Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

6 March 2012 *

(EAGGF — Guarantee Section — Expenditure excluded from financing — Fruit and vegetables — Obligation to justify expenditure — Conditions for recognition of producer organisations)

In Case T-230/10,

Kingdom of Spain, represented initially by M. Muñoz Pérez and A. Rubio González, and subsequently by Rubio González, lawyers,

applicant,

v

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

defendant,

APPLICATION for partial annulment of Commission Decision 2010/152/EU of 11 March 2010 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 2010 L 63, p. 7), in so far as it excludes certain expenditure incurred by the Kingdom of Spain in the fruit and vegetables sector,

THE GENERAL COURT (Fourth Chamber),

composed of I. Pelikánová, President, K. Jürimäe (Rapporteur) and M. van der Woude, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 22 November 2011,

gives the following

Judgment

Background to the dispute

1 On 7 April 2008, following five inquiries, with the reference numbers FV/2004/381/ES, FV/2005/301/ES, FV/2005/302/ES, FV/2006/354/ES and FV/2005/385/ES, conducted by the service of the Commission of the European Communities responsible for the audit of agricultural expenditure,

* Language of the case: Spanish.

concerning aid in the fruit and vegetables sector, the Commission, under Article 7(4) of Council Regulation (EC) No 1258/1999 of 17 May 1999 on the financing of the common agricultural policy (OJ 1999 L 160, p. 103), notified the Spanish authorities of its findings as a result of those inquiries.

2 By letter of 27 May 2008, the Kingdom of Spain requested intervention by the Conciliation Body. On 29 October 2008, the Conciliation Body delivered its final report. On 25 August 2009, the Commission informed the Kingdom of Spain of its final position.

3 On the basis of the arguments contained in the summary report of 30 September 2009, the Commission, by Decision 2010/152/EU of 11 March 2010 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 2010 L 63, p. 7) ('the contested decision'), decided to exclude from financing, inter alia, two types of expenditure incurred by the Kingdom of Spain in the fruit and vegetables sector.

4 First, the Commission applied an initial specific adjustment, totalling EUR 33 339 525.05, to the expenditure declared in respect of costs for the management of packaging expenses, due to the ineligibility of costs incurred in respect of the environmental management of packaging. Secondly, it applied another specific adjustment of 100%, totalling EUR 4 940 378.44, in respect of the aid granted to the producer organisation SAT Royal ('SAT Royal') due to weaknesses in the application of the criteria for its recognition.

Procedure and forms of order sought

5 By application lodged at the Court Registry on 21 May 2010, the Kingdom of Spain brought the present action.

6 The Kingdom of Spain claims that the Court should:

— annul the contested decision in so far as it excludes from European Union financing certain expenditure notified by the Kingdom of Spain;

— order the Commission to pay the costs.

7 The Commission contends that the Court should:

— dismiss the action;

— order the Kingdom of Spain to pay the costs.

Law

8 The Kingdom of Spain puts forward two pleas in support of its action. The first plea alleges in essence that the Commission erred in law, with regard to the exclusion of the costs generated by the environmental management of packaging, in its interpretation of the provisions of Council Regulation (EC) No 2200/96 of 28 October 1996 on the common organisation of the market in fruit and vegetables (OJ 1996 L 297, p. 1), and Commission Regulation (EC) No 1433/2003 of 11 August 2003 laying down detailed rules for the application of Regulation No 2200/96 as regards operational funds, operational programmes and financial assistance (OJ 2003 L 203, p. 25). The second plea alleges, in essence, that the Commission erred in law, with regard to the weaknesses in the control system for the recognition of SAT Royal, in its interpretation of the provisions of Regulation No 2200/96 and of

Commission Regulation (EC) No 1432/2003 of 11 August 2003 laying down detailed rules for the application of Regulation No 2200/96 regarding the conditions for recognition of producer organisations and preliminary recognition of producer groups (OJ 2003 L 203, p. 18).

First plea

9 In the context of the first plea, the parties disagree in essence over whether the provisions of Regulation No 2200/96 and of Regulation No 1433/2003 require that the additional costs generated by the environmental management of packaging should be borne directly or indirectly by the producer organisation and whether the latter, in order to receive the financial assistance referred to in Article 15(1) of Regulation No 2200/96, should enclose with its application for assistance specific evidence in writing to support those costs.

10 As a preliminary point, it is appropriate to outline the provisions and case-law that are relevant for the purposes of examining the first plea.

11 First, Article 15 of Regulation No 2200/96 provides:

'1. [European Union] financial assistance shall be granted on the terms set out in this Article to producer organisations setting up an operational fund.

This fund shall be maintained by financial contributions levied on member producers on the basis of the quantities or value of fruit and vegetables actually marketed and from the financial assistance referred to in the first subparagraph.

2. Operational funds as indicated in paragraph 1 shall be used to:

(a) finance both market withdrawals on the terms set out in paragraph 3;

(b) finance an operational programme submitted to the competent national authorities and approved by them under Article 16 (1).

…

5. The financial assistance referred to in paragraph 1 shall be equal to the amount of the financial contributions indicated in that paragraph as actually paid but limited to 50% of the actual expenditure incurred under paragraph 2.

…'

12 Paragraph (2)(c) of Article 18 of Regulation No 1433/2003, entitled 'Applications', provides that '[a]pplications shall be accompanied by supporting documents showing … the expenditure incurred in respect of the operational programmes.

13 According to point 2(c) of Annex I to Regulation No 1433/2003, entitled 'Optional contents of operational programmes', to which Article 8(2) of that regulation refers, operational programmes may, inter alia, contain points relating to 'specific costs … for environmental measures, including costs generated by the environmental management of packaging'.

14 Reference is made at the end of point 2(c) of Annex I to Regulation No 1433/2003 to footnote 3, which states that:

'The environmental management of packaging needs to be properly justified and follow the criteria of Annex II to Directive 94/62/EC of the European Parliament and of the Council on packaging and packaging waste …'

15 Secondly, it should be noted that, according to settled case-law, the EAGGF finances only intervention undertaken in accordance with the European Union rules within the framework of the common organisation of agricultural markets (see Case C-349/97 *Spain* v *Commission* [2003] ECR I-3851, paragraphs 45 to 47 and 49, and Case C-300/02 *Greece* v *Commission* [2005] ECR I-1341, paragraphs 32 to 36 and the case-law cited).

16 As regards the main claim, it is necessary to examine the arguments put forward by the Kingdom of Spain in support of the first plea.

17 In the first place, the Kingdom of Spain is wrong to state that the Commission acknowledged that the Spanish authorities were correct in fixing the 17% flat rate which they applied in respect of additional costs compared with conventional ones. It is apparent from the documents before the Court that, although the Commission acknowledges that the 17% rate adopted in the present case is not disproportionate per se, it criticises the Kingdom of Spain for including in the calculation of that rate the costs of the environmental management of packaging without providing any evidence whatsoever that those costs had been borne by the producer organisations or by their members.

18 In the second place, it is necessary to examine whether, as the Kingdom of Spain claims, the Commission erred in law in requiring that the costs generated by the environmental management of packaging should necessarily be borne by the producer organisations.

19 In that regard, according to the first subparagraph of Article 15(5) of Regulation No 2200/96, the financial assistance granted by the European Union is to be calculated in relation to 'the actual expenditure incurred', inter alia in connection with the financing of an operational programme by the operational fund. Similarly, under Article 18(2)(c) of Regulation No 1433/2003, applications for assistance made by producer organisations must be accompanied by supporting documents showing the expenditure incurred under the operational programme.

20 It is apparent from those provisions that European Union financial assistance may be granted to a producer organisation in respect of an operational programme only on condition that evidence is provided that the expenditure under that programme has actually been incurred.

21 That interpretation of the provisions concerned is not undermined by the argument, put forward by the Kingdom of Spain, that such a requirement does not apply to operational programmes which contain costs generated by the environmental management of packaging, since it follows from European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste (OJ 1994 L 365, p. 10), referred to in footnote 3 in Annex I to Regulation No 1433/2003, that the management of such packaging falls to the distributors, so that it would be illogical for that regulation to require producer organisations to bear the operating costs of managing packaging, a task which it is not their responsibility to carry out.

22 First of all, it must be stated that the rule outlined in paragraph 20 above does not exclude taking into account costs generated by the environmental management of packaging where, as in the present case, such costs are borne directly by the distributors and indirectly by the producer organisations. The only evidence required is evidence to show that the costs in question are borne, directly or indirectly, by the producer organisations.

23 It should also be pointed out that Regulation No 1433/2003 lays down detailed rules for the application of Regulation No 2200/96 as regards operational funds, operational programmes and financial assistance. In that regard, as is apparent from the considerations set out in paragraphs 19 and 20 above, Article 18(2)(c) of Regulation No 1433/2003, in so far as it provides that applications for assistance made by producer organisations are to be accompanied by supporting documents showing the expenditure incurred in respect of the operational programme, implements the rule laid down in Article 15(5) of Regulation No 2200/96.

24 However, neither Regulation No 2200/96 nor Regulation No 1433/2003, nor even Directive 94/62, to which footnote 3 in Annex I to Regulation No 1433/2003 refers, provides for any derogation, which would apply in the context of operational programmes containing costs generated by the environmental management of packaging, from the rule stemming from Article 15(5) of Regulation No 2200/96 and from Article 18(2) of Regulation No 1433/2003 that the financial assistance granted by the European Union is to be calculated in relation to the actual expenditure incurred and, hence, demonstrated by the applicant for the assistance, that is to say in the present case, the producer organisations.

25 It follows from the above considerations that the Kingdom of Spain is wrong to allege that the Commission erred in law in requiring that the costs generated by the environmental management of packaging should necessarily be borne by the producer organisations.

26 In the third place, it is necessary to assess whether, as the Kingdom of Spain submits, the requirement that the producer organisation should provide evidence that it has borne, directly or indirectly, the costs generated by the environmental management of packaging is disproportionate.

27 More specifically, the Kingdom of Spain contends, first, that the producer organisations are not required to have documentary evidence showing the specific amount of the sums paid for the environmental management of packaging and, secondly, that the distributors pass those costs on to the producer organisations, as they do the rest of the production costs.

28 In that regard, it should be recalled that the principle of proportionality, which is one of the general principles of European Union law, requires that acts adopted by European Union institutions do not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question; where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (see Case C-375/05 *Geuting* [2007] ECR I-7983, paragraph 45 and the case-law cited).

29 As regards judicial review of the implementation of that principle, bearing in mind the wide discretion enjoyed by the European Union legislature where the common agricultural policy is concerned, the lawfulness of the measure adopted can be affected only if the measure is manifestly inappropriate in terms of the objective which the Commission is seeking to pursue (see, to that effect, *Geuting*, paragraph 28 above, paragraph 46 and the case-law cited).

30 In the present case, first, it is necessary to reject the Kingdom of Spain's argument that Annex I to Regulation No 1433/2003 allows the costs generated by the environmental management of packaging to be included in operational programmes, without imposing any conditions whatsoever as to the person who must bear those costs.

31 As was stated in paragraph 24 above, Regulation No 2200/96 and Regulation No 1433/2003 do not provide for any derogation from the rule stemming from Article 15(5) of Regulation No 2200/96 and from Article 18(2) of Regulation No 1433/2003.

32 Secondly, contrary to what the Kingdom of Spain submits in essence, it cannot be accepted that, in order to show that expenditure has actually been borne indirectly by producer organisations, it is sufficient to accept the allegedly logical hypothesis that, in the light of actual practice, the selling price invoiced by the producer organisations to distributors has been reduced in order to take into account the fact that the latter have borne the costs of managing the packaging of the goods concerned.

33 That argument clearly conflicts with the rule outlined in paragraph 20 above. Moreover, it cannot be excluded that, instead of a reduction in the selling price invoiced by the producer organisations to the distributors, the additional cost generated by the environmental management of packaging might be passed on down the marketing chain in the form of an increase in the selling prices invoiced by the distributors to their customers.

34 Hence, the only way in which the rule outlined in paragraph 20 above can be complied with is if the applicant for the assistance can show that the expenditure has actually been incurred, directly or indirectly.

35 Thirdly, contrary to the Kingdom of Spain's assertion, the need to show this is not removed where, as in the present case, the Member State has, in accordance with the provisions of Regulation No 1433/2003, established the additional costs generated by the environmental management of packaging approximately as compared with conventional ones. The consequence of such an assertion would be that, in breach of the rule noted in paragraph 20 above, it would be possible for producer organisations which have not borne any additional cost to receive the assistance in question.

36 It is apparent from the above considerations that the arguments put forward by the Kingdom of Spain fail to take sufficient account of the legitimate objective pursued by the regulations at issue, which is to ensure, as recalled in paragraph 15 above, that financial interventions are undertaken in accordance with the European Union rules within the framework of the common organisation of agricultural markets. In consequence, neither the arguments put forward by the Kingdom of Spain nor the documents on the file give reason for considering that the Commission infringed the principle of proportionality in requiring a producer organisation to provide evidence that it has borne the costs generated by the environmental management of packaging.

37 In conclusion, since none of the arguments put forward by the Kingdom of Spain in support of the first plea are well-founded, that plea must be rejected.

The second plea

38 In the context of the second plea, the parties disagree in essence over whether Article 14 of Regulation No 1432/2003 applies only to the individuals or legal persons producing fruit and vegetables who, as members, make up a producer organisation such as SAT Royal, or whether it applies also, in the case of members that are legal persons, to the individuals or legal persons who control the latter's share capital.

39 First, it is appropriate to recall the relevant provisions in order to proceed to an examination of the second plea.

40 Article 11(1)(d)(3) of Regulation No 2200/96 provides:

'For the purposes of this Regulation, "producer organisation" means any legal entity:

…

(d) the rules of association of which provide for:

…

(3) rules enabling the producer members democratically to scrutinise their organisation and its decisions;

…'

41 Recital 14 in the preamble to Regulation No 1432/2003 reads:

'In order to ensure that producer organisations genuinely represent a minimum number of producers, Member States should take steps to ensure that a minority of members who may account for the bulk of production in the producer organisation do not unduly dominate its management and operation.'

42 Paragraph 1 of Article 4 of Regulation No 1432/2003, entitled 'Minimum size of producer organisations', provides:

'The minimum number of members referred to in Article 11(2)(a) of Regulation … No 2200/96 is hereby fixed at five producers by category.'

43 Article 13 of Regulation No 1432/2003, entitled 'Non-producer members', provides:

'1. The Member States may determine whether and on what conditions any individual or legal person who is not a producer may be accepted as a member of a producer organisation.

2. When setting the conditions referred to in paragraph 1, the Member States shall ensure, in accordance with Article 11(1)(a) and (d)(3) of Regulation … No 2200/96, that:

…

(b) the rules of association of producer organisations shall contain rules enabling the producer members to scrutinise their organisation and its decisions democratically.

…'

44 Article 14 of Regulation No 1432/2003, entitled 'Democratic accountability of producer organisations', provides:

'1. Member States shall take such measures as are required to avoid any abuse of power or influence by one or more members over the management and operation of a producer organisation.

2. No member of a producer organisation may have more than 20% of the voting rights. However, the Member State may increase this percentage up to a maximum of 49% in proportion to the member's contribution to the value of the marketed production of the producer organisation.'

45 Secondly, it is necessary to examine in the light of those provisions the arguments put forward by the Kingdom of Spain in support of the second plea, which divides into two parts.

46 With regard to the first and main part, the Kingdom of Spain criticises the Commission for considering that a particular individual, who was not a producer, exercised control over four of the nine legal persons which were members of SAT Royal because that individual held 76% of the shares of one of those four legal persons and almost 100% of the shares of the three others, and, accordingly, for failing to take into account the abovementioned provisions of Articles 13 and 14 of Regulation No 1432/2003. According to the Kingdom of Spain, the actual members of that producer organisation were only those nine legal persons, which are trading companies, and each of them held, in accordance with the abovementioned provisions, less than 20% of the voting rights.

47 In that regard, it is clear from the provisions of Regulation No 2200/96 and Regulation No 1432/2003 outlined in paragraphs 40 to 43 above that the European Union regulations concerning producer organisations are designed to ensure that such organisations operate democratically, in accordance with two principles.

48 First, under Article 11(1)(d)(3) of Regulation No 2200/96, the producer members of the producer organisation must scrutinise their organisation and its decisions. That principle is moreover expressly confirmed by the specific provisions of Article 13(2)(b) of Regulation No 1432/2003.

49 Secondly, it is apparent from Article 4 and Article 14(2) of Regulation No 1432/2003 that a producer organisation must include among its members at least five producers and that none of those members may, in principle, have more than 20% of the voting rights. Those provisions address the concern

outlined in recital 14 in the preamble to Regulation No 1432/2003, as cited in paragraph 41 above. Moreover, it is common ground that those provisions apply not only to members of a producer organisation who are individuals but also to members which are legal persons and that, in the present case, each such member has one vote within SAT Royal.

50 When Member States carry out checks to ascertain whether a producer organisation is operating democratically, it is necessary to take into account the identities of the individuals or legal persons holding the shares of the members of that organisation. If those identities are not checked it is possible that a particular individual or legal person holding the bulk, or even all, of the shares of several members of a producer organisation, so that it has control over those members, in particular over their decision-making processes, might be concealed behind those members.

51 In such circumstances, the second principle outlined in paragraph 49 above is likely to be circumvented, since the apparent number of members of the producer organisation is not representative of the number of that organisation's members that are genuinely independent.

52 That finding is not undermined by the fact that the individual in question in the present case is not a producer. On the contrary, it should be noted that in the present case the members of SAT Royal are producers. Therefore, the fact that the individual in question, a non-producer, holds the bulk, or even all, of the shares of several producer members of SAT Royal results in a breach of both of the principles outlined in paragraphs 48 and 49 above, applied by European Union rules in order to ensure that a producer organisation operates democratically. In such a circumstance, not only is the apparent number of members of the producer organisation not representative of the number of that organisation's members that are genuinely independent, in breach of the second principle outlined in paragraph 49 above, but also, since some of the producer members are controlled by a person who is a non-producer, in breach of the first principle outlined in paragraph 48 above, the power to scrutinise the producer organisation and its decisions is not, in reality, exercised only by producer members.

53 It is apparent from the above considerations that, contrary to the Kingdom of Spain's submission, the Commission was right to hold that, in order to ensure that producer organisations operate democratically, it is necessary to take into account the identities of the individuals or legal persons controlling the members of those organisations.

54 The first part of the second plea must therefore be rejected as unfounded.

55 With regard to the second part of the second plea, put forward in the alternative, the Kingdom of Spain claims that the Commission made an error of assessment in respect of the percentage of votes held indirectly by a particular individual in SAT Royal. The Commission thus mistakenly held that, in the present case, that person controlled four of the nine members of that producer organisation. The Kingdom of Spain argues that the individual concerned, who is not a producer, controlled only three of the nine members of that producer organisation. Thus, the Kingdom of Spain argues that the percentage of votes held indirectly by that particular individual in SAT Royal was not 44.44%, but 33%. The latter percentage is in accordance with the ceiling on voting rights as increased by the Kingdom of Spain under Article 14(2) of Regulation No 1432/2003.

56 In that regard, suffice it to say, first, that even if, as the Kingdom of Spain alleges, the individual in question controlled only three of the nine members of the producer organisation, it is apparent from the documents annexed to the defence that the proportion of production marketed by those three legal persons in relation to the value of the production marketed by the producer organisation was 11.8% and, secondly, that the Kingdom of Spain has not disputed that figure.

57 The second sentence of Article 14(2) of Regulation No 1432/2003 provides that the increase by the Member State of the maximum percentage of 20% of the voting rights held by a single member must be proportionate to that member's contribution to the value of the marketed production of the producer organisation.

58 As a consequence, as the Commission has argued, if the individual in question in the present case does control only three of the nine members of SAT Royal, since those members each have one vote within the producer organisation that individual will have a percentage of the voting rights amounting to 33%, which, although it is within the ceiling set by the Kingdom of Spain, is significantly higher than the proportion of the value of production of the three legal persons which it controls within the producer organisation.

59 In those circumstances, the Kingdom of Spain is required, in accordance with Article 14(1) of Regulation No 1432/2003 and in order to ensure that SAT Royal operates democratically, to take the necessary measures to prevent that individual from controlling more than 20% of the voting rights within the producer organisation.

60 It follows from the above considerations that the second part of the second plea is ineffective and that the second plea must be rejected in its entirety.

61 In conclusion, the action must be dismissed in its entirety.

Costs

62 Under Article 87(2) of the Rules of Procedure of the General Court, 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 Kingdom of Spain has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

1. Dismisses the action.

2. Orders the Kingdom of Spain to pay the costs.

Pelikánová Jürimäe van der Woude

Delivered in open court in Luxembourg on 6 March 2012.

[Signatures]