragraph 12.9.1 of the summary report, stating that the recital required the sample to be reliable and representative and to be increased in the case of anomalies, and that the results of the sample should be extrapolated to the rest of the population. However, that same paragraph of the summary report shows to the required legal standard that, according to the Commission, the requirement for a reliable and representative check that could be achieved by the extrapolation of check results was provided for in Article 29 of Regulation No 796/2004 and Article 33 of Regulation No 1122/2009 and that those provisions were, according to the Commission, a valid legal basis in the present case.

37 In the second place, in relation to the argument that the Commission breached the principle of legality by applying a financial correction due to the fact that the results of the on-the-spot checks had not been extrapolated when the difference was found to be less than 3%, it should be noted that, according to Article 29 of Regulation No 796/2004, as amended by Regulation No 972/2007 and Article 33 of Regulation No 1122/2009, on-the-spot checks should cover all the agricultural parcels for which aid is requested. Under those provisions, the actual determination of the areas as part of an on-the-spot check may be limited to a sample of at least 50% of the agricultural parcels for which an application has been submitted, provided that the sample guarantees a reliable and representative level of control both in respect of area checked and aid claimed. The same provisions state that when this sample check reveals anomalies, the sample of agricultural parcels actually inspected shall be increased.

38 First, it is not in dispute that the Slovenian authorities limited the actual determination of the areas as part of an on-the-spot check to a sample of at least 50% of the agricultural parcels for which an application had been submitted, pursuant to Article 29 of Regulation No 796/2004 and Article 33 of Regulation No 1122/2009. It should be noted that the Republic of Slovenia does not dispute the Commission's findings that, when the Slovenian authorities discovered errors relating to agricultural parcels forming part of their on-the-spot checks, but which did not exceed 3% or two hectares, they were held to be errors without the check sample being increased in every case. According to

paragraph 12.9.2 of the summary report, the Slovenian authorities confirmed that, when the percentage error was less than 3%, the inspector decided whether or not it was necessary to extend the check to the whole holding.

39 As to the argument that the anomaly threshold necessitating an increase in the sample size could be set at 3% in compliance with Articles 33 and 58 of Regulation No 1122/2009, it must be noted, first, that Article 33 does not contain any threshold above which there is a requirement to increase the sample size. Secondly, it is true that Article 58 of Regulation No 1122/2009 provides that if, in respect of a crop group, the area declared for the purposes of any area-related aid schemes exceeds the area determined in accordance with Article 57 of that regulation, the aid shall be calculated on the basis of the area determined reduced by twice the difference found if that difference is more than either 3% or two hectares, but no more than 20% of the area determined. However, it does not in any way follow from Article 58 of Regulation No 1122/2009, which appears under Title IV of the regulation, entitled 'Basis for the calculation of the aid, reductions and exclusions' that, within the context of an on-the-spot check, the national authorities are not required to increase the sample when anomalies of less than 3% are found. In addition, it should be noted that the Commission was correct to assert that, when the entirety of the parcels are measured, the difference in surface area can exceed 3%, making a reduction in payment obligatory, pursuant to Article 58 of Regulation No 1122/2009.

40 To the extent that the Republic of Slovenia asserts that it relied on the guidelines of the Commission's Joint Research Centre, as interpreted in an e-mail from the Joint Research Centre to the Slovenian authorities of 10 October 2011, which set an anomaly threshold of 3% and required the sample size to be increased only above that threshold on the basis of Articles 33 and 58 of Regulation No 1122/2009, such arguments cannot be accepted either. First, it is true that, according to those guidelines, when the percentage error found during a sample check exceeds 3%, all the parcels within the crop group in question must be included in the sample. However, the guidelines also state that the finding of an anomaly below the 3% threshold constitutes a risk for the agricultural funds and can justify the making of a complete check. Secondly, to the extent that the e-mail of 10 October 2011 from the Joint Research Centre indicates that the 3% threshold was set because an anomaly for the purposes of Article 33 of Regulation No 1122/2009 existed only if it was likely to cause a payment reduction, which was the case if the difference was found to exceed 3%, under Article 58 of the regulation, such an interpretation of Articles 33 and 58 of Regulation No 1122/2009 must be rejected for the reasons set out in paragraph 39 above.

41 Secondly, in relation to the Commission's finding that it is possible to ensure that the check has a reliable and representative result by extrapolating the check results, in particular when the sample size is not increased to a level ensuring that there are no over-declarations, it is true that such an extrapolation is not provided for either in Article 29 of Regulation No 796/2004 or in Article 33 of Regulation No 1122/2009. Only Recital 44 of Regulation No 1122/2009 provides that it is necessary to extrapolate the results of the sample to the rest of the population. That recital applies only to on-the-spot checks for the claim years 2010 and 2011 and not to the claim year 2009 (see paragraph 26 above). It is also true that, according to settled case-law, while the preamble to an EU measure may explain the latter's content, it cannot be relied upon as a ground for derogating from the actual provisions of the measure in question (see, to that effect and by analogy, judgment of 10 January 2006 in *IATA and ELFAA*, C-344/04, ECR, EU:C:2006:10, paragraph 76 and the case-law cited).

42 However, it is apparent from Article 23(1) of Regulation No 796/2004 and from Article 26(1) of Regulation No 1122/2009 that on-the-spot checks must be made in such a way as to ensure effective verification of compliance with the terms under which aids are granted and of the requirements and standards relevant for cross-compliance. In addition, as asserted by the Commission, according to Article 29 of Regulation No 796/2004 and Article 33 of Regulation No 1122/2009, the possibility of limiting the actual determination of parcels to a sample of 50% of parcels is an exception to the principle of checking all agricultural parcels. The purpose of providing for this eventuality was one of

simplification, as is clear from Recital 44 of Regulation No 1122/2009. In the light of the foregoing, the Commission was correct to find that a reliable and representative result from the on-the-spot checks could be achieved by extrapolating the results of the sample to the rest of the population. Indeed, by making that extrapolation, it is possible to obtain a reliable and representative result from on-the-spot checks for all the parcels at issue and not only those parcels actually checked. It should be noted that extrapolation is the corollary of simplifying on-the-spot checks by limiting them to a sample of 50% of agricultural parcels.

43 In that regard, in relation to the Republic of Slovenia's argument that the extrapolation of an error infringes the principle of *audi alteram partem* and the right of the farmer concerned to be heard, and that extrapolation in compliance with fundamental rights would entail the compulsory measuring of all the areas, which would be contrary to the purpose of simplification expressed in Recital 44 of Regulation No 1122/2009 and contrary to the aim of reducing unnecessary administration costs and expenses, it should be recalled that the essential purpose of the decision on the clearance of the accounts is to ensure that the expenditure was incurred by the national authorities in accordance with EU law (judgment of 22 April 1999 in *Netherlands* v *Commission*, C-28/94, ECR, EU:C:1999:191, paragraph 49). In addition, it is settled case-law that the final and conclusive decision on the clearance of accounts is taken at the conclusion of a specific procedure giving effect to the *audi alteram partem* rule, during which the Member States concerned must be provided with all the guarantees necessary for them to present their point of view (see judgment of 14 December 2000 in *Germany* v *Commission*, C-245/97, ECR, EU:C:2000:687, paragraph 47 and the case-law cited). The procedure for the clearance of accounts is therefore a procedure against the Member State and not against the farmer in question, who does not have the right to be heard during that procedure. In addition, it must be noted that, by extrapolating the results of the sample to the rest of the population, no particular agricultural parcel is identified as ineligible. What is more, it must be pointed out that this extrapolation reduces administrative costs and expenses since a reliable result of the on-the-spot checks can be ensured whilst bearing in mind the aim to simplify those checks.

44 Thirdly, turning to the Republic of Slovenia's argument that the Commission was wrong to find that the parcels selected for the check had been chosen in a random manner, it is true that, according to paragraph 12.9.1 of the summary report, the Commission found that the agricultural parcels in question had been chosen at random. However, as the Republic of Slovenia admits, that paragraph contains nothing to indicate that the on-the-spot checks were found to be defective on the basis of the agricultural parcels allegedly not being representative. That argument on the part of the Republic of Slovenia is therefore irrelevant.

45 In the third place, the Republic of Slovenia submits that, given that the Slovenian authorities acted in compliance with guidelines from the Commission's Joint Research Centre, the Commission should have entirely withdrawn the financial correction under Document VI/5330/97.

46 In that regard, it should be noted that, under Document VI/5330/97, when deficiencies arise from difficulties interpreting EU texts, except in cases where it is reasonable to think that the Member State will raise those difficulties with the Commission, and when the national authorities took the necessary steps to remedy the deficiencies as soon as they were discovered, those weighting factors can be taken into account and can give rise to a lower rate of correction or to no correction.

47 In the present case, it must be pointed out that, even though, under the guidelines in question, the Slovenian authorities were not bound to increase the sample size for the check as the anomalies found did not exceed the 3% threshold, it is also the case that, under those same guidelines, it was necessary to extrapolate the results of the sample to the rest of the population. It does not therefore appear that the Commission was incorrect in applying the financial correction in question.

48 Accordingly, the second plea in law must be dismissed.

49 In the light of all the foregoing, the action must be partially upheld to the extent that the Commission applied a financial correction due to weaknesses in the verification of small parcels in terms of compliance with the definition of agricultural parcels. The contested decision must therefore be annulled inasfar as it excludes from EU financing, so far as concerns the Republic of Slovenia, the sum of EUR 85780.08 for the financial year 2010, of EUR 115956.46 for the financial year 2011 and of EUR 131269.23 for the financial year 2012. The action must be dismissed as to the remainder.

Costs

50 Under Article 134(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the parties shall bear their own costs. However, if it appears justified in the circumstances of the case, the Court may order that one party, in addition to bearing his own costs, pay a proportion of the costs of the other party.

51 In the present case, the Court must grant the form of order sought by the Republic of Slovenia in relation to the financial correction in the sum of EUR 333005.77. However, the action must be dismissed in relation to the remaining financial correction in the sum of EUR 14655.33. The Court will therefore make an equitable assessment of the circumstances of the case in ruling that the Commission is to bear its own costs and to pay nine-tenths of the costs incurred by the Republic of Slovenia. The Republic of Slovenia shall bear one-tenth of its own costs.

On those grounds,

THE GENERAL COURT (Fifth Chamber)

hereby:

1. **Annuls Commission implementing decision 2014/458/EU of 9 July 2014 on excluding from European Union financing certain expenditure incurred by the Member States under the 'Guarantee' Section of the European Agricultural Guidance and Guarantee Fund (EAGGF), under the European Agricultural Guarantee Fund (EAGF) and under the European Agricultural Fund for Rural Development (EAFRD), in so far as it excludes from European Union financing, so far as concerns the Republic of Slovenia, the sum of EUR 85780.08 for the financial year 2010, of EUR 115956.46 for the financial year 2011 and of EUR 131269.23 for the financial year 2012;**

2. **Dismisses the action as to the remainder;**

3. **Orders the European Commission to bear its own costs, and to pay nine-tenths of those incurred by the Republic of Slovenia;**

4. **Orders the Republic of Slovenia to bear one-tenth of its own costs.**

Dittrich Schwarcz Tomljenović

Delivered in open court in Luxembourg on 28 January 2016.

[Signatures]