Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

3 May 2012 *

(Appeal — EAGGF — 'Guarantee' section — Expenditure excluded from Community financing — Expenditure incurred by the Kingdom of Spain — Aid for the production of olive oil)

In Case C-24/11 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 14 January 2011,

Kingdom of Spain, represented by M. Muñoz Pérez, acting as Agent,

appellant,

the other party to the proceedings being:

European Commission, represented by F. Jimeno Fernández, acting as Agent,

defendant at first instance,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, J. Malenovský, R. Silva de Lapuerta, G. Arestis (Rapporteur) and D. Šváby, Judges,

Advocate General: E. Sharpston,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 26 October 2011,

after hearing the Opinion of the Advocate General at the sitting on 15 December 2011,

gives the following

Judgment

1 By its appeal, the Kingdom of Spain seeks to have set aside the judgment of the General Court of the European Union of 12 November 2010 in Case T-113/08 *Spain* v *Commission* ('the judgment under appeal'), by which the General Court dismissed its action seeking partial annulment of Commission Decision 2008/68/EC of 20 December 2007 excluding from Community financing certain expenditure

* Language of the case: Spanish.

incurred by the Member States under the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) (OJ 2008 L 18, p. 12) ('the contested decision'), inasmuch as it relates to certain expenditure incurred by the Kingdom of Spain in the olive oil and arable crop sectors.

Legal context

The rules on the financing of the Common Agricultural Policy

2 Regulation (EEC) No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy (OJ English Special Edition 1970(I), p. 218), as amended by Council Regulation (EC) No 1287/95 of 22 May 1995 (OJ 1995 L 125, p. 1) ('Regulation No 729/70')), established the general rules applicable to the financing of the common agricultural policy. Council Regulation (EC) No 1258/1999 of 17 May 1999 on the financing of the common agricultural policy (OJ 1999 L 160, p. 103) has replaced Regulation No 729/70 and applies to expenditure incurred as from 1 January 2000.

3 Under Article 1(2)(b) and Article 3(1) of Regulation No 729/70 and Article 1(2)(b) and Article 2(2) of Regulation No 1258/1999, the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) finances, in the context of the common organisation of agricultural markets, interventions intended to stabilise those markets, undertaken in accordance with Community rules.

4 Under Article 5(2)(c) of Regulation No 729/70 and Article 7(4) of Regulation No 1258/1999, the Commission is to decide on the expenditure to be excluded from the Community financing 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 must be notified in writing, after which the two parties are to 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 are to be set out in a report sent to and examined by the Commission, before a decision to refuse financing is taken. When evaluating the amounts to be excluded, the Commission is to take into account the nature and gravity of the infringement and the financial loss suffered by the European Community.

5 The fifth subparagraph of Article 7(4) of Regulation No 1258/1999 provides:

'A refusal to finance may not involve:

(a) expenditure … effected prior to 24 months preceding the Commission's written communication of the results of those checks to the Member State concerned;

(b) expenditure for a measure or action … in respect of which the final payment was effected prior to 24 months preceding the Commission's written communication of the results of those checks to the Member State concerned.'

6 The fifth point of Article 5(2)(c) of Regulation No 729/70 contains a similar provision.

7 Article 8(1) of Commission Regulation (EC) No 1663/95 of 7 July 1995 laying down detailed rules for the application of Regulation No 729/70 regarding the procedure for the clearance of the accounts of the EAGGF Guarantee Section (OJ 1995 L 158, p. 6), as amended by Commission Regulation (EC) No 2245/1999 of 22 October 1999 (OJ 1999 L 273, p. 5) ('Regulation No 1663/95'), provides:

'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 … 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 … 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.'

The rules on aid for the production of olive oil

8 With regard to payment of aid for the production of olive oil, Article 12 of Council Regulation (EEC) No 2261/84 of 17 July 1984 laying down general rules on the granting of aid for the production of olive oil and of aid to olive oil producer organisations (OJ 1984 L 208, p. 3), as amended by Council Regulation (EC) No 1639/98 of 20 July 1998 (OJ 1998 L 210, p. 38) ('Regulation No 2261/84'), provides that each olive oil grower may receive an advance on the amount of the aid applied for.

9 Article 16 of Commission Regulation (EC) No 2366/98 of 30 October 1998 laying down detailed rules for the application of the system of production aid for olive oil for the 1998/99, 1999/2000 and 2000/01 marketing years (OJ 1998 L 293, p. 50) states, in paragraph 1, that, subject to the results of checks carried out, in particular as referred to in Article 28, the Member States are to pay the advance provided for in Article 12 of Regulation No 2261/84 from 16 October of each marketing year. With regard to final payment, Article 16(2) states as follows:

'After carrying out all the requisite checks and subject to the results thereof, the Member States shall pay the balance of the aid to producers within 90 days of the fixing by the Commission of actual production for the marketing year concerned and of the unit amount of production aid as provided for in Article 17a(2) of Regulation … No 2261/84'.

The Statute of the Court of Justice of the European Union

10 Article 36 of the Statute of the Court of Justice of the European Union, which is applicable to the General Court by virtue of Article 53 thereof, provides that judgments are to state the reasons on which they are based and contain the names of the Judges who took part in the deliberations.

Background to the dispute

11 The background to the dispute has been set out as follows by the General Court in paragraphs 37 to 43 of the judgment under appeal:

'37 On 20 December 2007, the Commission adopted the [contested decision, which, inter alia, excluded from Community financing] certain expenditure declared by the Kingdom of Spain in the olive oil and arable crop sectors.

38 The present action concerns the following financial corrections:

— a flat-rate correction of 5% of the amount of aid for the production of olive oil for the marketing years 1998/1999, 1999/2000 and 2000/2001, excluding part of that correction relating to the marketing year 1999/2000 in Andalusia, which corresponds to a total amount of EUR 113 517 396.10;

— …

1. The financial correction applied to expenditure in the olive oil sector

39 In investigations under references HO/2002/01/ES and OT/2003/05/ES, the Commission carried out checks in Spain between 11 and 15 February 2002 and between 7 and 11 July 2003 respectively. The Commission's corresponding observations made under Article 8 of Regulation No 1663/95 were set out in letter AGR 16844 of 11 July 2002 ("letter AGR 16844") and in letter AGR 8316 of 23 March 2004 respectively.

40 A bilateral meeting between the Commission and the Spanish authorities concerning those two investigations was held on 21 December 2004. The Commission provided the Spanish authorities with a copy of the minutes of that meeting on 10 November 2005 and those authorities replied by letters of 13 and 16 January 2006.

41 On 11 August 2006, the Commission formally communicated its conclusions to the Spanish authorities. It proposed a flat-rate correction of 5% for each of the marketing years concerned.

42 Following the opinion of the Conciliation Body of 15 March 2007 and information supplied by the Spanish authorities, the Commission notified its final position, which is set out in point 13.1.5 of summary report AGRI-63341-01-2007 of 3 September 2007 relating to the results of checks in the clearance of accounts under the Guarantee Section of the EAGGF, pursuant to Article 5(2)(c) of Regulation No 729/70 and Article 7(4) of Regulation No 1258/1999 …

43 The following deficiencies which justify the application of a financial correction have been noted in particular as regards the performance of the key checks in the olive oil sector:

(a) as regards marketing years 1998/1999 and 1999/2000:

— inadequate monitoring of the checks by the Olive Oil Agency ("the AAO") at the mills;

— non-operational computerised files and olive oil register, casting doubt on all of the checks based on output, partly offset by the performance of the minimum required rate of on-site checks at a national level.

(b) as regards marketing year 2000/2001:

— failures in the mill checks;

— in the two Autonomous Communities which used a graphical base, that base also showed a number of errors in the land register and the calculation of the number of discrepancies was broadly reduced by taking into account the technical tolerances. The calculation of fines in the event of discrepancies did not comply with the rules;

— the other 11 Autonomous Communities demonstrated weaknesses similar to those existing in the marketing year 1998/1999;

— in all the Autonomous Communities, the checks of atypical output were based on an extremely summary analysis.'

The procedure before the General Court and the judgment under appeal

12 By application lodged at the Registry of the General Court (then the Court of First Instance) on 29 February 2008, the Kingdom of Spain brought an action for the partial annulment of the contested decision insofar as it concerns certain expenditure effected by that Member State in the olive oil and arable crop sectors.

13 In support of that action, the Kingdom of Spain put forward three pleas in law concerning the financial correction applied to the expenditure effected in the olive oil sector. Those pleas alleged breach of Article 8 of Regulation No 1663/95, breach of Articles 2 and 3 of Regulation No 729/20 and Article 2 of Regulation No 1258/1999, and failure to respect the period of 24 months laid down in Article 7(4) of Regulation No 1258/1999 respectively. In addition, that Member State put forward four other pleas in law concerning the financial correction applied to the aid for the area under arable crops.

14 By the judgment under appeal, the General Court rejected all those pleas in law and dismissed the action in its entirety.

15 In particular, with regard to the first plea raised in the context of the financial correction applied to the expenditure effected in the olive oil sector and alleging breach of Article 8 of Regulation No 1663/95, the General Court held, in paragraphs 63 to 66 of the judgment under appeal, as follows:

'63 In the present case, having regard to the complaints specifically raised by the Kingdom of Spain, it is therefore appropriate to ascertain whether the Commission has sufficiently identified in its communication under Article 8 of Regulation No 1663/95, that is to say, letter AGR 16844, the results of the investigation and, accordingly, the deficiencies which ultimately formed the basis of the financial correction in the olive oil sector for the marketing years 1998/1999 and 1999/2000 which were the subject of investigation HO/2002/01/ES.

64 It is common ground between the parties that the Commission based that financial correction, first, on the inadequate monitoring of the AAO checks of the mills and, second, on the fact that the computerised files and the olive oil register were non-operational.

65 Firstly, as the Commission accepts, the complaint that the AAO proposals were inadequately monitored by the Spanish authorities was not specifically referred to in letter AGR 16844, which refers merely to the fact that, in general, the work carried out by that agency was regarded as satisfactory by the investigation team. As the Kingdom of Spain has pointed out, the only reference to that agency appears in point 2.2, which states that "[t]he visits to the two mills were satisfactory and made it possible to confirm the work carried out by the monitoring agency, AAO, with the result that they did not give rise to any observations".

66 However, that finding, which relates solely to the work carried out by the AAO, did not prevent the Commission, following the account clearance procedure and having regard to the information and figures supplied by the Spanish authorities, particularly with a view to the bilateral meeting of 21 December 2004, from concluding that the monitoring by the Spanish authorities of the fines proposed by that agency was inadequate. On the contrary, the satisfaction expressed with regard to the work carried out by the AAO is precisely such as to highlight the importance to be attached to the monitoring of findings made by it, in compliance with the provisions of Article 1(4) of Regulation No 2262/84.'

16 Furthermore, as regards the third plea put forward in the context of the financial correction applied to the expenditure effected in the olive oil sector, alleging failure to respect the period of 24 months laid down in Article 7(4) of Regulation No 1258/1999, the General Court held, in paragraphs 118 to 123 of the judgment under appeal, as follows:

'118 The fifth subparagraph of Article 7(4) of Regulation No 1258/1999 provides that "[a] refusal to finance may not involve … expenditure … effected prior to 24 months preceding the Commission's written communication of the results of those checks to the Member State concerned".

119 In the present case, it is no longer in dispute that, in accordance with the rules developed in case-law …, it is by letter AGR 16844, sent pursuant to the first subparagraph of Article 8(1) of Regulation No 1663/95, that the Commission notified the results of the checks.

120 Furthermore, it is common ground that, as regards investigation HO/2002/01/ES, that letter was notified to the Kingdom of Spain on 15 July 2002.

121 It is therefore necessary only to determine which date is to be taken into consideration for calculation of the period of 24 months (*dies ad quem*) referred to in the fifth subparagraph of Article 7(4) of Regulation No 1258/1999, that is to say, the date which must be regarded as being the date of effective payment of the disputed aid.

122 In the absence of precision in the relevant rules, it is necessary to refer to the case-law in the field and, in particular, to the dicta of the Court of Justice in its judgment in Case C-329/00 *Spain* v *Commission* [2003] ECR I-6103, paragraph 43. The Court of Justice there held, as regards payment of aid in the banana sector, that the date which must be regarded as decisive as regards application of the period of 24 months referred to in Article 5(2)(c) of Regulation No 729/70 (the substantive content of which corresponds in essence to that of the fifth subparagraph of Article 7(4) of Regulation No 1258/1999), was the date on which the final amount of compensatory aid was fixed and the balance paid. Indeed, even if they could appear in the decision clearing the accounts, the amounts paid during the preceding year constituted only advances subject to the lodging of a security, and were therefore not relevant as regards determining the date on which the aid was expended, for the purposes of applying the period of 24 months.

123 In the same way as the system of aid in the banana sector which was at issue in that judgment, it is apparent, in the present case, from the combined provisions of Article 12 of Regulation No 2261/84 and Article 16 of Regulation No 2366/98 that olive oil producers receive an advance on the aid applied for at the start of the marketing year. Payment of the balance is made by the Member State after the checks prescribed for that purpose have been carried out and in the light of the results of those checks. In such circumstances, it is the date of payment of the balance of the payments which determines the calculation of the period of 24 months.'

Forms of order sought by the parties

17 The Kingdom of Spain claims that the Court should:

— set aside the judgment under appeal;

— annul, in their entirety, the financial corrections concerning aid to the production of olive oil imposed in the contested decision;

— in the alternative, annul the corrections either inasmuch as they relate to expenditure in respect of which advances were paid before 24 November 2002, or inasmuch as they relate to expenditure in respect of which advances were paid before 15 July 2000; and

— order the Commission to pay the costs.

18 The Commission contends that the Court should:

— dismiss the appeal, and

— order the Kingdom of Spain to pay the costs.

The appeal

19 In support of its appeal, the Kingdom of Spain puts forward three grounds of appeal, alleging, first, breach of Article 8 of Regulation No 1663/95, second, breach of Articles 36 and 53 of the Statute of the Court, by virtue of the insufficient reasons given in the judgment under appeal, and, third, failure to respect the period of 24 months laid down in the fifth point of Article 5(2)(c) of Regulation No 729/70 and the fifth subparagraph of Article 7(4) of Regulation No 1258/1999 respectively. The third ground of appeal is divided into two parts, the first part alleging that the date of letter AGR 16844 was incorrectly taken into account as the reference point from which that 24-month period was calculated and the second part alleging incorrect application in the present case of the Court's dicta in the judgment in *Spain* v *Commission*.

The first ground of appeal and the first part of the third ground of appeal, alleging breach of Article 8 of Regulation No 1663/95 and alleging that the date of letter AGR 16844 was incorrectly taken into account as the reference point from which the 24-month period laid down in the fifth point of Article 5(2)(c) of Regulation No 729/70 and the fifth subparagraph of Article 7(4) of Regulation No 1258/1999 was calculated

Arguments of the parties

20 By its first ground of appeal, the Kingdom of Spain complains that, in paragraphs 63 to 66 of the judgment under appeal, the General Court breached Article 8 of Regulation No 1663/95 by allowing the Commission to introduce, following the account clearance procedure, a new plea, alleging that the AAO proposals had been inadequately monitored by the Spanish authorities, which, ultimately, formed the basis for the financial correction applied in the olive oil sector in respect of the marketing years 1998/1999 and 1999/2000, even though that plea had not been specifically referred to in the Commission's communication under that provision, as the General Court itself held in paragraph 65 of that judgment.

21 The General Court, it continues, thus failed to have regard to the guarantees laid down in that provision in favour of the Member States, as is apparent from the case-law of the Court of Justice, which states that the communication written pursuant to Article 8 of Regulation No 1663/95 must inform the Government concerned fully of the Commission's reservations and the adjustments which will probably be made in relation to the sector in question, so that it can fulfil the warning function given to it by that provision.

22 The Commission refutes this argument of the Kingdom of Spain and submits that the first ground of appeal is unfounded. It argues that the General Court undertook, in the judgment under appeal, a logical and purposive interpretation of that which must be included in the first communication pursuant to Article 8 of Regulation No 1663/95.

23 By the first part of its third ground of appeal, the Kingdom of Spain complains that the General Court breached the fifth point of Article 5(2)(c) of Regulation No 729/70 and the fifth subparagraph of Article 7(4) of Regulation No 1258/1999 in that it did not annul the contested decision in so far as it relates to payments made prior to 24 November 2002, that is to say, payments made outside the period of 24 months laid down in those provisions.

24 The Kingdom of Spain argues that, inasmuch as the General Court recognised, in paragraph 65 of the judgment under appeal, that the ground for financial correction based on the fact that the AAO proposals had been inadequately monitored by the Spanish authorities had not been referred to in letter AGR 16844, but accepted, in paragraph 66 of that judgment, that there had been no procedural defect since all the grounds for a financial correction were set out in the Commission's letter of 24 November 2004 written with a view to a bilateral meeting, the General Court ought to have held that that period of 24 months should have been calculated from that date and, accordingly, should have annulled that decision. That period, it is submitted, should be calculated on the basis of the date of the communication of the Commission setting out new grounds for a financial correction, not set out in an earlier communication, in order to enable the Government concerned to be fully informed of the Commission's reservations, as required, in accordance with case-law, by Article 8 of Regulation No 1663/95.

25 The Commission, in turn, refutes this argument of the Kingdom of Spain and submits that the first part of the third ground of appeal is also unfounded. It takes the view that letter AGR 16844 satisfies the conditions laid down in Article 8 of Regulation No 1663/95 and, accordingly, all the expenditure in respect of which payment of the balance was made within the period of 24 months preceding notification of that letter, namely after 15 July 2000, could be the subject of the disputed financial correction.

Findings of the Court

26 Article 8(1) of Regulation No 1663/95 provides that if, as a result of an enquiry, the Commission considers that expenditure has not been effected according to Community rules, it is to notify the Member State concerned of the results of its checks and indicate the corrective measures to be taken to ensure future compliance.

27 In accordance with the case-law of the Court, the communication written pursuant to Article 8 of Regulation No 1663/95 must inform the Government concerned fully about the Commission's reservations, so that it can fulfil the warning function given to it by that provision (see Case C-170/00 *Finland* v *Commission* [2002] ECR I-1007, paragraph 34, and Case C-153/01 *Spain* v *Commission* [2004] ECR I-9009, paragraph 93).

28 It follows that Article 8(1) of Regulation No 1663/95 requires that the irregularity which the Member State concerned is alleged to have committed should be stated with sufficient precision in the written communication provided for in the first subparagraph of that provision, with the result that the Member State is fully informed of it. Thus, a communication which does not meet that requirement cannot be regarded as a written communication within the terms of that provision.

29 Furthermore, a failure to observe that condition laid down in Article 8(1) of that regulation deprives of its substance the procedural guarantee accorded to Member States by the fifth point of Article 5(2)(c) of Regulation No 729/70 and the fifth subparagraph of Article 7(4) of Regulation No 1258/1999, which

limits the period in respect of which expenditure can be refused financing by the EAGGF (see, to that effect, inter alia, Case C-158/00 *Luxembourg* v *Commission* [2002] ECR I-5373, paragraph 24, and Case C-300/02 *Greece* v *Commission* [2005] ECR I-1341, paragraph 70).

30 Article 8(1) of Regulation No 1663/95 must thus be read in conjunction with the fifth point of Article 5(2)(c) of Regulation No 729/70 and the fifth subparagraph of Article 7(4) of Regulation No 1258/1999, pursuant to which the Commission may not exclude expenditure effected more than 24 months prior to the Commission's written communication of the results of those checks to the Member State concerned. It follows that the written communication required under the first subparagraph of Article 8(1) of Regulation No 1663/95 serves as a warning that expenditure effected during the period of 24 months preceding notification of that communication may be excluded from financing by the EAGGF and, accordingly, that that communication constitutes the reference point from which the period of 24 months thus prescribed is to be calculated.

31 Consequently, in order to perform its function as a warning, in particular in the light of the fifth point of Article 5(2)(c) of Regulation No 729/70 and the fifth subparagraph of Article 7(4) of Regulation No 1258/1999, the communication referred to in Article 8(1) of Regulation No 1663/95 must first identify in a sufficiently precise manner all irregularities which the Member State concerned is alleged to have committed which, ultimately, formed the basis for the financial correction applied. Such a communication alone can ensure that full information is provided concerning the Commission's reservations, within the meaning of the Court's case-law cited in paragraph 27 of the present judgment, and can constitute the reference point for calculation of the period of 24 months laid down in the fifth point of Article 5(2)(c) of Regulation No 729/70 and the fifth subparagraph of Article 7(4) of Regulation No 1258/1999.

32 In the present case, with regard to the financial correction in the olive oil sector which was applied in the contested decision, the General Court held, in paragraph 65 of the judgment under appeal, that the complaint that the ground for financial correction based on the fact that the AAO proposals had been inadequately monitored by the Spanish authorities had not been specifically referred to in letter AGR 16844. The General Court found that that letter had simply referred to the fact that, in general, the work carried out by that agency had been regarded as satisfactory by the investigation team.

33 Furthermore, in paragraphs 119 and 120 of the judgment under appeal, as regards that complaint, the General Court held that letter AGR 16844 was a communication within the meaning of the first subparagraph of Article 8(1) of Regulation No 1663/95, notification of which to the Kingdom of Spain on 15 July 2002 constituted the reference point for calculation of the period of 24 months referred to in the fifth point of Article 5(2)(c) of Regulation No 729/70 and the fifth subparagraph of Article 7(4) of Regulation No 1258/1999.

34 In so ruling, the General Court failed to have regard for Article 8(1) of Regulation No 1663/95 and for the fifth point of Article 5(2)(c) of Regulation No 729/70 and the fifth subparagraph of Article 7(4) of Regulation No 1258/1999. As is set out in paragraph 31 of the present judgment, only a communication which identifies in a sufficiently precise manner all irregularities which the Member State concerned is alleged to have committed can be regarded as a communication within the terms of Article 8(1) of Regulation No 1663/95, which constitutes the reference point for calculation of the period of 24 months laid down in the fifth point of Article 5(2)(c) of Regulation No 729/70 and the fifth subparagraph of Article 7(4) of Regulation No 1258/1999. According to the findings of fact made by the General Court, however, letter AGR 16844 did not satisfy those requirements as regards the complaint referred to in paragraph 32 of the present judgment.

35 Consequently, the first ground of appeal and the first part of the third ground of appeal must be upheld.

The second ground of appeal, alleging breach of Articles 36 and 53 of the Statute of the Court of Justice by virtue of the insufficient reasons given in the judgment under appeal

Arguments of the parties

36 By its second ground of appeal, the Kingdom of Spain alleges that the General Court breached Articles 36 and 53 of the Statute of the Court of Justice by failing to give sufficient reasons for the judgment under appeal. After having rejected the arguments of that Member State alleging that the financial corrections were invalid in their entirety, the General Court ought to have examined the question of the date to be taken into consideration as the reference point for calculation of the period of 24 months laid down in the fifth point of Article 5(2)(c) of Regulation No 729/70 and the fifth subparagraph of Article 7(4) of Regulation No 1258/1999 and thus answer the arguments raised in the alternative by that Member State in that regard at the hearing before the General Court. That judgment, however, does not in any way address that question or, consequently, those arguments, with the result that that omission must, in the submission of the Kingdom of Spain, lead to its being set aside.

37 The Commission disputes the arguments of the Kingdom of Spain and claims that the second ground of appeal must be rejected as unfounded. It points out that, in paragraph 66 of the judgment under appeal, the General Court implicitly addressed those arguments raised in the alternative.

Findings of the Court

38 Having regard to the answer given to the first ground of appeal and to the first part of the third ground of appeal, there is no need to consider the second ground of appeal.

39 Even if this ground of appeal were to be accepted, the fact remains that the General Court, as is apparent from that answer, failed to have regard for the period of 24 months laid down in the fifth point of Article 5(2)(c) of Regulation No 729/70 and the fifth subparagraph of Article 7(4) of Regulation No 1258/1999 and, accordingly, necessarily erred as regards the date to be taken into consideration as the reference point from which that period is to be calculated, with the result that it is entirely irrelevant whether the General Court addressed the question of that date in the reasoning of the judgment under appeal.

40 This second ground of appeal must therefore be set aside.

The second part of the third ground of appeal, alleging incorrect application in the present case of the dicta in the judgment in Case C-329/00 Spain v *Commission*

Arguments of the parties

41 By the second part of its third ground of appeal, the Kingdom of Spain complains that, in paragraph 122 of the judgment under appeal, the General Court erred in law by incorrectly applying to the present case the reasoning followed by the Court of Justice in its judgment in Case C-329/00 *Spain* v *Commission* in order to conclude that the disputed financial correction could cover all expenditure for which payment of the balance had been made within the period of 24 months laid down in the fifth point of Article 5(2)(c) of Regulation No 729/70 and the fifth subparagraph of Article 7(4) of Regulation No 1258/1999, regardless of whether payment of the advances had been made outside that period.

42 The Kingdom of Spain submits that this reasoning of the Court of Justice relates to aid for the marketing of bananas and that, since such aid is substantially different from that for the production of olive oil, the reasoning does not apply to the latter aid. The Kingdom of Spain argues that that reasoning is based on the idea that, as regards expenditure relating to aid within the banana sector, the amounts advanced constitute only provisional payments subject to the lodging of a security, with the result that they are not relevant for the purpose of determining the date on which the aid is effected, for the purposes of applying the period of 24 months, whereas the situation in the olive oil sector is different since, in the latter, advances constitute mere advances payment of which does not at all have to be preceded by the provision of a guarantee.

43 The Commission disputes this argument of the Kingdom of Spain and submits that the second part of the third ground of appeal must also be rejected. It contends that the General Court did not state in any way that the olive oil and banana sectors were totally comparable and that it merely pointed out that, in accordance with Case C-329/00 *Spain* v *Commission*, the date which must be regarded as decisive as regards application of the period of 24 months must be that on which the final amount of the compensatory aid is fixed and the balance paid. Furthermore, the Commission notes that it is difficult to accept that payment of the balance depends solely on the fixing of the unit amount of the aid even though the applicable rules, in particular Article 16 of Regulation No 2366/98, expressly provide that the balance is to be paid once all checks stipulated for that purpose have been carried out and subject to the results of those checks, as the General Court held in paragraph 123 of the judgment under appeal.

Findings of the Court

44 The present ground of appeal relates to the question whether the General Court erred in law, in paragraphs 122 and 123 of the judgment under appeal, by designating the date of payment of the balance, rather than that of payment of the advance, as the date on which the expenditure was effected within the meaning of the fifth point of Article 5(2)(c) of Regulation No 729/70 and the fifth subparagraph of Article 7(4) of Regulation No 1258/1999.

45 It must be borne in mind that, in paragraphs 41 to 43 of the judgment in Case C-329/00 *Spain* v *Commission*, the Court held that the date which must be regarded as decisive as regards assessment of whether expenditure was effected within the period of 24 months referred to in the fifth point of Article 5(2)(c) of Regulation No 729/70 and the fifth subparagraph of Article 7(4) of Regulation No 1258/1999 must be that on which the final amount of the compensatory aid is fixed and the balance paid by the Member State concerned.

46 In the same way as the system of aid in the banana sector which was at issue in that judgment, it follows from the combined provisions of Article 12 of Regulation No 2261/84 and of Article 16 of Regulation No 2366/98 that olive oil producers also receive an advance on the amount of aid applied for at the start of each marketing year. However, by contrast to the provisions relating to the banana sector, olive oil producers do not have to provide a guarantee in respect of a possible obligation to make reimbursement in the event that the final amount of the aid is lower than that of the advance paid. Nevertheless, by virtue of those provisions, and as the General Court noted in paragraph 123 of the judgment under appeal, the Member State concerned pays the balance to the producers only after carrying out all the checks prescribed for that purpose and subject to the results of those checks. The final amount of the aid due is therefore not known before that balance is paid.

47 In those circumstances, the General Court cannot be criticised for having, in paragraphs 122 and 123 of the judgment under appeal, applied the dicta derived from the judgment in Case C-329/00 *Spain* v *Commission* and held that it is the payment of the balance which determines the date on which the expenditure is effected within the meaning of the fifth point of Article 5(2)(c) of Regulation No 729/70 and the fifth subparagraph of Article 7(4) of Regulation No 1258/1999. It is on that date

that the obligation of the Member State concerned and the corresponding debt of the producer are definitively established. In that regard, the fact that payment of the advance on the amount of the aid is not subject to the provision of a guarantee in no way affects the provisional nature of that payment.

48 The second part of the third ground of appeal must therefore be rejected as unfounded.

49 It follows from all of the foregoing considerations that the judgment under appeal must be set aside in so far as, by holding that letter AGR 16844 was a communication within the terms of Article 8(1) of Regulation No 1663/95, it found that the date of notification of that letter was the reference point for the start of the 24-month period laid down in the fifth point of Article 5(2)(c) of Regulation No 729/70 and the fifth subparagraph of Article 7(4) of Regulation No 1258/1999 for the purposes of the financial correction applied in the contested decision in the olive oil sector by reason of the fact that the AAO proposals following the checks carried out at the mills had been inadequately monitored by the Spanish authorities.

The action before the General Court

50 Under the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice, the Court of Justice may, where the decision of the General Court has been set aside, itself give final judgment in the matter, where the state of the proceedings so permits. That is the position in the present case.

51 With regard to the application which the Kingdom of Spain made to the General Court, by which it sought partial annulment of the contested decision and which alleged, as regards the financial correction applied to the expenditure effected in the olive oil sector, a breach of Article 8(1) of Regulation No 1663/95 and failure to respect the 24-month period laid down in the fifth point of Article 5(2)(c) of Regulation No 729/70 and in the fifth subparagraph of Article 7(4) of Regulation No 1258/1999, that application must be upheld in the light of the considerations set out in paragraphs 26 to 34 of the present judgment.

52 In particular, it is apparent from those paragraphs that the communication referred to in the first subparagraph of Article 8(1) of Regulation No 1663/95 must first identify, in a sufficiently precise manner, all irregularities which the Member State concerned is alleged to have committed and which, ultimately, formed the basis for the financial correction applied.

53 In the present case, having regard to the complaints specifically raised by the Kingdom of Spain before the General Court, it is therefore necessary to ascertain whether the Commission sufficiently identified in its communication under Article 8(1) of Regulation No 1663/95, that is to say, letter AGR 16844, the results of the investigation and, accordingly, the deficiencies which ultimately formed the basis of the financial correction applied to the expenditure in the olive oil sector for the marketing years 1998/1999 and 1999/2000 which were the subject of investigation HO/2002/01/ES.

54 As the General Court noted in paragraph 64 of the judgment under appeal, it is common ground between the parties that the Commission based that financial correction, inter alia, ‘on the inadequate monitoring of the AAO checks of the mills’.

55 As regards the complaint that the AAO proposals were inadequately monitored by the Spanish authorities, the General Court states, in paragraph 65 of the judgment under appeal, that that complaint was not, as the Commission acknowledges, specifically mentioned in letter AGR 16844, which refers merely to the fact that, in general, the work carried out by that agency was regarded as satisfactory by the investigation team.

56 If follows that that letter cannot constitute a communication for the purposes of Article 8(1) of Regulation No 1663/95 as it did not identify in a sufficiently precise manner the irregularity, based in the present case on the fact that the AAO proposals following the checks carried out at the mills had been inadequately monitored by the Spanish authorities, which, ultimately, formed the basis of the contested decision.

57 Furthermore, it must be noted that the Commission's letter of 24 November 2004, arranging the bilateral meeting of 21 December 2004, expressly refers to that irregularity for the first time. That letter accordingly constitutes the first communication from the Commission that, in the present case, complies with the requirements of that provision.

58 It follows that, in accordance with the fifth point of Article 5(2)(c) of Regulation No 729/70 and the fifth subparagraph of Article 7(4) of Regulation No 1258/1999, the period of 24 months laid down in those provisions must be calculated as running from the date of notification of that letter.

59 It follows from all of the foregoing considerations that the contested decision must be annulled in so far as it excludes from Community financing the expenditure effected by the Kingdom of Spain in the olive oil sector outside the period of 24 months which preceded the date of notification of the Commission's letter of 24 November 2004, arranging the bilateral meeting of 21 December 2004, inasmuch as that expenditure is affected by the correction applied by reason of the fact that the AAO proposals following the checks carried out at the mills were inadequately monitored by the Spanish authorities.

Costs

60 The first paragraph of Article 122 of the Court's Rules of Procedure provides that, where the appeal is unfounded, or where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs.

61 Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. The first subparagraph of Article 69(3) of those Rules provides, however, that where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court may order that the costs be shared or that the parties bear their own costs.

62 Since both the Kingdom of Spain and the Commission have failed in part on certain heads of claim in the appeal and in the action at first instance, it is appropriate to order each to bear its own costs incurred both at first instance and in the present appeal.

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

1. **Sets aside the judgment of the General Court of the European Union of 12 November 2010 in Case T-113/08 *Spain* v *Commission* in so far as, by holding that the Commission's letter AGR 16844 of 11 July 2002 was a communication within the terms of 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, as amended by Commission Regulation (EC) No 2245/1999 of 22 October 1999, the General Court found that the date of notification of that letter was the reference point for the start of the 24-month period laid down in the fifth point of Article 5(2)(c) of Regulation (EEC) No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy, as amended by Council Regulation (EC) No 1287/95 of 22 May 1995, and the fifth subparagraph of Article 7(4) of Council Regulation (EC) No 1258/1999 of 17 May 1999 on the financing of the common agricultural policy, for**

the purposes of the financial correction applied in Commission Decision 2008/68/EC of 20 December 2007 excluding from Community financing certain expenditure incurred by the Member States under the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) in the olive oil sector by reason of the fact that the proposals of the olive oil agency following the checks carried out at the mills had been inadequately monitored by the Spanish authorities;

2. **Annuls Decision 2008/68 in so far as it excludes from Community financing the expenditure incurred by the Kingdom of Spain in the olive oil sector outside the 24-month period which preceded the date of notification of the Commission's letter of 24 November 2004, arranging the bilateral meeting of 21 December 2004, inasmuch as that expenditure is affected by the correction applied by reason of the fact that the proposals of the olive oil agency following the checks carried out at the mills were inadequately monitored by the Spanish authorities;**

3. **Orders the Kingdom of Spain and the European Commission to bear their own respective costs incurred both at first instance and in the present appeal.**

[Signatures]