JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)

12 December 2007 *

In Case T-308/05,

Italian Republic, represented initially by A. Cingolo, and subsequently by P. Gentili, avvocati dello Stato,

applicant,

v

Commission of the European Communities, represented by L. Flynn and M. Velardo, acting as Agents, and by G. Faedo, avocat,

defendant,

APPLICATION for annulment of the decisions allegedly contained in the Commission's letters No 5272 of 7 June 2005, No 5453 of 8 June 2005, Nos 5726 and 5728 of 17 June 2005, and No 5952 of 23 June 2005,

* Language of the case: Italian.

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

composed of A.W.H. Meij, acting for the President, N.J. Forwood and I. Pelikánová, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 25 April 2007,

gives the following

Judgment

Legal context

1 Under Article 159 EC, the European Community is to support the achievement of the objectives of economic and social cohesion, including regional development, by action through the Structural Funds (European Agricultural Guidance and Guarantee Fund, Guidance Section; European Social Fund; European Regional Development Fund; 'the Structural Funds' or 'the Funds').

2 Under Article 161 EC, the Council is to define the tasks, priority objectives and organisation of the Structural Funds, together with the general rules applicable to them.

3 On the basis of Article 161 EC, the Council adopted Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds (OJ 1999 L 161, p. 1; 'the general regulation'), which governs the objectives, organisation, functioning and implementation of the Structural Funds, together with the respective roles and powers of the Commission and the Member States in that regard.

Provisions relating to the eligibility of expenditure for a contribution from the Funds

4 Article 30 of the general regulation lays down the conditions for the 'eligibility' of expenditure for a financial contribution from the Funds. Under Article 30(3), the 'relevant national rules shall apply to eligible expenditure except where, as necessary, the Commission lays down common rules on the eligibility of expenditure in accordance with the procedure referred to in Article 53(2)'.

5 Pursuant to Article 30(3) and Article 53(2) of the general regulation, the Commission adopted Regulation (EC) No 1685/2000 of 28 July 2000 laying down detailed rules as regards eligibility of expenditure of operations co-financed by the Structural Funds (OJ 2000 L 193, p. 39). That regulation entered into force on 5 August 2000. It was subsequently amended — with effect from its entry into force, so far as concerns the provisions material to the present case — by Commission Regulation (EC) No 1145/2003 of 27 June 2003 (OJ 2003 L 160, p. 48). Later, the Commission adopted Regulation (EC) No 448/2004 of 10 March 2004 (OJ 2004 L 72, p. 66) withdrawing Regulation No 1145/2003 and amending the Annex to Regulation No 1685/2000 by replacing it with the text contained in the annex to the

amending regulation ('the Annex to Regulation No 448/2004'). Regulation No 448/2004 entered into force on 11 March 2004. In accordance with Article 3 thereof, it was to apply retroactively from 5 July 2003, the date on which Regulation No 1145/2003 entered into force, except for points 1.3, 2.1, 2.2 and 2.3 of Rule No 1, which applied from 5 August 2000, the date on which Regulation No 1685/2000 entered into force.

6 Rule No 1 of the Annex to Regulation No 448/2004, which deals with 'expenditure actually paid out', defines what is meant by 'payments effected by final beneficiaries'. Under point 1.2 thereof:

'In the case of aid schemes under Article 87 of the Treaty and aid granted by bodies designated by the Member States, 'payments effected by final beneficiaries' means aid paid to individual recipients by the bodies which grant the aid. Payments of aid by final beneficiaries must be justified by reference to the conditions and objectives of the aid.'

7 Under point 1.4 of Rule No 1:

'In cases other than those referred to in point 1.2, "payments effected by final beneficiaries" means payments effected by the bodies or public or private firms of the type defined in the programme complement in accordance with Article 18(3)(b) of the general regulation having direct responsibility for commissioning the specific operation.'

8 Rule No 1 also lays down the detailed rules for 'proof of expenditure'. Under point 2.1 thereof:

'As a general rule, payments by final beneficiaries, declared as interim payments and payments of the final balance, shall be supported by receipted invoices. Where this cannot be done, payments shall be supported by accounting documents of equivalent probative value.'

9 Point 2.3 of Rule No 1 provides as follows:

'In addition, where operations are executed in the framework of public procurement procedures payments by final beneficiaries, declared as interim payments and payments of the final balance, shall be supported by receipted invoices issued in accordance with the provisions of the signed contracts. In all other cases, including the award of public grants, payments by final beneficiaries, declared as interim payments and payments of the final balance, shall be justified by expenditure actually paid (including expenditure referred to in point 1.5) [that is to say, depreciation, contributions in kind and overheads] by the bodies or public or private firms concerned in implementing the operation.'

Provisions concerning payment of the contribution from the Funds

10 Article 32 of the general regulation governs 'payments' of the contribution from the Funds. The third and fourth subparagraphs of Article 32(1) provide as follows:

'Payments may take the form of payments on account, interim payments or payments of the final balance. Interim payments and payments of the balance shall relate to expenditure actually paid out, which must correspond to payments effected by the final beneficiaries, supported by receipted invoices or accounting documents of equivalent probative value.

Subject to available funding, the Commission shall make interim payments within no more than two months of receipt of an acceptable payment application ...'

11 Under Article 32(2) of the general regulation:

'When the first commitment is made, the Commission shall make a payment on account to the paying authority. This payment on account shall be 7% of the contribution from the Funds to the assistance in question. ...'

12 Article 32(3) of the general regulation provides, inter alia, that:

'Interim payments shall be made by the Commission to reimburse expenditure actually paid under the Funds as certified by the paying authority. ... They shall be subject to the following conditions:

...

The Member State and the paying authority shall be informed immediately by the Commission if one of these conditions is not fulfilled and the payment application is therefore not acceptable and they shall take the necessary steps to remedy the situation.'

13 Article 32(4) of the general regulation provides as follows:

'The final balance of the assistance shall be paid if:

(a) the paying authority submits to the Commission, within six months of the deadline for payment laid down in the decision granting a contribution from the Funds, a certified statement of expenditure actually paid;

...'

Provisions concerning the certification of expenditure

14 Pursuant to Article 53(2) of the general regulation, and in order to harmonise standards for the certification of expenditure for which interim payments or the final balance are claimed from the Funds, the Commission adopted — as part of Commission Regulation (EC) No 438/2001 of 2 March 2001 laying down detailed rules for the implementation of the general regulation as regards the management and control systems for assistance granted under the Structural Funds (OJ 2001 L 63, p. 21) — rules which specify the content of certificates concerning statements of interim and final expenditure, as well as the nature and quality of the information on which those certificates are to be based.

Provisions concerning financial control

15 Financial control is governed by Articles 38 and 39 of the general regulation and by the detailed rules for their application contained in Regulation No 438/2001.

16 Article 38(1) of the general regulation provides that, in the context of the financial control for which they are to take responsibility in the first instance, the Member States are to '[cooperate] with the Commission to ensure that Community funds are used in accordance with the principles of sound financial management'.

17 One of the provisions dealing with 'management and control systems', Article 7 of Regulation No 438/2001, provides as follows:

'1. Member States' management and control systems shall provide a sufficient audit trail.

2. An audit trail shall be considered sufficient where it permits:

(a) reconciliation of the summary amounts certified to the Commission with the individual expenditure records and supporting documents held at the various administrative levels and by final beneficiaries including, where the latter are not the final recipients of funding, the bodies or firms carrying out operations ...'

18 In the part dealing with 'Certification of expenditure', Article 9(1) of Regulation No 438/2001 provides that:

'The certificates of statements of interim and final expenditure referred to in Article 32(3) and (4) of [the general regulation] shall be drawn up in the form prescribed in Annex II by a person or department within the paying authority that is functionally independent of any services that approve claims.'

19 Article 9(2)(b)(i) of Regulation No 438/2001 provides that, before certifying a given statement of expenditure, the paying authority is to satisfy itself that the statement of expenditure includes only expenditure 'in the form of expenditure by final beneficiaries, within the meaning of points 1.2, 1.3 and 2 of Rule No 1 of the Annex to Regulation ... No 1685/2000, which can be supported by receipted invoices or accounting documents of equivalent probative value'.

Facts

20 By letter of 7 September 2001, the Commission sent the Italian Republic a memorandum setting out an interpretation of the third subparagraph of Article 32(1) of the general regulation ('the interpretative memorandum'). The covering letter indicates that 'the purpose of [the] memorandum is to clarify certain questions referred to the Commission on the meaning of "expenditure actually paid out" and "payments effected by the final beneficiaries"'. In that connection, point 8 of the interpretative memorandum set out, in regard to the abovementioned provision, the eligibility conditions for co-financing by the Structural Funds of advance payments made by national bodies ('the final beneficiaries') within the framework of State aid schemes for the purposes of Article 87 EC or in relation to the grant of aid ('advance

payments'): 'Where the final beneficiary is not the same as the individual recipient of the Community funds — for aid schemes, for example — advances on subsidies are paid to the individual recipients by the final beneficiaries. However, expenditure declared by the final beneficiary to the management or payment authority, or to the intermediary body, must match the expenditure actually paid out by the final recipients, as attested to by receipted invoices or by documents of equivalent probative value. That is why advance payments made by the final beneficiary cannot be included in the expenditure declared to the Commission unless that beneficiary was able to establish that the final recipient used the advance to reimburse expenditure actually paid out.' Thus, according to the interpretative memorandum, advance payments not supported by proof of their use by the final recipients ('unsupported advance payments') are not eligible for a contribution from the Funds ('the general rule at issue').

21 By letter of 20 January 2003, the Commission informed the Italian Republic, in the context of processing a payment application made by the latter, that it would deduct the amounts corresponding to unsupported advance payments. It called upon the Italian Republic to inform it of the amount of such advances, processing of the payment application being suspended in the meantime.

22 By letter of 3 March 2003, the Commission informed the Italian Republic that it had ordered payment of a sum lower than that requested, having deducted the amount corresponding to the unsupported advance payments.

23 On 27 March 2003, the Italian Republic brought an action for annulment of the two abovementioned letters (Case C-138/03).

24 At the same time as those events, a consultation procedure was under way within the Committee on the Development and Conversion of Regions ('the Committee')

with the aim of defining ways of simplifying the management of the Structural Funds. In that context, the Commission had asked the Committee to examine the possibility that advance payments might be eligible for a contribution from the Funds and the conditions of eligibility in such a case. Since no agreement was reached at the Committee's 73rd meeting held on 19 February 2003, the Commission decided to take no further steps in that regard.

25 By letter of 14 May 2003, the Commission informed the Italian Republic of the outcome of the discussions which had taken place within the Committee. It indicated that its position as regards the eligibility of advance payments remained the same as that stated in the interpretative memorandum. However, referring to the doubts which could have arisen as to the interpretation of the provisions in force and in order not to disappoint expectations which might legitimately have been created by the discussions within the Committee, the Commission decided to treat unsupported advance payments as eligible where they related to aid in respect of which the final decision to grant the aid had been adopted by 19 February 2003 at the latest, or to aid granted in the context of a tendering procedure which had been concluded by that date at the latest. In addition, the Commission informed the Italian Republic that the amount of advance payments had to be specified, in accordance with the rules thus laid down, in the statements of expenditure accompanying the payment applications submitted to it. On 24 July 2003, the Italian Republic brought an action for annulment of the letter of 14 May 2003 (Case C-324/03).

26 In application of the rules set out in the letter of 14 May 2003, the Italian authorities received payment, on 5 June 2003, of the amounts referred to in the letters of 20 January and 3 March 2003, which had been claimed in Case C-138/03.

27 By letter of 29 July 2003, the Commission sent the Italian authorities a new version of the letter of 14 May 2003, which corrected a number of translation errors in the latter. On 9 October 2003, the Italian Republic brought an action for annulment of the letter of 29 July 2003 (Case C-431/03). As in Case C-324/03, the Italian Republic contested the letter in so far as it refused to accept as eligible for a contribution from the Structural Funds advance payments unsupported by documentary evidence of

their use by the final recipients where the final decision to grant the aid had been adopted after 19 February 2003 or the tendering procedure had been concluded after that date ('the advance payments at issue').

28 On 25 September 2003, the Italian Republic also brought an action against Regulation No 1145/2003, which had entered into force on 5 July 2003 (Case C-401/03, which became Case T-223/04 when it was transferred to the Court of First Instance).

29 By letter of 25 March 2004, the Commission informed the Italian Republic that the amounts of advance payments made in the context of aid schemes for any Objective 1 or Objective 2 programme must be clearly specified in respect of each measure in future statements of expenditure, as was stated in the letters of 14 May and 29 July 2003. The Italian Republic brought an action against the letter of 25 March 2004 and, in the alternative, against Regulation No 448/2004, which had entered into force on 11 March 2004 (Case T-207/04).

30 By letter No 6311 of 1 March 2005, the Italian Republic applied to the Commission for an interim payment in the context of the implementation of the regional operational programme ('ROP') on the basis of Objective 1 for 2000-06 in respect of the Campania region.

31 By letter No 2772 of 21 March 2005, the Commission asked the Italian Republic to complete the statement of expenditure accompanying that payment application by indicating clearly the amounts of the advance payments at issue.

32 By letter No 12827 of 29 April 2005, the Italian Republic made a further payment application for an amount of EUR 17 341 776.84, again in the context of the implementation of the abovementioned ROP.

33 By application lodged at the Registry of the Court of First Instance on 30 May 2005, the Italian Republic brought an action against, inter alia, letter No 2772 of 21 March 2005 (Case T-212/05).

34 By letter No 5272 of 7 June 2005 ('the first contested letter'), the Commission asked the Italian Republic to complete the statements of expenditure accompanying the payment applications made to it by letter No 6311 of 1 March 2005 and letter No 12827 of 29 April 2005 ('the statements of expenditure at issue' and 'the payment applications at issue') by specifying, in respect of each measure, the amount of the advance payments at issue which had been paid or were to be paid. It also pointed out that the payment procedures for the payment applications at issue would be suspended or would remain suspended until that information was received. That letter was received by the Italian authorities concerned on 8 June 2005.

35 By letter No 5453 of 8 June 2005 ('the second contested letter'), letters Nos 5726 and 5728 of 17 June 2005 ('the third contested letter' and 'the fourth contested letter', respectively) and letter No 5952 of 23 June 2005 ('the fifth contested letter'), the Commission informed the Italian Republic that the payments made would not match the amount applied for in the context of the implementation, on the one hand, of the Single Programming Document under Objective 2 for 2000-06 in respect of the Lazio region and, on the other, the ROP under Objective 1 for the same period in respect of the Puglia region, as a result of the deduction of the amounts corresponding to the advance payments at issue.

36 By judgment of 24 November 2005 in Joined Cases C-138/03, C-324/03 and C-431/03 *Italy* v *Commission* [2005] ECR I-10043 (the 'judgment in Joined Cases C-138/03, C-324/03 and C-431/03'), the Court of Justice held that it was unnecessary to give judgment on the action in Case C-138/03 and that the actions in Case C-324/03 and Case C-431/03 fell to be dismissed as unfounded and inadmissible, respectively.

Procedure and forms of order sought

37 By application lodged at the Registry of the Court of First Instance on 10 August 2005, the Italian Republic brought the present action.

38 By letter of 10 January 2006, the Registry asked the parties to submit their observations on the possible implications for the present case of the judgment in Joined Cases C-138/03, C-324/03 and C-431/03, cited in paragraph 36 above. The parties submitted their observations within the time allowed and the Commission submitted to the Registry on 2 March 2006 a corrigendum intended to correct a clerical error in its observations.

39 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure, asked the Commission to answer a number of written questions and asked the Italian Republic to produce a document. The parties complied with those requests.

40 By decision of 2 February 2007, Judge A.W.H. Meij and Judge N.J. Forwood were designated as Acting President of Chamber and Judge, respectively, replacing Judge J. Pirrung, who was unable to take part.

41 The parties presented oral argument and replied to the questions put by the Court at the hearing on 25 April 2007. Following the hearing, an informal meeting with the representatives of the parties was organised before the Court.

42 The Italian Republic claims that the Court should:

— annul the first contested letter in so far as it asks it to complete the statements of expenditure accompanying the payment applications at issue by indicating, in respect of each measure, the amount of the advance payments at issue which had been paid or which were to be paid and in so far as payment procedures for the contested applications for payment would be suspended or would remain suspended until that information was received;

— annul the second, third, fourth and fifth contested letters in so far as they inform it that the payments made would not match the amount applied for as a result of the deduction of the amounts corresponding to the advance payments at issue;

— order the Commission to pay the costs.

43 The Commission contends that the Court should:

— dismiss the action as inadmissible or as unfounded;

— order the Italian Republic to pay the costs.

Admissibility

Arguments of the parties

44 The Commission raised an objection of inadmissibility in respect of the first contested letter on the ground that it does not constitute an actionable measure for the purposes of Article 230 EC by reason of its interpretative nature or, in the alternative, because it merely confirms the view expressed in the interpretative memorandum.

45 Primarily, the Commission contends that the first contested letter does not, of itself, produce any legal effects but is purely interpretative.

46 With regard, first, to the general rule at issue, the first contested letter merely repeats the Commission's interpretation of the third subparagraph of Article 32(1) of the general regulation and, of itself, does not produce any legal effect vis-à-vis the Italian Republic.

47 With regard, secondly, to the request for information concerning advance payments, that request was merely an implementing step and the practical expression of the rules concerning the eligibility of expenditure and, in particular, of the rules on proof of expenditure laid down in Regulation No 448/2004.

48 Thirdly and finally, the statement that, pending receipt of the information concerning advance payments, the payment procedures at issue would be suspended or would remain suspended reflects the Commission's obligation, pursuant to the principles of sound financial management, not to follow up payment applications

which are irregular or incomplete or which do not comply with the rules on proof of expenditure. That statement reflects the fact that, in the absence of the required information, the Commission cannot make the requested payments without expressing its view as to whether or not the payment applications at issue are justified.

49 In reply to the Italian Republic's argument, the Commission contends that, in accordance with settled case-law, the question whether the first contested letter is an actionable measure cannot be determined by reference to the fact that the general rule at issue, to which it refers, may be unlawful or even to the possibility that, in adopting that rule, the Commission exceeded its powers.

50 In the alternative, the Commission alleges that the first contested letter merely confirms the view expressed by it in the interpretative memorandum. That letter confirmed the general rule at issue set out in the letters of 14 May and 29 July 2003 and, before those letters were adopted, in the interpretative memorandum. Those letters definitively ended the institutional debate on the question of the eligibility of advance payments. In paragraphs 36 and 37 of the judgment in Joined Cases C-138/03, C-324/03 and C-431/03, cited in paragraph 36 above, the Court of Justice confirmed that the letter of 14 May 2003 reflected the definitive outcome of a reconsideration of that question.

51 Finally, the Commission argues that the Italian Republic can obtain no real advantage from the annulment of the first contested letter inasmuch as the Commission will continue in any event to apply the criteria laid down in the interpretative memorandum when considering the payment applications at issue.

52 The Italian Republic claims that the action against the first contested letter is admissible. That letter, of itself, produces legal effects and could directly modify its

legal position, which means that, in accordance with settled case-law, it constitutes an actionable measure for the purposes of Article 230 EC.

53 In the first place, the first contested letter contains, in accordance with the contents of the letters of 29 July 2003 and 25 March 2004, an injunction to include information relating to advance payments in the statements of expenditure at issue. The obligation to make such statements does not flow from the provisions of Regulation No 438/2001, laying down the detailed rules for the certification of expenditure, but from the general rule at issue, which is based on an erroneous interpretation of the provisions of the general regulation and Regulation No 448/2004 concerning the eligibility of expenditure.

54 In the second place, the first contested letter added a new element to the rules governing the eligibility of expenditure and certification thereof, and to the Commission's earlier letters, inasmuch as it attached a penalty to the injunction to transmit information concerning advance payments. The letter stated that the payment applications at issue would not be dealt with so long as the information concerning advance payments had not been sent. Thus, contrary to the applicable rules, the first contested letter introduced a new, purely procedural, ground for rejecting payment applications.

55 Finally, the Italian Republic challenges the Commission's argument that the first contested letter merely confirms the view expressed by it in the interpretative memorandum. On being challenged, the general rule at issue referred to in the interpretative memorandum had been reconsidered in depth in the context of the institutional debate concerning the amendment of Regulation No 1685/2000, and the first contested letter, adopted shortly after Regulation No 448/2004, reflects the outcome of that debate.

Findings of the Court

56 According to settled case-law, an action for annulment under Article 230 EC is available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to produce legal effects (see the judgment in Joined Cases C-138/03, C-324/03 and C-431/03, cited in paragraph 36 above, paragraph 32 and the case-law cited therein).

57 In order to assess whether the first contested letter produces legal effects for the purposes of the case-law cited above in that it asks the Italian Republic to complete the statements of expenditure at issue by indicating, in respect of each measure, the amount of the advance payments at issue which had been paid or which were to be paid and in that it states that the payment procedures under way in respect of the payment applications at issue would be suspended or would remain suspended until that information was received, regard must be had both to the substance of the letter and to the context in which it was adopted (see the order in Case C-50/90 *Sunzest* v *Commission* [1991] ECR I-2917, paragraph 13).

58 It should be noted, first, that the Italian Republic's allegation that the first contested letter imposed a penalty on it by stating that the payment applications at issue would not be dealt with until the information concerning advance payments had been received is essentially a criticism of the state of inaction prolonged by the Commission. As it admitted at the hearing, the Italian Republic considers that the Commission should have been required in those circumstances to make the payments corresponding to the payment applications at issue within the two-month time-limit laid down in the fourth subparagraph of Article 32(1) of the general regulation.

59 It should be pointed out in that regard that when the Commission receives a payment application which is acceptable within the meaning of Article 32(3) of the general regulation, it is not entitled to prolong a state of inaction. Subject to

available funding, the Commission is to make the related interim payments within no more than two months of receipt of that application, in accordance with the fourth subparagraph of Article 32(1) of the general regulation. Thus, if the Commission had failed to fulfil that obligation to act, as the Italian Republic claims, the latter should have contested that situation by bringing an action for failure to act (see, to that effect, Case 44/81 *Germany* v *Commission* [1982] ECR 1855, paragraph 6, and the judgment of 14 December 2006 in Joined Cases T-314/04 and T-414/04 *Germany* v *Commission,* not published in the ECR, paragraph 48). If that action for failure to act had been declared well founded, the Commission would have been required, pursuant to Article 233 EC, to take the necessary measures to comply with the judgment (see Joined Cases T-314/04 and T-414/04 *Germany* v *Commission*, paragraph 48).

60 That conclusion is not called into question by the fact that the Italian Republic was expressly informed, by the first contested letter, of the Commission's refusal to act. A refusal to act, however explicit it may be, can be brought before the Court under Article 232 EC since it does not put an end to the failure to act (Case 302/87 *Parliament* v *Council* [1988] ECR 5615, paragraph 17).

61 In any event, as the Commission confirmed at the hearing — without being contradicted by the Italian Republic — the state of inaction disclosed by the first contested letter was only temporary and did not continue after the reasons justifying it had disappeared, inasmuch as the Commission finally adopted a decision on the payment applications at issue. That final decision was communicated to the Italian Republic by letter No 8799 of 24 August 2005, against which the Italian Republic brought an action (Case T-402/05).

62 Consequently, it must be held that the first contested letter, in so far as it disclosed to the Italian Republic the Commission's refusal to act in regard to the payment applications at issue, produced no legal effects which can be contested in the context of an action for annulment under Article 230 EC.

63 With regard, secondly, to the statement that the Italian Republic had to send the Commission information concerning the advance payments, it should be pointed out that the first contested letter is thereby referring back to an obligation to provide statements which arises, in the case of that Member State, from the combined application of the general rule at issue and the decision contained in the letter of 14 May 2003 (see paragraph 25 above), the effect of which is that the only unsupported advance payments eligible for co-financing by the Funds are those which relate either to aid in respect of which a final decision granting that aid was adopted no later than 19 February 2003 or to aid granted in the context of a tendering procedure which was concluded by that date at the latest. The first contested letter expressly refers to letter No 2772 of 21 March 2005 (see paragraph 31 above), which in turn refers to the letter of 29 July 2003, rectifying the letter of 14 May 2003 (see paragraph 27 above).

64 It is thus clear from the very content of the first contested letter that it was intended to remind the Italian Republic, when the payment applications at issue were being considered, that it had an obligation to provide statements under the rules governing the eligibility of expenditure and, in particular, the general rule at issue.

65 In order to ascertain whether that letter actually does no more than remind the Italian Republic of obligations that flow from Community rules, without changing the scope of those rules, or whether, on the other hand, that letter is capable of producing legal effects, certain questions going to the substance of the present case must be decided (see, to that effect, Case C-57/95 *France* v *Commission* [1997] ECR I-1627, paragraphs 9 and 10, and the judgment in Joined Cases C-138/03, C-324/03 and C-431/03, cited in paragraph 36 above, paragraphs 33 to 35).

Substance

66 The Italian Republic relies on nine pleas in law in support of its application for annulment of the first, second, third, fourth and fifth contested letters (collectively,

'the contested letters'). The first plea alleges lack of a legal basis and infringement of the provisions governing financial control. The second plea alleges a complete failure to state reasons. The third plea alleges failure to follow the procedures for the adoption of Commission decisions and infringement of the Commission's Rules of Procedure. The fourth plea alleges infringement of Article 32 of the general regulation and of points 1 and 2 of Rule No 1 of the Annex to Regulation No 448/2004. The fifth plea alleges infringement of the provisions concerning the eligibility of expenditure. The sixth plea alleges infringement of the principle of proportionality and misuse of powers. The seventh plea alleges infringement of Regulation No 448/2004, the principles of equal treatment and legal certainty, and the contradictory nature of the contested letters. The eighth plea alleges infringement of Article 9 of Regulation No 438/2001. Finally, the ninth plea alleges infringement of the principle of simplified procedures.

67 Since the Commission has contested the admissibility of the third plea in law, it should be considered first.

68 It should also be borne in mind that the solution to the admissibility issue raised in paragraph 65 above depends on the answers given to questions of substance concerning (i) the interpretation of the Community rules concerning the eligibility of expenditure and (ii) the inevitable consequences flowing from those rules at the stage of the declaration and certification of expenditure. Since those questions of substance have been raised by the fourth and fifth pleas in law, on the one hand, and by the eighth and ninth pleas in law, on the other, those pleas should be considered immediately after the third plea.

The third plea in law, alleging failure to follow the procedures for the adoption of Commission decisions and infringement of the Commission's Rules of Procedure

Arguments of the parties

69 The Italian Republic claims essentially that, by sending it the contested letters, the Commission was notifying it of decisions which had clearly not been adopted in accordance with the procedure laid down in its Rules of Procedure.

70 The Commission contends that the third plea should be rejected as inadmissible, pursuant to Article 44(1)(c) of the Rules of Procedure of the Court of First Instance. The arguments advanced in support of that plea are lacking in clarity and precision as regards identification of the rules allegedly infringed.

Findings of the Court

71 Article 44(1)(c) of the Rules of Procedure of the Court of First Instance provides that an application is to state a summary of the pleas in law on which the application is based. That means that the application must specify the grounds on which the action is based, and that a mere abstract statement of the grounds is not sufficient (Case T-16/91 *Rendo and Others* v *Commission* [1992] ECR II-2417, paragraph 130, and Case T-251/97 *T. Port* v *Commission* [2000] ECR II-1775, paragraph 90).

72 Moreover, the summary of the pleas in law — albeit concise — on which the application is based must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the application, if necessary, without any further information. In order to ensure legal certainty and the sound administration of justice, it is necessary — if an action or, more specifically, a plea in law is to be admissible — that the basic legal and factual particulars relied on be indicated coherently and intelligibly in the application itself (see, with regard to the admissibility of an action, Case T-348/94 *Enso Española* v *Commission* [1998] ECR II-1875, paragraph 143, and *T. Port* v *Commission*, cited in paragraph 71 above, paragraph 91).

73 In the present case, the arguments put forward in support of the third plea in law lack clarity and precision as regards identification of the provisions of the Commission's Rules of Procedure which are alleged to have been infringed when the contested letters were adopted, notwithstanding the fact that the Commission's Rules of Procedure are published, in all the languages of the European Union, in the *Official Journal of the European Communities* (OJ 2000 L 308, p. 26).

74 The Commission is thus justified in arguing that the way in which the present plea is set out in the application is not sufficiently clear and precise to enable it to prepare its defence. Nor does it enable the Court to determine whether the plea is well founded.

75 Consequently, the third plea in law must be rejected as inadmissible.

The fourth plea in law, alleging infringement of Article 32 of the general regulation and of points 1 and 2 of Rule No 1 of the Annex to Regulation No 448/2004, and the fifth plea in law, alleging infringement of the provisions concerning the eligibility of expenditure

Arguments of the parties

76 The Italian Republic claims that the contested letters infringe Article 32 of the general regulation and Rule No 1 of the Annex to Regulation No 448/2004 inasmuch as they are based on the general rule at issue. In the event that Regulation No 448/2004 could provide a basis for the general rule at issue, the Italian Republic raises a plea of illegality in respect of that regulation, on the ground that it infringes Article 32 of the general regulation.

77 The Italian Republic argues that the approach adopted by the Court of Justice in the judgment in Joined Cases C-138/03, C-324/03 and C-431/03, cited in paragraph 36 above, cannot be transposed to the present case. First, point 2 of Rule No 1 of the Annex to Regulation No 1685/2000, on which that approach is based, was substantially amended by Regulation No 448/2004. Secondly, the present dispute is concerned solely with Article 30 of the general regulation and the provisions of the Annex to Regulation No 448/2004, which govern the eligibility of expenditure incurred by final beneficiaries, whereas the judgment of the Court of Justice interpreted a different provision — Article 32 of the general regulation — which governs the payment by the Commission of contributions from the Structural Funds.

78 The Italian Republic also denies that Article 32 of the general regulation and Rule No 1 of the Annex to Regulation No 448/2004 can be interpreted along the lines of the general rule at issue.

79 First of all, neither the provisions of the general regulation nor those of Regulation No 448/2004 permit account to be taken of the activities of final recipients for the

purposes of assessing the eligibility of advance payments. On the contrary, the new provisions laid down in Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing the general regulation (OJ 2006 L 210, p. 25) confirm that the provisions of the general regulation did not permit account to be taken of the activities of final recipients. That only became possible when the concept of 'beneficiary' was amended by Regulation No 1083/2006.

80 Secondly, point 2.1 of Rule No 1 of the Annex to Regulation No 448/2004 confirms by implication the eligibility for a contribution from the Structural Funds of unsupported advance payments, in that it requires final beneficiaries to produce documentary evidence only of payments made by way of 'interim payments and payments of the final balance'.

81 Thirdly, the principle of the necessity of State aid — according to which aid may be declared compatible with Community law only if it benefits undertakings which do not have sufficient financial resources of their own to carry out the proposed investment — precludes making the eligibility of advance payments conditional upon submission of documents proving that the aid has been used by the final recipients. By virtue of that principle, advance payments must always precede the investment to be carried out by the undertakings. Just as it justifies the treatment of payments into venture capital, loan and guarantee funds as eligible expenditure, as provided for in point 1.3 of Rule No 1 of the Annex to Regulation No 448/2004, the principle of the necessity of State aid implies recognition of the eligibility of unsupported advance payments.

82 Finally, the provisions of the Annex to Regulation No 448/2004 concerning depreciation, contributions in kind and overheads show that the special nature of certain expenditure may justify its eligibility not being made conditional upon the submission of documents proving its use.

83 The Commission contests all the arguments put forward by the Italian Republic. It contends that in so far as the contested letters refer to the general rule at issue or are an application of that rule, they are consistent with the letter and the spirit of Article 32 of the general regulation and of Rule No 1 of the Annex to Regulation No 448/2004. Consequently, it asks that the fourth and fifth pleas in law be rejected. As regards the plea of illegality raised in respect of Regulation No 448/2004, alleging it to be unlawful in the light of Article 32 of the general regulation, the Commission contends that that plea is inadmissible since it was raised out of time and because, in any event, Regulation No 448/2004 complies with the general regulation.

Findings of the Court

84 By its fourth and fifth pleas in law, the Italian Republic argues essentially that the Commission misinterpreted Article 32 of the general regulation and Rule No 1 of the Annex to Regulation No 448/2004 by extrapolating the general rule at issue from those provisions.

85 It should be pointed out at the outset that, in the judgment in Joined Cases C-138/03, C-324/03 and C-431/03, cited in paragraph 36 above, the Court of Justice answered, on the basis of Article 32 of the general regulation and Rule No 1 of the Annex to Regulation No 1685/2000, the question whether — and, if so, under what conditions — advance payments are eligible for a contribution from the Funds.

86 In that context, the Court of Justice pointed out, first, that one of the objectives of the general regulation, set out in recital 43 in the preamble thereto, is to assure sound financial management by providing that expenditure is to be duly justified and certified (judgment in Joined Cases C-138/03, C-324/03 and C-431/03, cited in paragraph 36 above, paragraph 44). That objective explains why the system introduced by Article 32 of the general regulation and by Rule No 1 of the Annex to

Regulation No 1685/2000 is based on the principle of reimbursement of expenses (judgment in Joined Cases C-138/03, C-324/03 and C-431/03, cited in paragraph 36 above, paragraph 45). That implies that, as a rule, eligibility of expenditure paid out by national bodies is conditional upon proof being submitted to the Commission of its use for the project financed by the European Union. Such proof can be provided by means of receipted invoices or, where that is not possible, by accounting documents of equivalent probative value (judgment in Joined Cases C-138/03, C-324/03 and C-431/03, cited in paragraph 36 above, paragraph 46). Although it is true that where the Commission pays the national authorities — by way of a payment on account as provided for in Article 32(2) of the general regulation — an amount equal to 7% of the contribution from the Structural Funds to the assistance in question, those authorities are not required to submit, at that early stage, documents attesting to expenditure paid out (judgment in Joined Cases C-138/03, C-324/03 and C-431/03, cited in paragraph 36 above, paragraph 47), they must nevertheless submit such documents when an interim payment or payment of the final balance is made (judgment in Joined Cases C-138/03, C-324/03 and C-431/03, cited in paragraph 36 above, paragraph 49).

87 In conclusion, the Court decided that the rule that advance payments made by Member States in relation to an aid scheme, and declared by them as interim payments and payments of the final balance, are not eligible for a contribution from the Structural Funds unless documents are submitted proving their use by the final recipients is consistent with Article 32 of the general regulation and points 1 and 2 of Rule No 1 of the Annex to Regulation No 1685/2000 (judgment in Joined Cases C-138/03, C-324/03 and C-431/03, cited in paragraph 36 above, paragraph 50).

88 None of the circumstances invoked by the Italian Republic precludes the approach adopted by the Court of Justice in Joined Cases C-138/03, C-324/03 and C-431/03, cited in paragraph 36 above, from being transposed to the present case, so that the general rule at issue can be regarded as complying with Article 32 of the general regulation and points 1 and 2 of Rule No 1 of the Annex to Regulation No 448/2004.

89 The arguments based on the entry into force of Regulation No 448/2004 must be rejected. In the first place, Regulation No 448/2004 did not change either the meaning or the scope of Article 32 of the general regulation, in regard to which it merely laid down detailed implementing rules, as provided for in Article 53(2) of the general regulation. In the second place, the reference added by Regulation

No 448/2004 to point 2 of Rule No 1 of the Annex to Regulation No 1685/2000, concerning the need to provide documentary evidence of the payments effected by final beneficiaries 'as interim payments and payments of the final balance', appears, having regard to the legislative context in which that rule is placed, to be a mere explanation of the rule previously applicable, not an amendment of that rule. The Court held, on the basis of points 1 and 2 of Rule No 1 of the Annex to Regulation No 1685/2000, that the principle of reimbursement of expenses applied only to payments made by the Commission in the form of an interim payment or payment of the final balance, within the meaning of the third subparagraph of Article 32(1) of the general regulation (judgment in Joined Cases C-138/03, C-324/03 and C-431/03, cited in paragraph 36 above, paragraphs 48 and 49).

90 The Italian Republic is therefore wrong to argue that Regulation No 448/2004 changed the meaning of points 1 and 2 of Rule No 1 of the Annex to Regulation No 1685/2000. Moreover, it contradicted itself on several occasions in its own pleadings by arguing that the relevant provisions of Regulation No 1685/2000 were materially identical before and after the entry into force of Regulation No 448/2004. The fact that they are identical justifies, in the present case, the application by analogy of the judgment of the Court of Justice in Joined Cases C-138/03, C-324/03 and C-431/03, cited in paragraph 36 above.

91 It is also necessary to reject the argument that the difference between the rules considered by the Court of Justice in its judgment in Joined Cases C-138/03, C-324/03 and C-431/03, cited in paragraph 36 above, and those at issue in the present case makes it impossible to apply that judgment by analogy. It is clear from the Italian Republic's own pleadings, and in particular from the fourth and fifth pleas in law put forward in the application, that the present dispute raises the question whether advance payments are eligible under Article 32 of the general regulation and the detailed rules for its implementation laid down in Regulation No 448/2004, that is to say, a question similar to the one considered by the Court of Justice in its judgment in Joined Cases C-138/03, C-324/03 and C-431/03 (see paragraphs 85 and 87 above).

92 Thus, for the same reasons as those set out by the Court of Justice in its judgment, and which are referred to in paragraphs 86 and 87 above, it must be held that the

general rule at issue complies both with Article 32 of the general regulation and with points 1 and 2 of Rule No 1 of the Annex to Regulation No 448/2004. Consequently, without there being any need to rule on the objection of inadmissibility raised by the Commission, the plea of illegality raised by the Italian Republic in respect of Regulation No 448/2004 must be rejected.

93 Moreover, none of the arguments put forward by the Italian Republic gives ground for doubt as to whether the general rule at issue complies with the rules governing the eligibility of expenditure.

94 First of all, the argument that the applicable rules do not permit the activities of final recipients to be taken into account for the purposes of assessing the eligibility of advance payments must be rejected. That argument was rejected by the Court of Justice, having already been argued before it on the basis of Article 32 of the general regulation and Rule No 1 of the Annex to Regulation No 1685/2000 (judgment in Joined Cases C-138/03, C-324/03 and C-431/03, cited in paragraph 36 above, paragraphs 39, 40 and 44 to 50). Nor can that argument be accepted after the entry into force of Regulation No 448/2004, which did not change either the meaning or the scope of the relevant applicable rules (see paragraph 90 above).

95 It follows from point 2.1 of Rule No 1 of the Annex to Regulation No 448/2004, concerning proof of expenditure, that payments effected by final beneficiaries, declared as interim payments and payments of the final balance, must be accompanied by supporting documents. Having regard to its broad logic, that rule applies generally to payments made by final beneficiaries, both in the context of operations which they carry out themselves and in the context of the aid which they grant, in particular, in the context of aid schemes. However, with regard to the latter type of payment, point 2.3 of Rule No 1 of the Annex to Regulation No 448/2004 states that the supporting documents must correspond to expenditure actually paid out by the final recipients for implementing the operation.

96 As the Commission rightly pointed out, the production of documents proving that the advance payments have been used by the final recipients for implementing operations is also provided for in Article 7 of Regulation No 438/2001, which provides that the audit trail which the Member States are to provide in the context of their management and control systems must enable the summary amounts certified to the Commission to be reconciled with the individual expenditure records and supporting documents, including, in the case of State aid schemes or grants of aid, those held by final recipients.

97 In addition, it follows from the earlier findings in the present judgment that the argument *a contrario* that the Italian Republic claims to infer from the provisions of Regulation No 1083/2006, applicable to programmes for the 2007-13 period, must be rejected. Moreover, as the Commission rightly pointed out at the hearing, far from contradicting the general rule at issue, Article 78(2) of Regulation No 1083/2006 confirms that recognition of the eligibility of advance payments required the intervention of the Community legislature. In particular, that was necessary in order to define, consistently with the principles of sound management, the conditions for such recognition, bearing in mind that no agreement was reached on that point in regard to the programmes for the 2000-06 period (see paragraph 24 above).

98 The textual argument based on point 2.1 of Rule No 1 of the Annex to Regulation No 448/2004 is also without foundation. It should be pointed out that that provision governs proof of expenditure declared to the Commission in order to obtain from it 'interim payments and payments of the final balance' within the meaning of the third subparagraph of Article 32(1) of the general regulation. In that context, the reference to 'interim payments and payments of the final balance' is explained by the fact that where, by way of payment on account, the Commission pays an amount equal to 7% of the contribution from the Funds to the assistance in question, as provided for in the first subparagraph of Article 32(2) of the general regulation, the national authorities are not required to submit, at that early stage, documents attesting to expenditure paid out (judgment in Joined Cases C-138/03, C-324/03 and C-431/03, cited in paragraph 36 above, paragraph 47). Consequently, the terms

'interim payments and payments of the final balance' in point 2.1 of Rule No 1 of the Annex to Regulation No 448/2004 cannot be interpreted as meaning that advance payments are not covered by the principle of reimbursement of expenses.

99 The arguments based on the 'principle of necessity' of State aid must also be rejected as irrelevant. The Italian Republic has not explained how the alleged 'principle of necessity' — even if it exists — requires the principle of reimbursement of expenses, applicable to applications for interim payments and payments of the final balance by virtue of Article 32 of the general regulation, to be set aside. The fact that, in the context of aid schemes, the Member States make advance payments to undertakings which do not have sufficient resources of their own does not mean that the Commission must reimburse those advance payments, made by way of interim payments and payments of the final balance, even where they do not correspond to expenditure actually paid out within the meaning of Article 32 of the general regulation.

100 No argument to that effect may be inferred from point 1.3 of Rule No 1 of the Annex to Regulation No 448/2004, because that provision expressly states that payments into venture capital, loan and guarantee funds (including venture capital holding funds) which meet the requirements of that regulation are to be treated as expenditure actually paid out within the meaning of the third subparagraph of Article 32(1) of the general regulation. The eligibility of advance payments for a contribution from the Funds cannot be inferred from specific implementing legislation which governs only payments by the Member States into venture capital, loan and guarantee funds.

101 Finally, the arguments based on the provisions of the Annex to Regulation No 448/2004 concerning depreciation, contributions in kind and overheads cannot be accepted. Even supposing that the eligibility of that expenditure was not conditional upon submission of supporting documents, such a circumstance is irrelevant for the purposes of assessing the eligibility of advance payments. In any event, it is clear from points 2.1 and 2.3 of Rule No 1 of the Annex to Regulation No 448/2004 that depreciation, contributions in kind and overheads must be supported by accounting documents of probative value.

102 It follows from the foregoing that the first contested letter, in so far as it refers to the general rule at issue, did not change the scope of the Community rules and, to that extent, cannot constitute an actionable measure for the purposes of Article 230 EC.

103 It also follows that the second, third, fourth and fifth contested letters, in so far as they rely on the general rule at issue as a basis for refusing to charge to the Funds the amounts corresponding to the advance payments at issue, are in conformity with Article 32 of the general regulation and with points 1 and 2 of Rule No 1 of the Annex to Regulation No 448/2004.

104 The fourth and fifth pleas in law must therefore be rejected as unfounded with regard to the second, third, fourth and fifth contested letters.

The eighth plea in law, alleging infringement of Article 9 of Regulation No 438/2001, and the ninth plea in law, alleging infringement of the principle of simplified procedures

Arguments of the parties

105 The Italian Republic claims that the contested letters infringe the rules concerning the certification of expenditure, laid down in Article 9 of Regulation No 438/2001, inasmuch as they require or presuppose that the competent national authorities specify in respect of each measure in their statements of expenditure the amount of the advance payments at issue which have been paid or which are to be paid. The detailed rules for certification of expenditure are entirely governed by that article, which provides that the certificates of statements of interim and final expenditure referred to in Article 32(3) and (4) of the general regulation are to be drawn up in

accordance with the model certificate in Annex II to Regulation No 438/2001. Above a certain amount, expenditure merely needs to be declared in that certificate by identifying, in respect of each measure, the source of financing involved ('Public, Community', 'Public, Other public' and 'Private') and the year in which the expenditure was paid out. Thus, by requiring the competent national authorities to complete their declarations by providing information concerning the amount of the advance payments made, the Commission imposed on them declaration obligations not provided for under the rules in force.

106 In addition, the Italian Republic argues that by imposing rules for the certification of expenditure which are more stringent and more restrictive than those laid down in Article 9 of Regulation No 438/2001, the Commission infringed the principle of simplification of the management of the Structural Funds. It is possible to deduce the existence of such a principle from recital 42 in the preamble to the general regulation, the Commission's oral statements and the proposals that it submitted to the Committee.

107 The Commission contends that the plea alleging infringement of Article 9 of Regulation No 438/2001 should be rejected as unfounded. The information concerning the advance payments at issue was essential for the purposes of determining the amount to be charged to the Community budget. Consequently, for the national authorities, communication of that information marked the fulfilment of their obligation under Article 9 of Regulation No 438/2001 to certify expenditure.

108 The Commission also disputes the plea alleging infringement of the principle of simplification. The objective of simplifying the management of the Funds cannot justify compromising in the present case the rules concerning the declaration and certification of expenditure flowing from the principles of sound financial management.

Findings of the Court

109 The Commission is responsible for the implementation of the general budget of the European Union by virtue of Article 274 EC. Since Article 274 EC draws no distinction according to the form of management employed, the Commission continues to exercise that general responsibility in the context of the shared management of the Structural Funds. In addition, it follows from Articles 10 EC and 274 EC that, in the context of the shared management of the Structural Funds, the Member States must cooperate with the Commission in order to ensure that Community funds are used in accordance with the principles of sound financial management. Reference is made to those rules in Article 38(1)(g) of the general regulation, dealing with financial control of assistance.

110 In the context of that financial control, the Member State is to take responsibility in the first instance by certifying to the Commission, in particular, that expenditure declared as interim payments and payments of the final balance corresponds to expenditure actually paid out within the meaning of the third subparagraph of Article 32(1) of the general regulation and points 1 and 2 of Rule No 1 of the Annex to Regulation No 448/2004. The Commission is to adopt a decision on such payment applications by determining, in the context of its general responsibility for the implementation of the budget, the amount of the expenditure declared and certified by the Member State which is to be charged to the Community budget.

111 Where the Member States' management and control systems are reliable and provide a 'sufficient audit trail' within the meaning of Article 7(2) of Regulation No 438/2001, the certification of expenditure provides, in principle, sufficient assurance to the Commission that the applications for a contribution from the Community are correct, regular and eligible, as provided in Article 2(1) of Regulation No 438/2001.

112 However, where — as in the present case — the Commission and a Member State adopt different interpretations of a measure determining the conditions of eligibility of certain expenditure, the reliability of the national management and control system no longer assures the Commission that all the expenditure declared by the Member State is eligible expenditure within the meaning of the applicable rules. It is therefore for the Member State concerned, in the exercise of its responsibilities regarding the certification of expenditure and in sincere cooperation with the Community institutions, to place the Commission in a position to implement the budget on its own responsibility by providing it with all the information which the Commission considers necessary to effect payments which are in conformity with the third subparagraph of Article 32(1) of the general regulation. Any other approach would frustrate the useful effect of Article 38(1) of the general regulation and, more generally, of Articles 10 EC and 274 EC.

113 Both the general rule at issue — which, it has been decided, is in conformity with the third subparagraph of Article 32(1) of the general regulation and with points 1 and 2 of Rule No 1 of the Annex to Regulation No 448/2004 — and the special rule concerning the eligibility of unsupported advance payments made before 19 February 2003, which results from a decision of the Commission which was not contested in Cases C-324/03 and C-431/03, may be relied upon against the Italian Republic in so far as it had been previously informed of them (see paragraphs 25 and 27 above). However, as can be seen from paragraph 112 above, the combined application of those two rules inevitably requires the Italian Republic to communicate with its payment applications and statements of expenditure the information in its possession which has been requested by the Commission so as to permit the latter to determine the amount of the advance payments at issue which have been paid or which are to be paid. The Commission thus rightly contends that the declaration obligation at issue in this case is merely an implementing rule and the inevitable practical consequence of the Italian Republic's obligation under Article 9 of Regulation No 438/2001 to certify expenditure.

114 Accordingly, by asking the Italian authorities to complete the statements of expenditure at issue by indicating, in respect of each measure, the amount of the advance payments at issue which had been paid or which were to be paid, the first contested letter was merely drawing their attention to a declaration obligation which

was inevitably incumbent upon them under the Community rules, without changing the scope of those rules. In the light of the foregoing considerations, and those set out in paragraph 102 above, it must be concluded that the first contested letter did not produce the legal effects contested by the Italian Republic and cannot in that regard constitute an actionable measure within the meaning of the case-law referred to in paragraph 56 above. In so far as the present action has been brought against the first contested letter, therefore, it must be dismissed as inadmissible. Consequently, it is necessary to consider the action further only in so far as it has been brought against the second, third, fourth and fifth contested letters.

115 There is no basis for the Italian Republic's argument that the second, third, fourth and fifth contested letters infringe Article 9 of Regulation No 438/2001 or a general principle of simplification, as they presupposed that the competent national authorities would comply with the declaration formality at issue.

116 It has already been found in paragraph 113 above that that formality was an implementing rule and the inevitable practical consequence of the Italian Republic's obligation under Article 9 of Regulation No 438/2001 to certify expenditure.

117 In addition, the legality of the declaration formality at issue cannot be called into question on the basis of the principle of simplification, as alleged by the Italian Republic. Although it is true that the general regulation addresses concerns relating to the simplification of procedures for making commitments and payments and although the Commission has tried to eliminate useless administrative complications, the fact remains that the Structural Funds scheme does not contain a principle according to which procedures for making commitments and payments must be simplified regardless of the consequences for the proper operation and the sound financial management of the Funds. As has already been pointed out in paragraphs 112 and 113 above, the intention of simplifying procedures expressed in the general regulation cannot call into question a declaration formality which flows from the

implementation of the Structural Funds system, in accordance with the principles of sound financial management referred to in Article 274 EC.

118 The eighth and ninth pleas in law relied on in support of the application for annulment of the second, third, fourth and fifth contested letters cannot therefore be upheld.

The first plea in law, alleging lack of a legal basis and infringement of the provisions governing financial control

Arguments of the parties

119 The Italian Republic complains that the contested letters do not specify the provision of law which made their adoption possible, as is required by the principle of legal certainty (Case C-325/91 *France* v *Commission* [1993] ECR I-3283, paragraph 26). A mere implied reference to the letter of 29 July 2003 cannot constitute a lawful and adequate legal basis inasmuch as the general rule at issue, contained in that letter, is contrary to the provisions of the general regulation and Regulation No 448/2004.

120 The Italian Republic also complains that, by adopting the contested letters, the Commission usurped powers accruing exclusively to the Member States by virtue of Articles 38 and 39 of the general regulation and the detailed rules for the implementation thereof contained in Regulation No 438/2001. It follows from those provisions and from the communication from the Commission to the European Parliament and the Council of 6 September 2004 concerning the respective responsibilities of the Member States and the Commission in the shared management of the Structural Funds and the Cohesion Fund (COM(2004) 580

final) that the Member States are primarily responsible for the financial control of assistance paid out of the Funds and that they must ascertain and certify to the Commission that the expenditure which they declare as interim payments and payments of the final balance is eligible. The Commission is empowered only to verify the 'management and control systems' put in place by the Member States.

121 The Commission contends that the first claim, alleging lack of a legal basis, should be rejected. The contested letters are part of a regulatory framework which is clearly defined and with which the Italian Republic has long been familiar. They refer to the letter of 29 July 2003, which itself refers to the interpretative memorandum, and, by virtue of that reference, could legitimately take as their legal basis the general rule at issue mentioned in those letters.

122 With regard to the second claim, alleging infringement of the provisions governing financial control, the Commission maintains that the Italian Republic's argument should be rejected as unfounded. Responsibility for financial control of assistance paid out of the Funds, which is primarily a matter for the Member States, is irrelevant as regards the eligibility of advance payments. The Commission reaffirms that the general rule at issue complies with the principle of reimbursement of expenses, which underlies the rules applicable in this matter.

Findings of the Court

123 With regard to the first claim, alleging lack of a legal basis, it should be borne in mind that, in accordance with established case-law, Community legislation must be clear and its application foreseeable for all interested parties. The principle of legal

certainty forms part of the general principles of Community law, the observance of which it is the Court's task to ensure. It requires that the binding nature of any act intended to produce legal effects must be derived from a provision of Community law which prescribes the legal form to be taken by that act and which must be expressly indicated therein as its legal basis (*France* v *Commission*, cited in paragraph 119 above, paragraphs 26 and 30).

124 However, it is also clear from the case-law that failure to specify the precise legal basis for a legislative act need not necessarily constitute a material defect where it is possible to determine the legal basis for that act on the basis of other elements thereof. None the less, explicit reference is indispensable where, in its absence, the parties concerned and the competent Community Court would remain uncertain as to the precise legal basis (Case 45/86 *Commission* v *Council* [1987] ECR 1493, paragraph 9, and Case T-70/99 *Alpharma* v *Council* [2002] ECR II-3495, paragraph 112).

125 The second, third, fourth and fifth contested letters contain decisions of the Commission to pay an amount different from that applied for by the Italian Republic. Those decisions are expressly based on a refusal by the Commission to charge to the budget the expenditure declared by the Italian Republic in relation to the advance payments at issue. They do not make express reference to the provision of Community law from which they derive their binding authority and which prescribes the legal form which they must take.

126 It must therefore be determined whether other elements of the second, third, fourth and fifth contested letters resolve the uncertainty engendered by the absence from those documents of the legal basis for the decisions adopted by the Commission.

127 It is clear from the statement of facts (see paragraphs 20 to 35 above) that the contested letters are part of a lengthy exchange of correspondence between the Commission and the Italian Republic on the question of the eligibility of advance payments. In the interpretative memorandum, the Commission informed the Italian Republic of the general rule at issue, according to which advance payments not accompanied by documents proving their use by the final recipients would not be eligible for a contribution from the Funds under the third subparagraph of Article 32(1) of the general regulation. In its letters of 14 May and 29 July 2003, the Commission referred once again to the general rule at issue. It also informed the Italian Republic of its decision, in accordance with the principle of the protection of legitimate expectations, to treat as eligible the advance payments made up until 19 February 2003.

128 Read in that context, the contents of the second, third, fourth and fifth contested letters enable the Italian Republic and the Court to understand that they are applying, in each case, the general rule at issue and that the decisions which they contain are therefore based on the interpretation of the third subparagraph of Article 32(1) of the general regulation set out by the Commission in the interpretative memorandum and the letters of 14 May 2003, 29 July 2003 and 25 March 2004.

129 Moreover, the lawfulness of that legal basis cannot be called into question by the Italian Republic in the light of the general rule and Regulation No 448/2004 because, as has been pointed out in paragraph 92 above, the general rule at issue is in conformity both with Article 32 of the general regulation and with the detailed rules for the implementation thereof contained in points 1 and 2 of Rule No 1 of the Annex to Regulation No 448/2004.

130 The first claim, alleging lack of a legal basis, cannot therefore be upheld.

131 With regard to the second claim, alleging infringement of the provisions governing financial control, it should be pointed out that under that heading, the Italian Republic is arguing, essentially, that the Commission did not have the power to refuse reimbursement, by way of a contribution from the Funds, of the advance payments at issue declared by the Italian authorities.

132 However, inasmuch as it is established that the refusal to reimburse is based on the Commission's obligation under the third subparagraph of Article 32(1) of the general regulation and the detailed rules for the implementation thereof to make only interim or final payments which correspond to expenditure actually paid within the meaning of that article, the Italian Republic's argument must be rejected. The certification of expenditure by the Italian Republic does not preclude the possibility that the Commission, in the context of its general responsibility for the implementation of the budget, might refuse Community co-financing for expenditure declared and certified which, according to its interpretation of the applicable rules, does not constitute eligible expenditure.

133 In the present case, the Commission therefore acted in the exercise of its powers of allocation in relation to the implementation of the Community budget, without encroaching on the powers reserved to the Member States as regards the financial control of assistance, such as those flowing from Articles 38 and 39 of the general regulation and the detailed rules for the implementation thereof in Regulation No 438/2001.

134 The second claim must therefore also be rejected. Consequently, the first plea in law must be dismissed in its entirety.

The second plea in law, alleging a complete failure to state reasons

Arguments of the parties

135 The Italian Republic argues that the contested letters infringe the obligation laid down in Article 253 EC to state the reasons on which a Community measure is based, as interpreted by Community case-law, in so far as there is nothing in those letters to justify the decisions contained therein. In the present case, it was for the Commission to provide explicit reasoning in the contested letters since the change in the regulatory framework had occurred shortly before their adoption as a result of the entry into force of Regulation No 448/2004 and since the scope of the decisions contained in those letters goes appreciably further than earlier decisions (Case 73/74 *Fabricants de papiers peints* v *Commission* [1975] ECR 1491, paragraph 31).

136 The Commission contends that the second plea in law should be rejected on the ground that the contested letters contain a sufficient statement of the reasons on which they are based, having regard to the context of the case and to the rules governing the eligibility of expenditure for a contribution from the Structural Funds, which were known to the Italian Republic by virtue of its having been informed of them in the interpretative memorandum and the letter of 29 July 2003.

Findings of the Court

137 It is settled case-law that the statement of reasons required under Article 253 EC must be appropriate to the act at issue and must disclose in a clear and unequivocal

fashion the reasoning followed by the institution which adopted the measure in question, in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community Court to exercise its power of review (Case C-445/00 *Austria* v *Council* [2003] ECR I-8549, paragraph 49; Case C-304/01 *Spain* v *Commission* [2004] ECR I-7655, paragraph 50; and the judgment in Joined Cases C-138/03, C-324/03 and C-431/03, cited in paragraph 36 above, paragraph 54).

138 That obligation to state reasons must be appraised by reference to specific circumstances, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressee of the measure may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (Case C-17/99 *France* v *Commission* [2001] ECR I-2481, paragraph 36; Case C-310/99 *Italy* v *Commission* [2002] ECR I-2289, paragraph 48; and the judgment in Joined Cases C-138/03, C-324/03 and C-431/03, cited in paragraph 36 above, paragraph 55).

139 As can be seen from paragraphs 127 and 128, above, the second, third, fourth and fifth contested letters implicitly applied the general rule at issue, set out in the interpretative memorandum and in the letters of 14 May 2003, 29 July 2003 and 25 March 2004. The exchange of letters between the Commission and the Italian Republic thus enabled the latter to understand that the refusal of reimbursement was based impliedly, but in a clear and unequivocal fashion, on the fact that the advance payments at issue declared by the Italian Republic could not be regarded as expenditure actually paid out within the meaning of the third subparagraph of Article 32(1) of the general regulation and were not therefore eligible for a contribution from the Funds.

140 Moreover, it can be seen from the Italian Republic's arguments in the present case that it understood the reasoning underlying the decisions to refuse reimbursement contained in the second, third, fourth and fifth contested letters. Its application for the annulment of those decisions is based principally on its challenge of the general rule at issue, which forms the basis for the decisions in question.

141 Under those circumstances, the second plea in law, alleging a complete failure to state reasons, must be rejected.

The sixth plea in law, alleging infringement of the principle of proportionality and a misuse of powers, and the seventh plea in law, alleging infringement of Regulation No 448/2004, the principles of equal treatment and legal certainty, and the contradictory nature of the contested letters

Arguments of the parties

142 By its sixth plea in law, the Italian Republic claims that the contested letters infringe the principle of proportionality inasmuch as they apply a general and abstract principle of the ineligibility of advance payments which is disproportionate to the objective to be attained. That principle is based, first of all, on the unsubstantiated premiss that, in the case of advance payments, there is no sufficient guarantee that the amounts made available to the final recipients will actually be used for the purposes for which the aid was granted. Secondly, it was applied without consideration being given to whether other appropriate, less restrictive, measures existed and, in particular, without account being taken of the guarantees flowing from national rules. Italian law provides guarantees for the implementation by the final recipients of advance payments of assistance co-financed by the Funds. Finally, the principle applied by the Commission precludes the possibility of any analysis by its officials at the stage when the payment applications submitted by the national authorities are being considered.

143 The Italian Republic adds that the general and abstract principle of the ineligibility of advance payments is evidence of a misuse of powers inasmuch as it amounts merely to a means of putting pressure directly on the competent national authorities.

144 By its seventh plea in law, the Italian Republic claims that the contested letters infringe the general principle of equal treatment, as defined in Community case-law, and the provisions of Regulation No 448/2004, and are vitiated by a flagrant contradiction in that they introduce, without legal justification, a double set of rules in regard to State aid schemes co-financed by the Structural Funds. Although aid which is generally granted in the form of advance payments is, in principle, not eligible, the situation is different as regards investment aid for small and medium-sized enterprises (SMEs), granted in the form of payments into venture capital, loan and guarantee funds (including venture capital holding funds) under point 1.3 of Rule No 1 of the Annex to Regulation No 448/2004 and point 2.9 of Rule No 8 thereof. The alleged specificity of that sort of financing cannot justify such a difference in treatment, regard being had to the principle of the necessity of State aid, already referred to in paragraph 81 above.

145 The Italian Republic also claims that the contested letters infringe the principle of legal certainty. They introduce uncertainty as to the applicable rules, by allowing it to be supposed that, even in the special case of aid granted in the form of payments into venture capital, loan and guarantee funds, the production of documents other than those indicated in Regulation No 448/2004 could be required for the purposes of assessing their eligibility.

146 The Commission denies that the contested letters infringe the principle of proportionality. The general regulation and the detailed rules for its implementation do not prevent final beneficiaries from making advance payments to final recipients. Such advance payments may even be co-financed by the Funds without any requirement as to proof of their use, up to an amount of 7% of the contribution from

the Structural Funds to the assistance in question, the amount being paid by the Commission under Article 32(2) of the general regulation when the first commitment is made.

147 Moreover, the Commission points out that the claims put forward in the context of the seventh plea in law are without foundation and should therefore be dismissed. The rules on eligibility as regards payments into venture capital, loan and guarantee funds were laid down because of the specific characteristics of that type of financing.

Findings of the Court

— Infringement of Regulation No 448/2004

148 As has already been noted in paragraph 103 above, the second, third, fourth and fifth contested letters are in conformity with points 1 and 2 of Rule No 1 of the Annex to Regulation No 448/2004 in so far as they refuse to charge to the Community budget the amounts corresponding to the advance payments at issue. The claim alleging infringement of Regulation No 448/2004 must therefore be rejected at the outset.

— Infringement of the principles of proportionality, equal treatment and legal certainty

149 The claims alleging infringement of the principles of proportionality, equal treatment and legal certainty refer essentially to the application made of the general

rule at issue in the second, third, fourth and fifth contested letters. It was on the basis of that rule that the Commission refused to charge to the Community budget the amounts corresponding to the advance payments at issue declared by the Italian authorities.

150 It should be pointed out that the third subparagraph of Article 32(1) of the general regulation and the detailed rules for its implementation confer no discretion on the Commission in regard to determining the conditions of eligibility of advance payments. By deciding, in the second, third, fourth and fifth contested letters, that the advance payments at issue, declared as interim payments by the Italian Republic, were not eligible, the Commission could not therefore be in breach of the principle of proportionality, the principle of equal treatment or the principle of legal certainty.

151 Even if it were to be considered that, in support of its action against individual decisions adopted on the basis of the third subparagraph of Article 32(1) and the detailed rules for its implementation, the Italian Republic is arguing that those measures are unlawful and even if the admissibility of those objections of illegality under Article 241 EC was accepted, such objections could not be upheld on the merits.

152 The general rule at issue is merely a specific application — in the case of aid schemes or aid granted by national bodies — of the principle of reimbursement of expenses incurred by way of interim payments and payments of the final balance, on which Article 32 of the general regulation and the detailed rules for its implementation are based, in order to ensure that Community funds are used in accordance with the principles of sound financial management referred to in Article 274 EC (see paragraph 86 above). The alleged infringement of the principles of proportionality, equal treatment and legal certainty entailed thereby must now be considered.

153 With regard to the alleged infringement of the principle of proportionality, it should be noted that that principle, which is one of the general principles of Community law, requires that measures adopted by Community institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately 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 (Case C-157/96 *National Farmers' Union and Others* [1998] ECR I-2211, paragraph 60; Joined Cases C-27/00 and C-122/00 *Omega Air and Others* [2002] ECR I-2569, paragraph 62; Case T-211/02 *Tideland Signal* v *Commission* [2002] ECR II-3781, paragraph 39; and Case T-2/03 *Verein für Konsumenteninformation* v *Commission* [2005] ECR II-1121, paragraph 99).

154 For the purposes of judicial review of compliance with the abovementioned conditions, it should be borne in mind that, for the purposes of defining the general rules applicable to the Structural Funds, the Community legislature has a wide discretionary power, consonant with its political responsibilities under Article 161 EC. Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue (see, to that effect, in relation to the common agricultural policy, *National Farmers' Union and Others*, cited in paragraph 153 above, paragraph 61 and the case-law cited therein).

155 In the system put in place by Article 32 of the general regulation, the principle of reimbursement of expenses incurred by way of interim payments and payments of the final balance helps to ensure that Community funds are used in accordance with the principles of sound financial management referred to in Article 274 EC. It makes it possible to avoid the Community granting substantial financial contributions from the Funds of which it cannot obtain repayment, or has difficulty in obtaining it, where those contributions are not put to their intended use, by limiting the risk to the Community budget to an amount equal to 7% of the contribution from the Funds to the assistance in question (Opinion of Advocate General Kokott in Joined Cases C-138/03, C-324/03 and C-431/03, cited in paragraph 36 above, points 77 and 80).

156 That limitation of the risk to the Community budget posed by an irregular use of payments on account cannot be challenged in the present case on the basis of guarantees that might be available under the Italian rules. Since the guarantees required at national level are provided by the final recipient in favour of the national bodies which make the advance payments, it cannot be considered manifestly inappropriate that the latter, rather than the Community, should bear the risks associated with default on the part of the final recipients and assume responsibility as regards the difficulties relating to a possible claim for recovery of amounts unduly paid.

157 Accordingly, neither the principle of reimbursement of expenses incurred by way of interim payments and payments of the final balance, nor the general rule at issue which implements that principle, can therefore be considered a manifestly inappropriate measure. The principle of proportionality has thus not been infringed.

158 With regard to the alleged infringement of the principles of equal treatment and legal certainty, it should be pointed out that the general principle of equal treatment requires that comparable situations must not be treated differently unless such treatment is objectively justified (see, with regard to the civil service, Case T-184/00 *Drouvis* v *Commission* [2003] ECR-SC I-A-51 and II-297, paragraph 39; see also, with regard to competition, Joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission* [2001] ECR II-3757, paragraph 237, and Case T-48/02 *Brouwerij Haacht* v *Commission* [2005] ECR II-5259, paragraph 108), whereas the principle of legal certainty requires that legal rules be clear and precise, and aims to ensure that situations and legal relationships governed by Community law remain foreseeable (Case C-63/93 *Duff and Others* [1996] ECR I-569, paragraph 20, and Joined Cases T-141/99, T-142/99, T-150/99 and T-151/99 *Vela and Tecnagrind* v *Commission* [2002] ECR II-4547, paragraph 391). The principle of legal certainty implies that provisions of Community law must not be drafted in contradictory terms.

159 Point 1.3 of Rule No 1 of the Annex to Regulation No 448/2004 provides that State aid granted in the form of payments into venture capital, loan and guarantee funds is to be treated as expenditure actually paid out within the meaning of the third subparagraph of Article 32(1) of the general regulation, provided that the funds concerned meet the requirements of Rules Nos 8 and 9 of that annex. As the Commission rightly argued, that rule is a particular application of the principle of reimbursement of expenses incurred by way of interim payments and payments of the final balance, designed to take account of the specific nature of the financing of undertakings' capital investments. Such financing is granted to SMEs by independent legal entities acting as intermediaries. Contrary to the situation in regard to advance payments — which are paid directly to the final recipients by the national bodies — financing for capital investments is paid into funds whose purpose is to facilitate the access of the final recipients to the sources of the finance. It is because of that specific situation, which is not comparable to that of advance payments, that payments into venture capital, loan and guarantee funds can be treated as expenditure actually paid out within the meaning of the third subparagraph of Article 32(1) of the general regulation.

160 It follows from the foregoing that the provisions of the Annex to Regulation No 448/2004, by virtue of which only payments into venture capital, loan and guarantee funds can be treated as expenditure actually paid out within the meaning of the third subparagraph of Article 32(1) of the general regulation, do not infringe the principle of equal treatment.

161 Moreover, the principle of legal certainty cannot be regarded as infringed in the present case inasmuch as the principle of reimbursement of expenses incurred by way of interim payments and payments of the final balance constitutes a correct implementation of the applicable rules, as does the general rule at issue. It should be pointed out that the Italian Republic's attention was drawn to the existence of the general rule at issue, as well as to the eligibility conditions for advance payments laid down in the third subparagraph of Article 32(1) of the general regulation, by the interpretative memorandum and the letters of 14 May 2003, 29 July 2003 and 25 March 2004. In addition, it follows from the considerations set out in paragraph 159 above that the Italian Republic is not entitled to claim that it was left in a state of

uncertainty as to the rules in force by reason of the difference between the rules on eligibility contained in points 1.2 and 1.3 of Rule No 1 of the Annex to Regulation No 448/2004, and Rule No 8 thereof.

162 In view of all of the foregoing, it does not appear that the principle of reimbursement of expenses incurred by way of interim payments and payments of the final balance and the general rule at issue infringe — whether in themselves or in the specific application thereof which was made in the second, third, fourth and fifth contested letters — the principles of proportionality, equal treatment or legal certainty.

163 The claims alleging infringement of those principles must therefore be rejected.

— Misuse of powers

164 According to the case-law, a decision is vitiated by misuse of powers only if it appears, on the basis of objective, relevant and consistent factors, to have been taken with the sole, or at least the decisive, aim of achieving purposes other than those stated (Case T-46/89 *Pitrone* v *Commission* [1990] ECR II-577, paragraph 71, and Joined Cases T-92/00 and T-103/00 *Diputación Foral de Álava and Others* v *Commission* [2002] ECR II-1385, paragraph 84).

165 In the present case, the Italian Republic adduces no objective evidence supporting the conclusion that the Commission misused its powers. It follows that misuse of powers has not been established.

166 It follows that the sixth and seventh pleas in law must be rejected and the action must be dismissed in its entirety, partly as inadmissible and partly as unfounded.

Costs

167 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs against the Italian Republic and the latter has been unsuccessful, the Italian Republic must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. Dismisses the action;

2. Orders the Italian Republic to pay the costs.

Meij Forwood Pelikánová

Delivered in open court in Luxembourg on 12 December 2007.

E. Coulon A.W.H. Meij

Registrar Acting President

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