JUDGMENT OF THE COURT (Second Chamber)

25 March 2010 *

In Case C-414/08 P,

APPEAL under Article 56 of the Statute of the Court of Justice, lodged on 19 September 2008,

Sviluppo Italia Basilicata SpA, established in Potenza (Italy), represented by F. Sciaudone, R. Sciaudone and A. Neri, avvocati,

appellant,

the other party to the proceedings being:

European Commission, represented by L. Flynn, assisted by A. Dal Ferro, avvocato, with an address for service in Luxembourg,

defendant at first instance,

* Language of the case: Italian.

THE COURT (Second Chamber),

composed of J.-C. Bonichot, President of the Fourth Chamber, acting for the President of the Second Chamber, C. Toader (Rapporteur), C.W.A. Timmermans, P. Kūris and L. Bay Larsen, Judges,

Advocate General: V. Trstenjak,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 3 September 2009,

after hearing the Opinion of the Advocate General at the sitting on 29 October 2009,

gives the following

Judgment

1 By its appeal, Sviluppo Italia Basilicata SpA seeks to have set aside the judgment of the Court of First Instance of the European Communities (now 'the General Court') of 8 July 2008 in Case T-176/06 *Sviluppo Italia Basilicata* v *Commission* ('the judgment under appeal'), by which that court dismissed its application for, first, annulment of Commission Decision C(2006) 1706 of 20 April 2006 reducing the financial assistance from the European Regional Development Fund (ERDF) in favour of an

overall allocation for the purpose of implementing measures to support small and medium-sized enterprises operating in the Basilicata Region of Italy, granted under the Community support framework for Community structural assistance in the regions of Italy covered by Objective 1 ('the contested decision'), and, second, damages for the harm caused to it by that decision.

Legal context

The basic regulations

2 Article 1 of Council Regulation (EEC) No 2052/88 of 24 June 1988 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 185, p. 9), as amended by Council Regulation (EEC) No 2081/93 of 20 July 1993 (OJ 1993 L 193, p. 5) ('Regulation No 2052/88'), provides that, in order to support the achievement of the general objectives set out in Articles 158 EC and 160 EC, the Structural Funds are to contribute to the attainment of five priority objectives. The first of those objectives ('Objective 1') consists in 'promoting the development and structural adjustment of the regions whose development is lagging behind'. The Basilicata Region is one of the regions concerned by Objective 1, in accordance with Annex I to the regulation.

3 Article 5 of Regulation No 2052/88 lists the possible forms in which financial assistance may be provided under the Structural Funds. Among these, Article 5(2)(c) mentions the possibility of assistance in the form of 'global grants', as a general rule managed by an intermediary designated by the Member State in agreement with the European Commission and allocated by the intermediary in the form of individual grants to final beneficiaries.

4 The relevant rules of procedure governing financial assistance are set out in two regulations, namely Council Regulation (EEC) No 4253/88 of 19 December 1988, laying down provisions for implementing Regulation No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 374, p. 1), as amended by Council Regulation (EEC) No 2082/93 of 20 July 1993 (OJ 1993 L 193, p. 20) ('Regulation No 4253/88'), and Council Regulation (EEC) No 4254/88 of 19 December 1988, laying down provisions for implementing Regulation No 2052/88 as regards the European Regional Development Fund (OJ 1988 L 374, p. 15), as amended by Council Regulation (EEC) No 2083/93 of 20 July 1993 (OJ 1993 L 193, p. 34) ('Regulation 4254/88').

5 Article 6(2) of Regulation No 4254/88 provides that the procedures for the use of global grants are to be the subject of an agreement concluded, in agreement with the Member State concerned, between the Commission and the intermediary; the agreement must detail, in particular, the types of measure to be carried out, the criteria for choosing beneficiaries, the conditions and rates of ERDF assistance and the arrangements for monitoring use of the global grants.

6 Paragraphs 1 and 2 of Article 24 of Regulation No 4253/88, which is entitled 'Reduction, suspension and cancellation of assistance', are worded as follows:

'1. If an operation or measure appears to justify neither part nor the whole of the assistance allocated, the Commission shall conduct a suitable examination of the case in the framework of the partnership, in particular requesting that the Member State or authorities designated by it to implement the operation submit their comments within a specified period of time.

2. Following this examination, the Commission may reduce or suspend assistance in respect of the operation or a measure concerned if the examination reveals an

irregularity or a significant change affecting the nature or conditions for the implementation of the operation or measure for which the Commission's approval has not been sought.'

7 Articles 25 and 26 of Regulation No 4253/88 lay down the rules governing the monitoring and assessment of implementation of financial assistance measures. In particular, Article 25(1) and (3) provide as follows:

'1. Within the framework of the partnership, the Commission and the Member States shall ensure effective monitoring of implementation of assistance from the Funds, geared to the Community support framework and specific operations (programmes, etc.). Such monitoring shall be carried out by way of jointly agreed reporting procedures, sample checks and the establishment of monitoring committees.

...

3. Monitoring committees shall be set up, within the framework of the partnership, by agreement between the Member State concerned and the Commission.

The Commission and, where appropriate, the EIB may delegate representatives to those committees.'

The Commission decisions setting out the rules applicable to the financial assistance at issue

8 On 29 July 1994, the Commission adopted Decision 94/629/EC on the establishment of the Community support framework for Community structural assistance for the Italian regions concerned by Objective 1, which are Abruzzo, Basilicata, Calabria, Campania, Molise, Puglia, Sardinia and Sicily (OJ 1994 L 250, p. 21), for the period from 1 January 1994 to 31 December 1999.

9 On 23 April 1997, the Commission adopted Decision 97/322/EC modifying the decisions approving the Community support frameworks, the single programming documents and the Community initiative programmes in respect of Italy (OJ 1997 L 146, p. 11). That decision established the rules governing eligible expenditure for the various Community assistance programmes in Italy. The Annex to that decision contains Datasheet No 19 ('Datasheet No 19') concerning the eligibility of expenditure within the framework of the Structural Funds for financial engineering operations entailing venture capital funds ('VCFs').

10 The general principles governing the part-financing of financial engineering operations set out in Datasheet No 19 include the following:

'(ii) the Community may part-finance the public contribution to the authorised capital of a fund; it should not take part in the management of the fund or contribute to its running costs. Only the Member State and its private or public partners, and not the Commission, can be participants/shareholders in such funds;

....

(vii) the ways in which such funds are run must be appropriate to the financial implementing provisions of the assistance, in particular with regard to commitment of resources and expenditure incurred as well as termination of the operation;

(viii) VCFs assist firms which are economically and financially viable. …'

11 With regard to the specific provisions concerning VCFs, Section B of Datasheet No 19, entitled 'VCF operations', provides as follows:

'…

2. VCF activities consist in the acquisition of shareholdings, e.g. subscription of share capital in firms supported, loans (where appropriate, equity loans), bonds (where appropriate, convertible). …

…

8. During the period of Community assistance, the revenue of the VCF (more particularly any dividends, capital gains and interest on investments) must be credited to the fund

and be used for the purpose of financing acquisitions of holdings as well as management costs within the limits set out [in Datasheet No 19].

…

10. Reports on the activities of the VCF must be produced for each calendar year and submitted to the Commission after the Monitoring Committee has given its opinion. This report must contain a balance sheet and an analysis of the revenue and losses of the VCF, a detailed breakdown of management costs incurred, an analysis of repayments made to the fund, a detailed list of the holdings acquired (investments made, loans granted, etc. by firm and by sector, with due respect for the principles of confidentiality) and the problems encountered together with any solutions proposed or decided on.

11. The Commission and the Court of Auditors have a right to inspect the activities of the VCF, including the right to perform or have performed audits in firms in which the VCF has held or holds a stake.

…'

12 Section C of Datasheet No 19 defines 'legal and financial commitment' as 'the legal act of forming or increasing the initial capital of a VCF'. 'Expenditure actually incurred' is defined in that section as 'the payment in cash of the paid-up capital of the VCF by the participants (share capital) in strict relation to the performance reports mentioning the acquisitions made which serve as proof of the progress of the measure'.

13 Section D of Datasheet No 19, entitled 'Termination of assistance', provides as follows:

'1. The VCF has to be established for an appropriate length of time compatible with the aims pursued. The minimum lifespan of a VCF is that of the assistance measure concerned.

2. When the Community operation is terminated (after the final date for payments), the net financial position of the VCF must be calculated by comparing the use made of the total paid up capital with the total sum of assistance to firms during the period.

— If the resultant sum of the cumulative total of assistance to firms during the period is found to cover at least 100% of the paid-up capital (> or =), the measure is considered to have been performed in full.

…

— If, despite the surveillance of the Monitoring Committee, at the time of termination, the total sum of assistance to firms during the period is found to be less than the total paid-up capital, the amount corresponding to the excess will be deducted from the final balance paid to the Member State by the Community in respect of the assistance measure concerned.

3. Once the final balance of the assistance measure has been paid, the Commission no longer intervenes in the implementation or monitoring of the measure …'

Background to the dispute

Factual background to the dispute and the contested decision

14 In implementation of Regulation No 2052/88, the Commission, by Decision 94/629, approved the Community legal framework applicable to assistance measures adopted in favour of the regions of Italy concerned by Objective 1, which include the Basilicata Region, for the period from 1 January 1994 to 31 December 1999.

15 On 24 February 1998, with a view to stimulating the development of small and medium-sized enterprises ('SMEs') established in the Basilicata Region, the Italian Government submitted to the Commission an application for financial assistance in the form of a global grant. Measure No 2 contemplated by that application provided for the formation of a VCF, to be financed by the ERDF and the private sector, to provide financial assistance (shareholdings, equity loans and convertible bonds) to undertakings established in that region or intending to establish themselves there.

16 By Decision C(1999) 314 of 2 March 1999 on the granting of a contribution from the European Regional Development Fund to an overall allocation for the purpose of implementing measures to support small and medium-sized enterprises operating in the Basilicata Region, granted under the Community support framework for structural assistance covered by Objective 1 in Italy, the Commission approved the grant of assistance sought by the Italian authorities ('the decision to grant assistance').

17 Article 5 of the decision to grant assistance states that 'the Community assistance relates to expenditure in connection with operations covered by the global grant, which, in the Member State concerned, are the subject of legally binding commitments and for which the requisite finance has been specifically allocated no later

than 31 December 1999'. The final date for taking account of expenditure incurred in connection with those operations was 31 December 2001.

18 The global grant proposal which the Italian authorities sent to the Commission in order to obtain assistance was annexed to the decision to grant the assistance ('the global grant proposal') and formed an integral part of that decision. The proposal provided that the assistance measure was to be implemented in three stages, referred to, respectively, as the 'promotion', 'creation' and 'management' of the VCF (paragraph 5.2.2 of the global grant proposal). It also states, at paragraph 5.2.5, that the fund was EUR 9,7 million, EUR 4,7 million of which was to be provided by the ERDF, and that, in accordance with Datasheet No 19, 'commitment' was to be defined as 'the legal act of forming the capital fund' and 'expenditure' as 'the payment in cash of the paid-up capital of the VCF by the participants'. Lastly, the proposal provided that the commitments were to be entered into 'by 31 December 1999' (paragraph 5.2.6. of the proposal) and that the VCF had a lifespan of 10 years from the date of its formation.

19 The procedures for granting the global grant are set out in an agreement concluded on 22 July 1999 between the Commission and the Centro europeo di impresa e innovazione Sistema BIC Basilicata, which was initially the intermediary designated to manage the global grant and was replaced by the appellant ('the agreement'). Article 9 of the agreement provides for the setting-up of a monitoring committee, composed of representatives of the Commission, the competent national authorities and the intermediary.

20 Article 9(2) and (3) of the agreement provides as follows:

'2. Both during and after the period in which they shall be applicable, the measures implemented under this agreement shall be subject to the provisions on monitoring and assessment laid down in Regulation (EEC) No 4253/88 and set out in the [Community support framework].

3. The monitoring committee for the global grant shall be responsible for the assessment referred to in paragraphs 1 and 2. The intermediary shall make available to the committee all the data necessary for the purposes of monitoring and assessment.'

21 Article 13(2) and (4) of the agreement are worded as follows:

'2. … payment of the final balance is subject to the following cumulative conditions:

— the submission to the Commission by the Basiclicata Region of a request for payment, duly certified [by the Minister for the Economy and Finance] within six months following actual completion of the operation in question;

…

4. Decisions to commit expenditure for initiatives which are to benefit from assistance under the global grant (decision to grant assistance, conclusion of contracts for external activities) must be taken no later than 31 December 1999. Payments by the intermediary in implementation of the global grant shall be made no later than 31 December 2001 and the accounts in respect of the expenditure incurred by the intermediary in implementing the grant shall be presented to the Commission no later than 30 June 2002.'

22 Article 16(5) of the agreement is worded as follows:

'If the intermediary fails to fulfil one of the obligations under the agreement or fails to perform such an obligation correctly, the Commission — in consultation with the Basilicata Region — may give it formal notice, by registered letter, to fulfil the obligation in question. If that obligation is not fulfilled within one month of the notification, the Commission, together with the Basilicata Region, may, irrespective of the consequences specified in the legislation applicable to the agreement, terminate the agreement without further formalities.'

23 Lastly, Article 18 of the agreement stated that the agreement was to terminate on 30 June 2002.

How the VCF was formed and brought into operation

24 The VCF was formed on 16 December 1999, with funding of EUR 9,7 million, of which EUR 4,7 million was provided by the ERDF and EUR 5 million by private investors. The share capital was fully paid up between February 2000 and December 2001.

25 By letter of 18 March 2003, the Basilicata Region sent to the Italian Ministry for the Economy and Finance the final statement of expenditure and the request for payment submitted by the appellant. On 20 March 2003, the ministry forwarded those documents to the Commission.

26 By letter of 10 February 2004, the Commission informed the Italian authorities and the appellant that it considered that, under Section D of Datasheet No 19, part of the assistance initially granted was not justified, since it had not been invested in SMEs before 31 December 2001.

27 On 20 April 2006, the Commission adopted the contested decision and, taking the view that part of the assistance from the ERDF had not been used to acquire shareholdings in SMEs before 31 December 2001, reduced the amount of assistance granted in connection with the global grant for the Basilicata Region by EUR 4 554 108.91 and sought to recover the sum of EUR 3 434 108.91.

28 At paragraphs 9, 10, 18 and 19 of the contested decision, the Commission set out the complaints submitted by the intermediary body in writing and at the hearing which took place on 27 October 2005. Moreover, at paragraph 22 of that decision, it stated, in particular, as follows:

'With regard to the problem concerning the ineligibility of expenditure, … the Commission considers that the provision of assistance in the form of a venture capital fund is subject to a "condition as to use" and actual benefits for the undertakings concerned, a condition which, in the present case, was not satisfied because, by the final date for payments under the proposal (31 December 2001), less than 3% of the Fund resources (namely, EUR 9 700 000, of which EUR 4 700 000 was provided by the ERDF) had been used to acquire shareholdings in the undertakings. More specifically, the objectives of the ERDF, namely to finance productive investment so as to make it possible to maintain and create sustainable jobs and to support the activities of [SMEs] by improving their access to capital markets, providing guarantees and acquiring shareholdings, cannot be regarded as having been actually attained simply because a payment has been made in cash of the capital to form the venture fund.'

The judgment under appeal

29 By application lodged at the Registry of the Court of First Instance on 30 June 2006, the appellant brought an application for annulment of the contested decision and for damages.

The action for annulment

30 In its defence before the Court of First Instance, the Commission argued that the application for annulment was inadmissible on the basis that, since the appellant was neither the addressee of the contested decision nor the beneficiary of the funds granted by way of financial assistance under the ERDF, it was not directly concerned for the purpose of the fourth paragraph of Article 230 EC.

31 The Court of First Instance did not rule on that plea of inadmissibility, considering that the application was in any event unfounded.

32 In support of its application for annulment, the appellant relied on six pleas in law, of which only those that are relevant for the purpose of the present proceedings will be referred to.

33 By its plea alleging infringement of Datasheet No 19, the appellant submitted that the Commission had misinterpreted 'expenditure actually incurred' as defined in Section C of the datasheet. The Commission failed to take account of the distinction made in that section between 'expenditure' and 'commitment of resources' and therefore concluded that the 'expenditure actually incurred', which had to be completed before the deadline of 31 December 2001, was the shareholdings acquired by the VCF in the SMEs. By contrast, it is apparent from Section C, paragraph 5.2.5 of the global

grant proposal, Article 5 of the decision to grant assistance and Article 13(4) of the agreement that the 'expenditure actually incurred' is the 'commitments', that is to say, the payments in cash to form the VCF and that, accordingly, only those payments had to be completed before the deadline in question.

34 Moreover, the appellant submits that the period for which Community assistance was granted could not coincide with the period of the fund, which terminated on 16 December 2009. It points out in that connection that it would have been difficult, or even impossible, for the fund to have acquired shareholdings in the SMEs in an amount equal to that of its paid-up capital by 31 December 2001.

35 The Court of First Instance rejected that plea, considering, at paragraphs 42 to 59 of the judgment under appeal, that the Commission had correctly taken the closure date for Community assistance to be 31 December 2001. It stated that it is apparent from Datasheet No 19, in particular Section D, that the period for which that assistance was granted did not have to coincide with the period of the VCF, since the latter period could extend beyond the closure date for assistance. It also considered that it follows from Section C of Datasheet No 19 that 'expenditure actually incurred', to be completed before 31 December 2001, consists not only in expenditure incurred in the initial formation of the VCF but also in the 'shareholdings acquired' by the fund. Such an interpretation is confirmed, according to the Court of First Instance, by paragraph 5.2.5 of the global grant proposal, which reproduces the provisions set out in Section C, and by the agreement, which terminated on 30 June 2002, since it would not have been possible to fix that date before the closure date for Community assistance.

36 By its plea alleging that the contested decision was illogical, inadequate and lacked any proper legal or factual basis, the appellant complained that the Commission had based its decision on a purported infringement, alleged at paragraph 22 of the decision, of a 'condition as to use of the assistance', which does not appear in the decision to grant assistance or the global grant proposal. It stated that, in any event, the breach

of that condition, even if it were established, could not constitute an irregularity affecting the nature or the conditions for the implementation of the assistance measure for the purposes of Article 24(2) of Regulation No 4253/88.

37 The Court of First Instance considered, at paragraphs 66 to 75 of the judgment under appeal, that it is clear from the correspondence exchanged by the parties during the administrative procedure and recital 23 in the preamble to the contested decision that the Commission based its decision in particular on Section D of Datasheet No 19 and that the purpose of the other grounds in that decision is simply to lend support to its interpretation of that section. Moreover, it pointed out that Article 1 of Regulation No 4254/88 provides that the purpose of the ERDF is to finance productive investment. Accordingly, assistance provided by that fund must be examined in the light of the objectives of the assistance, which cannot be regarded as having been actually attained simply because a payment has been made in cash of the capital to form the VCF.

38 By its plea alleging infringement of the rules of procedure, in particular the rules in Articles 25 and 26 of Regulation No 4253/88, the appellant submitted that the Commission could not initiate the procedure under Article 24 of that regulation unless it had first, during the period in which the assistance was being brought into operation, especially at the meetings held by the monitoring committee on 14 June and 10 December 2001, raised objections as to the manner in which the assistance measure was being implemented.

39 As regards the purported infringement of Articles 25 and 26 of Regulation No 4253/88, the Court of First Instance stated in particular, at paragraph 79 of the judgment under appeal, that those provisions did not lay down any rule of procedure making the right of the Commission to reduce or withdraw financial assistance subject to the condition that it must first raise doubts as to the proper implementation of the proposal before the closure date for assistance.

40 It added at paragraph 79 that, even if the judicature of the European Union were able to apply rules of procedure not expressly provided for by the legislature in order to

comply with fundamental principles (see, to that effect, Case C-462/98 P *Mediocurso* v *Commission* [2000] ECR I-7183), the appellant does not claim, in the present case, that the rule of procedure on which it relies, which may be inferred from the Commission's monitoring obligations, is necessary to guarantee protection of its rights of defence.

41 By its pleas alleging breach of the principles of the protection of legitimate expectations and legal certainty and breach of the principle of proportionality, the appellant maintained that the Commission had led it to entertain a legitimate expectation that the project would be implemented, since the measures implemented had been approved, in particular by the monitoring committee, and progress made in connection with the global grant proposal. It argued that, even though all the six-monthly reports submitted to that committee clearly showed that, by 30 June 2001, no financial operation had been completed, the committee never raised any objections in that connection.

42 The Court of First Instance found, at paragraphs 89 to 92 of the judgment under appeal, that the facts relied on by the appellant were not such as to give rise on its part to a legitimate expectation, since, even if they were proved, the precise, unconditional and consistent assurances invoked by the appellant infringed the provisions applicable, in particular Datasheet No 19.

43 Lastly, the appellant submitted that the contested decision failed to have regard to the principle of proportionality in that it did not confine itself to blocking payment of sums not yet paid but also required that sums already allocated should be recovered.

44 In that connection, the Court of First Instance held, at paragraph 93 of the judgment under appeal, that the Commission did not have any discretion as to the inferences to be drawn from the fact that, on 31 December 2001, part of the capital paid into the

VCF had not been invested in SMEs. It referred in that regard to Case C-84/96 *Netherlands* v *Commission* [1999] ECR I-6547, paragraphs 22, 23 and 47, and added that if account were taken of the various facts relied on by the appellant, that would not only be tantamount to an acknowledgement that the rules in Datasheet No 19 had been infringed but would also enable it to take advantage of its misinterpretation.

The claim for damages

45 In support of its claim for damages, the appellant submits that the contested decision, which is based on a misinterpretation of the applicable legislation, caused harm to it. Its assessment of that harm is based both on the purported economic damage, which is equal to the amount which the Commission decided to recover, together with the sum which that institution decided not to pay and loss of profit, and on the non-pecuniary damage suffered as a result of the harm caused to its reputation as an undertaking, because it found itself in a situation which forced it to renege on its commitments.

46 The appellant also submitted that, even if the Court of First Instance were to consider that the contested decision was not unlawful, the Commission should in any event make reparation for the damage suffered by it, on account of the unusual and special nature of that damage.

47 The Court of First Instance held, at paragraphs 112 to 117 of the judgment under appeal, that the examination of the pleas relied on by the appellant in support of its application for annulment of the contested decision had not disclosed any unlawful act such as to vitiate the decision and that, accordingly, the requirements for bringing an action alleging liability on the part of an institution for an unlawful act were

not met. It also found that the unusual and special nature of the damage purportedly suffered by the appellant was not made out, since the alleged failure on the part of the Commission to carry out checks and verifications did not prevent the appellant from avoiding the damage alleged by it. That court therefore also dismissed the claim for compensation for a lawful act.

The appeal

48 By its appeal, the appellant claims that the Court should:

— set aside the judgment under appeal and refer the case back to the General Court for an adjudication on the substance in the light of any guidance which the Court of Justice may provide; and

— order the Commission to pay the costs of the present proceedings and the proceedings at first instance.

49 The Commission contends that the Court should:

— dismiss the appeal; and

— order the appellant to pay the costs of the present proceedings and the proceedings at first instance.

50 In support of its appeal, the appellant relies on eight grounds disputing the findings of the Court of First Instance on its application for annulment of the contested decision and two grounds relating to that court's findings on its claim for damages.

The part of the judgment under appeal relating to the admissibility of the application for annulment

51 In its defence, the Commission repeats, as a preliminary point, the arguments it put forward at first instance concerning the admissibility of the claim for annulment of the contested decision. It points out in particular that, since the appellant was not the addressee of the decision, which was addressed to the Italian Republic, it was not directly concerned by the decision for the purposes of the fourth paragraph of Article 230 EC. It states that since, in any event, as is apparent from the Court's case-law, where the court decides at first instance that there is no need to rule on a plea of inadmissibility raised by one party but then grants that party's substantive application, such a decision cannot be challenged (see, in particular, Case C-23/00 P *Council* v *Boehringer* [2002] ECR I-1873, paragraphs 50 and 51), it does not intend to ask the Court to set aside the judgment under appeal inasmuch as a ruling was not given on the plea of inadmissibility raised at first instance.

52 It is sufficient to state in that connection that, since those arguments do not seek to call into question the operative part of the judgment under appeal, they must be regarded as ineffective, and accordingly rejected as such.

The part of the judgment under appeal relating to the merits of the application for annulment

The first ground of appeal, alleging 'distortion of the appellant's application'

— Arguments of the parties

53 By its first ground of appeal, the appellant submits that, by examining the pleas relied on in support of its application for annulment in a different order from that in which they were set out in the application initiating the proceedings, the Court of First Instance, first, upset the logical sequence of the arguments put forward by the Commission in support of the contested decision and, second, distorted the meaning and overall scope of its application. In particular, the Court of First Instance considered that the main grounds for the contested decision resided in the failure to complete eligible expenditure before the deadline imposed, whereas the Commission expressly imposed a requirement, at paragraph 22 of the grounds of the decision, that, in order to be eligible, financial assistance from a VCF was subject to a 'condition as to use'. By its first plea, the appellant actually disputed the lawfulness of such a condition but that plea was not addressed by the Court of First Instance.

54 The Commission maintains that those assertions are incorrect. It states, first, that the Court of First Instance ruled on the plea alleging that the reference to the condition as to use was unlawful and, second, that the order in which that court examined the pleas is clearly logical, acceptable and consistent with the reasoning followed in the contested decision. That decision was based on the provisions in Datasheet No 19, whereas the 'condition as to use' was relied on in the decision not as a legal basis for the decision but as a concept to explain the logic underlying the rules governing the manner in which the VCF was to be operated and provided a key to the interpretation of those rules.

— Findings of the Court

55 By its first ground of appeal, the appellant essentially disputes the logical sequence of the reasoning followed by the Court of First Instance in the grounds of the judgment under appeal. In its view, such a sequence distorted the meaning and the scope of both the contested decision and the application.

56 A judgment of the court having jurisdiction as to the substance of a case which examines the reasoning set out in a decision of an institution of the European Union by taking account of all the factors on which the decision is based cannot, by itself, alter the scope of that decision when it deals with those factors in a different order from that followed in that reasoning. Accordingly, where the Court of First Instance has not distorted or erroneously assessed the factual and legal considerations pertaining to the contested measure, a systematic analysis of those considerations in a different sequence from that followed in the measure cannot, contrary to the appellant's contentions, constitute an error in law.

57 Similarly, with regard to the alleged distortion of the meaning and scope of the application, it should be noted that, in examining the pleas in an application, the court seised is in no way required, in its reasoning, to follow the order in which those pleas were set out by the party making the application.

58 Accordingly, since the appellant has failed by its first ground of appeal to establish that there is any defect capable of calling into question the reasoning of the judgment under appeal, such a ground cannot succeed.

59 Consequently, the first ground relied on by the appellant in support of its appeal must be rejected as unfounded.

The second ground of appeal, alleging misinterpretation of Datasheet No 19

— Arguments of the parties

60 According to the appellant, in its assessment of the ground for annulment alleging infringement of Datasheet No 19, the Court of First Instance not only supplemented the reasoning of the contested decision, by putting itself in the place of the Commission, but also misinterpreted the datasheet. The court gave an inaccurate definition of 'expenditure actually incurred' by including therein both expenditure relating to the formation of the VCF and that incurred in the acquisition by the VCF of shareholdings in SMEs and thus came to the erroneous conclusion that the shareholdings had to be acquired by 31 December 2001.

61 The appellant argues that that interpretation was based on an ambiguity. The acquisition of shareholdings in SMEs was not directly linked to the implementation of the financial assistance measure but to the operational impact of that measure. The recipients of that assistance were not, therefore, the SMEs but simply the VCF. The date in question should thus have been applicable only to payments for the formation of the VCF.

62 The appellant submits, in that regard, that in none of the relevant measures is the date of 31 December 2001 given as the deadline by which all expenditure was to have been completed. In particular, the global grant proposal relating to measure No 2 referred to that date as the closing date for incurring 'expenditure' consisting in financial payments to the VCF and not for investments in SMEs. Nor could the interpretation adopted by the Court of First Instance, applying that date to such investments, be based on the agreement, in particular Article 13(4) thereof, which is a general provision applicable to all the measures contemplated by the global grant proposal and not only to measure No 2, which is at issue in the present case.

63 Moreover, the appellant states that it would have been difficult, or even impossible, to invest in SMEs before 31 December 2001, since the VCF was not fully established until that date.

64 The Commission disputes all the appellant's arguments. As regards the complaint that the Court of First Instance substituted its own grounds for those of the contested decision, it submits that that court's findings in the judgment under appeal are not in any way at variance with the grounds of the decision, since the Commission itself always took the view that 'expenditure actually incurred' corresponded to investments in SMEs.

65 With regard to the interpretation of the global grant proposal, it states that the objectives of measure No 2 cannot be confined to the VCF being brought into operation, as the appellant claims, but must also take account of the 'operational stage' of that measure, which is concerned with the acquisition of shareholdings in SMEs. Moreover, as regards the interpretation of Datasheet No 19, it considers that, as the Court of First Instance correctly observed, the definition of 'expenditure actually incurred' in that datasheet expressly links the concept of expenditure in the context of the VCF with that of actual financial structuring assistance for undertakings which are intended to be part-financed under the ERDF. Consequently, the deadline of 31 December 2001 could refer only to investments acquired in those undertakings.

66 Lastly, as regards the arguments alleging that genuine difficulties were encountered in completing investments before 31 December 2001, the Commission states, as was also pointed out by the Court of First Instance, that the global grant proposal provided, at paragraph 5.2.2, that there was to be an initial stage for the introduction of the Community assistance measure, consisting in identifying undertakings potentially affected by the VCF. It follows that the date prescribed for the actual implementation of the investments, namely 31 December 2001, would not have been difficult to comply with.

— Findings of the Court

67 Article 5(2)(c) of Regulation No 2052/88 provides that one of the forms of assistance under the Structural Funds is 'global grants', which are 'as a general rule, managed by an intermediary designated by the Member State in agreement with the Commission and allocated by the intermediary in the form of individual grants to final beneficiaries'.

68 The contested decision concerns a global grant allocated by means of the formation of a VCF. Datasheet No 19 provided that the Structural Funds were to part-finance a VCF in which national partners would also participate and which, in accordance with the general rule set out at paragraph (ii) of Datasheet No 19, was to be managed not by the Commission but by a national body which would act as an intermediary for the purposes of the allocation of the global grant. The VCF, formed with both national funds and ERDF funds, was to assist viable undertakings in compliance with the financial implementing provisions for Community assistance, in accordance with the general rule set out at paragraphs (vii) and (viii) of the datasheet.

69 Section C of Datasheet No 19 refers to 'commitments' and 'expenditure actually incurred', which are, respectively, 'the legal act of forming or increasing the initial capital of a VCF', and the expenditure 'consisting of the payment in cash of the paid-up capital of the VCF by the participants (share capital) in strict relation to the performance reports mentioning the acquisitions made which serve as proof of the progress of the measure'. Lastly, Section D(2) of the datasheet provides that '[w]hen the Community operation is terminated … the net financial position of the VCF must be calculated by comparing the use made of the total paid up capital with the total sum of assistance to firms during the period'. Accordingly, if, when the operation is terminated, all of the capital in that fund has not been invested in SMEs, the assistance measure cannot be regarded as having been implemented in full.

70 Given the strict relation imposed in Section C of Datasheet No 19 between, on the one hand, the payment in cash of the paid-up capital of the VCF by the participants

and, on the other, the performance reports mentioning the acquisitions made in SMEs which serve as proof of the progress of the measure, the Court of First Instance did not err in law in finding that the Commission correctly considered the closure date for Community assistance to be 31 December 2001.

71 As regards the appellant's complaint alleging misinterpretation of the agreement, it is also apparent from the foregoing that, as the Court of First Instance held at paragraph 55 of the judgment under appeal, the reference to 'payments by the intermediary' in Article 13(4) of the agreement, which were to be made before the closure date for assistance, must be understood as a reference to the acquisition of shareholdings in SMEs within the meaning of Section B of Datasheet No 19.

72 Contrary to the appellant's submission, such an interpretation is not at odds with the rules governing the assistance measure set out in the global grant proposal. As the Court of First Instance correctly stated at paragraph 53 of the judgment under appeal, it is sufficient to point out that paragraph 5.2.5 of that proposal reproduces the definitions of commitments and expenditure as they appear in Section C of Datasheet No 19. It is therefore not possible to conclude from the proposal itself that the closure date for Community assistance was any other than 31 December 2001.

73 As regards the claim that the global grant proposal does not contain any reference to shareholdings in SMEs as VCF expenditure, it should be noted, as observed by the Court of First Instance at paragraph 53 of the judgment under appeal, that the proposal reproduces the definitions set out in Section C of Datasheet No 19 and provides that such acquisitions are to be specified in the performance reports.

74 Moreover, with regard to the practical difficulties which the appellant claims were entailed in acquiring shareholdings in SMEs before 31 December 2001, the Court of First Instance correctly stated, at paragraph 57 of the judgment under appeal, that paragraph 5.2.5 of the global grant proposal provided that there was to be a 'promotion' stage for the fund prior to the Community assistance measure being brought

into operation, during which the national authorities could in fact have identified the undertakings potentially concerned by the VCF and carried out a prior assessment of such undertakings in order to anticipate the commitments to be made before 31 December 1999 and make payments before 31 December 2001. Furthermore, it should be noted that the intermediary was in any event aware of the closure date for assistance when the agreement was signed on 22 July 1999.

75 Lastly, as regards the appellant's argument that the Court of First Instance substituted its own grounds for those of the contested decision, it should be noted, in any event, that the Commission pointed out in particular in that decision, in response to comments made by the appellant during the administrative procedure, that a condition for the eligibility of expenditure was that the sums granted were to be used to acquire investments in SMEs in the Basilicata Region. It also made express reference to Section D of Datasheet No 19. It follows that the Court of First Instance did not substitute its own reasoning for that of the contested decision but took account of the factual and legal considerations set out in that decision in order to examine the lawfulness of the measure.

76 The second ground relied on by the appellant in support of its appeal must therefore be rejected as unfounded.

The third ground of appeal, alleging misinterpretation of the 'condition as to use'

— Arguments of the parties

77 According to the appellant, the Court of First Instance erred in law in rejecting the ground for annulment alleging infringement of the 'condition as to use' of the Community assistance. It inferred that condition from the rules governing the time-limit

for payments to the VCF, whereas none of those rules refers to any such condition for the eligibility of expenditure. Given that, according to case-law on the Structural Funds (see Joined Cases T-349/06, T-371/06, T-14/07, T-15/07 and T-332/07 *Germany* v *Commission* [2008] ECR II-2181), the discretion granted to the Commission in deciding whether or not to reduce financial assistance cannot extend to enabling it to adopt decisions which disregard the conditions laid down in Article 24 of Regulation No 4253/88, the Court of First Instance should have found that the contested decision was unlawful.

78 The Commission acknowledges that the Court of First Instance found that the term 'condition as to use' does not appear in the provisions governing the global grant. However, it states that that court referred to Article 1 of Regulation No 4254/88 as a general provision laying down a programme for assistance from the ERDF and that it inferred therefrom that the objectives of that fund can be regarded as having been attained only if assistance is provided to undertakings at which such assistance is directed. Accordingly, such a condition does not form the legal basis of the contested decision but is instead a guiding principle and the logical basis of the provisions governing the proposal.

— Findings of the Court

79 The Court of First Instance correctly took the view that the function of the term 'condition as to use' in paragraph 22 of the grounds of the contested decision is to evoke the principles on which all the provisions relating to the allocation of a global grant such as that in the present case are based. As stated at paragraphs 67 to 73 above, it is apparent in particular from Regulation No 2052/88, Datasheet No 19 and the global grant proposal that a global grant allocated by means of the formation of a VCF must be regarded as having been properly implemented if Community assistance is received by the undertakings at which it is directed, being in the present case the SMEs established in the Basilicata Region. That is the condition which is expressed in the contested decision by that term.

80 The fact that that term does not expressly appear in the measures relating to the global grant in question is irrelevant, in the light of the examination of the lawfulness of the contested decision.

81 Therefore, contrary to what the appellant maintains, the Court of First Instance did not err in law by considering, at paragraph 72 of the judgment under appeal, that the insertion of the reference to the 'condition as to use' does not add a further condition to those laid down by the rules applicable to the assistance at issue, the Commission simply having applied those rules.

82 The third ground relied on by the appellant in support of its appeal must therefore be rejected as unfounded.

The fourth ground of appeal, alleging misinterpretation and misapplication of the principles relating to respect for the rights of the defence, as described in *Mediocurso* v *Commission*

— Arguments of the parties

83 According to the appellant, in adjudicating, at paragraph 79 of the judgment under appeal, on the plea for annulment alleging infringement of Articles 25 and 26 of Regulation No 4253/88, the Court of First Instance misinterpreted the judgment in *Mediocurso* v *Commission*, according to which, in all proceedings against a person, respect for that person's rights of defence must be guaranteed even in the absence of any specific rules in that connection. The Court confined the possibility of applying that rule to the sole situation in which it is relied on as being necessary to safeguard the rights of the defence. It therefore adopted an interpretation which is at odds with that followed by the courts of the European Union, for which the application of that rule is unconditional. The appellant refers in this connection to Case C-287/02 *Spain*

v *Commission* [2005] ECR I-5093, paragraph 37; Case C-44/06 *Gerlach* [2007] ECR I-2071, paragraph 38; and judgment of 8 March 2007 in Case T-65/04 *Nuova Gela Sviluppo* v *Commission*, paragraph 53.

84 The Commission submits that the Court of First Instance did not err in law because, in the present case, the conditions for the application of the principle established by the *Mediocurso* v *Commission* case-law were not met, since the proceedings were not liable to culminate in a measure adversely affecting the appellant.

— Findings of the Court

85 Article 24(1) of Regulation No 4253/88 provides that, where the Commission considers that a measure does not justify either part or the whole of the assistance allocated, it is to conduct a suitable examination of the case and request that the Member State or authorities designated by it to implement the operation, such as the appellant, submit their comments. Articles 25 and 26 of the regulation lay down the rules for the monitoring and assessment of implementation of the assistance, which is to be carried out within the framework of the partnership between the Member States and the Commission.

86 Those provisions, in particular Article 24, do not provide, as the Court of First Instance correctly pointed out, that the undertakings receiving financial assistance or the intermediaries responsible for managing the global grant must be consulted when the Commission is examining the manner in which the assistance measure has been implemented with a view to making any change in the amount of the assistance.

87 According to the case-law of the Court of Justice relied on by the appellant, in particular *Mediocurso* v *Commission*, in any procedure brought against a person which

may lead to an act adversely affecting that person, rules of procedure must be applied, even where the legislature has made no express provision for them, when they are essential for ensuring respect for fundamental principles, such as the protection of the rights of the defence. The Court of First Instance correctly held, at paragraph 79 of the judgment under appeal, that the appellant could not rely on such a principle in order to infer from the applicable legislation, in particular Articles 25 and 26 of Regulation No 4253/88, a right to be consulted when the Commission is examining the lawfulness of the Community assistance in question.

88 The Member State, which is consulted, in accordance with Article 24 of that regulation, is the sole addressee of the contested decision because it falls to that State to refund to the Commission sums corresponding to any reduction in the grant, since that decision does not require the national authorities to recover such sums from the recipient undertakings concerned.

89 It follows that, in a procedure such as that which led to the adoption of the contested decision, the general principle that the rights of the defence must be respected did not impose any obligation on the Commission to consult the SMEs concerned or, a fortiori, the intermediary body which was responsible for managing the global grant.

90 Moreover, it is apparent from the contested decision, in particular paragraphs 10, 18 and 19 of the grounds, that the appellant also had the opportunity to be heard by the Commission and to submit its written observations.

91 It follows that the fourth ground relied on by the appellant in support of its appeal is unfounded.

The fifth ground of appeal, alleging infringement of Articles 25 and 26 of Regulation No 4253/88 concerning the Commission's supervision and monitoring obligations

— Arguments of the parties

92 According to the appellant, the Court of First Instance infringed Articles 25 and 26 of Regulation No 4253/88, in so far as it held incorrectly that those provisions do not impose any obligation on the Commission, in connection with assistance such as that at issue in the present proceedings, to raise any objections concerning the manner in which the assistance measure is being implemented during the operational stage, in particular at the meetings of the Monitoring Committee. Not only was the Court of First Instance incorrect to find that, if such an obligation were recognised, that would prevent the Commission from adopting decisions to reduce or cancel financial assistance, but it also encouraged the Commission to refrain from applying the supervision and monitoring system provided for in those provisions.

93 The Commission points out that, as is apparent from the contested decision, during the implementation stage of assistance measures, its task is not to identify and penalise any irregularities which occur during the implementation but to participate, in cooperation with the Member States, in implementing effective monitoring by using the instruments provided in Article 25 of Regulation No 4253/88 and carrying out the assessments referred to in Article 26. The identification of irregularities and the adoption of any necessary financial adjustments form part of the procedure laid down in Article 24 of the regulation.

— Findings of the Court

94 Articles 25 and 26 of Regulation No 4253/88 lay down, respectively, a procedure for monitoring the implementation of financial assistance and a procedure for assessing measures undertaken by the Community.

95 In accordance with the first subparagraph of Article 25(1) of Regulation No 4253/88, in the monitoring procedure, the Commission and the national authorities are to act jointly within the framework of a partnership which operates via monitoring committees. According to the second sentence of that provision, '[s]uch monitoring shall be carried out by way of jointly agreed reporting procedures, sample checks and the establishment of monitoring committees'.

96 In accordance with Article 26 of Regulation No 4253/88, the Commission, in cooperation with the national authorities, must carry out ex ante and ex post assessments of operations undertaken for structural purposes with a view, inter alia, to drawing up Community assistance frameworks.

97 The Court of First Instance took the view, in paragraphs 79 and 80 of the judgment under appeal, that it was not apparent from those provisions that the Commission was required to raise any objections or doubts, in particular within the Monitoring Committee, before reducing financial assistance under Article 24 of Regulation No 4253/88.

98 Such a finding is not marred by any error of law.

99 Article 24 does not make the reduction, suspension or cancellation of assistance subject to the prior submission of objections in the procedure for monitoring the implementation of assistance.

100 Similarly, Articles 25 and 26 of Regulation No 4253/88, which concern the monitoring and assessment of implementation of assistance, do not establish any connection between the Commission's functions during the implementation stage and its powers to reduce, suspend or cancel assistance.

101 It follows that, under the system established by that regulation, the Commission is not under any obligation to present any objections to the Monitoring Committee before taking a decision to reduce, suspend or cancel assistance.

102 Moreover, the beneficiaries of the assistance and, in the case of a global grant, the intermediaries, are alone responsible for the measure in question. Therefore, the fact that, in some cases, the Commission has failed to point out irregularities during the implementation of such an operation cannot be regarded as excluding or limiting that responsibility. The effect of the interpretation proposed by the appellant would be, inter alia, as the Advocate General stated at point 140 of her Opinion, to absolve the intermediary of all responsibility for any irregularities which were not pointed out by the Commission during the implementation of the measure under which financial assistance was granted. That interpretation is incompatible with the objective of the legislation in question, which is to guarantee effective compliance on the part of the undertakings concerned with the conditions under which such assistance is granted.

103 In those circumstances, even though, contrary to what the Commission contends, it is not required to confine itself, in exercising its monitoring responsibilities, to performing solely a support function for the implementation of Community assistance, but must also, having regard to the partnership arrangement underlying the system established by Regulation No 4253/88, bring the matter to the attention of the competent authorities when it becomes aware of irregularities on the part of the undertakings concerned, the fact that it failed to do so in the present case has no bearing on the lawfulness of the contested decision.

104 It therefore follows from the foregoing that the fifth ground relied on by the appellant in support of its appeal is unfounded.

The sixth ground of appeal, alleging infringement of the principles of the protection of legitimate expectations and legal certainty

— Arguments of the parties

105 The appellant submits that the Court of First Instance incorrectly held that the Commission did not lead it to entertain a legitimate expectation as to the duration of the Community assistance. That court considered that any alleged assurances of the Commission, even if they were proved, were at odds with the provisions applicable to the financial assistance in question, in particular as regards the closure date for the assistance. The Court of First Instance based its decision in particular on an erroneous assessment of both the content of the global grant proposal and the beneficiaries under that proposal.

106 In that connection, the Commission simply submits that the assessment carried out by the Court of First Instance of the characteristics of the assistance in question and its closure date is not substantively inaccurate. It also states that it never gave the appellant precise, unconditional and consistent assurances, but always made it clear that the only expenditure eligible for funding was for investments acquired in SMEs before 31 December 2001.

— Findings of the Court

107 First, in order for a claim to entitlement to the protection of legitimate expectations to be well founded, the institution must have given precise assurances such as to give rise to a legitimate expectation on the part of the person to whom they are given that the assurances comply with the applicable rules (see, to that effect, Case C-207/99 P *Commission* v *Hamptaux* [2000] ECR I-9485, paragraph 47).

108 The ground relied on by the appellant is based on arguments which, as is apparent from paragraphs 67 to 73 above, are unfounded. Contrary to the appellant's assertions, the Court of First Instance correctly held that it follows from the legislation applicable that the intended recipients of the grant were not the appellant but SMEs established in the Basilicata Region and that, in accordance with the decision to grant assistance, the global grant proposal and the agreement, the deadline imposed for acquiring investments in SMEs was 31 December 2001.

109 The Court of First Instance was therefore correct to consider, at paragraph 90 of the judgment under appeal, that the Commission could not have given the appellant assurances leading it to believe that the closure date for assistance was any other than that laid down in the rules applicable to the assistance, since such assurances would have been at odds with those rules themselves.

110 The sixth ground relied on by the appellant in support of its appeal is therefore unfounded.

The seventh ground of appeal, alleging distortion of the evidence and infringement of the general principles governing the burden of proof

— Arguments of the parties

111 By this ground, which concerns paragraph 91 of the judgment under appeal, the appellant submits that it relied, in its application at first instance, on the fact that it was apparent from the six-monthly reports submitted to the Monitoring Committee that, during the procedure for the formation of the VCF, the Commission was kept fully informed of the progress of the assistance measure, that it approved the action taken by the intermediary body and shared its interpretation of the provisions

applicable to the measure. In spite of the fact that the Commission did not challenge those assertions before the Court of First Instance, that court held that the appellant had failed to adduce any evidence in that regard. It found that the appellant had failed to provide both the six-monthly reports which showed that, as at 30 June 2001, no financial operation had been completed and the report concerning the updating which took place on 21 November 2001. In the absence of those documents, the Court of First Instance erroneously considered that it was not in a position to establish whether the appellant's assertions were true. The appellant submits that, on the contrary, since the Commission did not dispute them, the Court of First Instance should have regarded its assertions as well founded or, if those documents were in fact considered to be essential for the purposes of the judgment, it should have asked the appellant to produce them.

112 The Commission considers that the seventh ground of appeal is ineffective, since the Court of First Instance based its rejection of the plea alleging infringement of the principle of the protection of legitimate expectations on grounds other than those relating to the assessment of those documents. It submits that, as regards the substance, the Court of First Instance was correct to consider that it could not adjudicate, in the absence of any evidence, on whether the Monitoring Committee was informed of the fact that assistance to SMEs had not been provided before 31 December 2001. The documents produced at first instance did not in fact disclose any clear evidence on this point. Consequently, in the light of the different positions adopted by the Commission and the appellant, the Court of First Instance was correct in holding that it was not in a position to adjudicate on that point.

— Findings of the Court

113 In support of its seventh ground of appeal, alleging distortion of the evidence and infringement of the general principles governing the burden of proof, the appellant has produced four new documents.

114 In an appeal, the Court's jurisdiction is confined to review of the assessment by the Court of First Instance of the pleas argued before it (see Joined Cases C-199/01 P and C-200/01 P *IPK-München* v *Commission* [2004] ECR I-4627, paragraph 52 and

the case-law cited). To allow a party to adduce for the first time before the Court of Justice evidence which it has not produced before the Court of First Instance would in effect allow that party to bring before the Court, whose jurisdiction in appeals is limited, a case wider in ambit than that heard by the Court of First Instance (Case C-266/05 P *Sison* v *Council* [2007] ECR I-1233, paragraph 95).

115 The production of those documents by the appellant cannot therefore be accepted.

116 Moreover, it is indeed the case, as pointed out by the Commission, that the ground of appeal in question relates to a preliminary assessment made by the Court of First Instance. At paragraphs 88 to 92 of the judgment under appeal, that court rejected the plea for annulment alleging infringement of the principle of the protection of legitimate expectations on the basis of evidence other than that to be inferred from the documents which the appellant contends were erroneously assessed by the Court of First Instance.

117 With regard to the merits of that ground of appeal, it should be recalled, first, that, in an action for annulment, the party disputing the legality of a measure has the burden of producing evidence capable of substantiating its claims.

118 Moreover, the first subparagraph of Article 66(1) of the Rules of Procedure of the Court of First Instance provides that that court is to prescribe the measures of inquiry that it considers appropriate. According to the case-law of the Court of Justice, only the court adjudicating on the substance can determine whether it is necessary to supplement the information available to it in the case before it and assess the evidence, unless that evidence has clearly been distorted (see order of 26 January 2005 in Case C-153/04 P *Euroagri* v *Commission*, paragraphs 61 and 62). Therefore, the fact that the Court of First Instance did not ask for a document to be placed on the file does not constitute, in the absence of a request for the production of documents by the party concerned, an infringement of the Rules of Procedure.

119 Second, according to the established case-law of the Court of Justice, there is distortion of the clear sense of the evidence where, without recourse to new evidence, the assessment of the existing evidence appears to be clearly incorrect (Case C-229/05 P *PKK and KNK* v *Council* [2007] ECR I-439, paragraph 37, and also, to that effect, Case C 551/03 P *General Motors* v *Commission* [2006] ECR I-3137, paragraph 54, and Case C-326/05 P *Industrias Químicas del Vallés* v *Commission* [2007] ECR I-6557, paragraph 60).

120 In the present case, it should be noted that, at paragraph 91 of the judgment under appeal, the Court of First Instance held that, since neither the six-monthly reports submitted to the Monitoring Committee nor the report concerning the updating which took place on 21 November 2001, referred to in the minutes of the committee meeting held on 10 December 2001, were produced, it was not in a position to consider whether the committee had been informed of the fact that it was not possible for all the capital of the VCF to be invested in SMEs before 31 December 2001.

121 It is apparent from point 5 of those minutes that, on 10 December 2001, the Monitoring Committee expressed its 'approval for the advancement of the overall allocation programme' and that it took note of the report concerning the updating which took place on 21 November 2001as regards the formation of the VCF.

122 The Court of First Instance considered that, since the appellant had failed to produce the documents enabling it to establish whether it had informed the Monitoring Committee of the fact that not all the share capital had been invested in SMEs before 31 December 2001, it could not conclude that the Commission had in fact been aware of the progress achieved in the implementation of the Community assistance measure.

123 That assessment cannot be regarded as incorrect since, in the absence of evidence which could have enabled the Monitoring Committee to express its agreement, the Court of First Instance could not find that the Commission had approved the procedures followed in implementing the assistance measure in question.

124 It follows that the seventh ground, alleging distortion of evidence and infringement of the general principles governing the burden of proof, must in any event be regarded as unfounded.

The eighth ground of appeal, alleging infringement of the case-law concerning the application of the principle of proportionality in cases in which financial assistance is reduced

— Arguments of the parties

125 By its eighth ground, the appellant disputes the findings of the Court of First Instance, in particular those at paragraph 93 of the judgment under appeal, by which that court held, with reference to the judgment in *Netherlands* v *Commission*, that, since investments in SMEs remained incomplete, the Commission was obliged to reduce the assistance without taking account of the various factors relied on by the appellant as to the moderate nature of the infringement. The appellant claims that that judgment concerns a decision based on Article 12 of Regulation No 4254/88, not Article 24 of that regulation. Article 24 does not contain any reference to an 'automatic' recovery system under which the Commission has no discretion. On the other hand, as is clear from the judgment in Case T-306/00 *Conserve Italia* v *Commission* [2003] ECR II-5705, paragraphs 135 to 149, in determining the reduction to be made from the amount of assistance originally granted, the Commission should take account of the beneficiaries' conduct, in particular the fact that they have not acted fraudulently.

126 The Commission submits that the Court of First Instance was entitled to consider that, where one of the conditions for granting Community assistance is not complied with, such as the condition relating to the period within which eligible expenditure must be implemented, the reduction which it makes is simply a financial adjustment, irrespective of any consideration as to culpability or possible attempted fraud on the part of the beneficiaries. The Court of First Instance did not therefore misrepresent the case-law concerning the principle of proportionality by finding that the Commission had no discretion as to the reduction to be made from the amount of financial assistance originally granted.

— Findings of the Court

127 At paragraph 93 of the judgment under appeal, the Court of First Instance found that the Commission did not have any discretion as to the conclusions to be drawn from the fact that, by 31 December 2001, part of the paid-up capital of the VCF had not been invested in SMEs. It referred in that connection to paragraphs 22, 23 and 47 of the judgment in *Netherlands* v *Commission*.

128 As pointed out by the appellant, that judgment concerned a Commission decision adopted on the basis of Article 12 of Regulation No 4254/88, which introduced a transitional provision imposing a time-limit and requiring the recovery of unused funds. By contrast, the contested decision is based on Article 24 of Regulation No 4253/88, which gives the Commission the power to reduce financial assistance where the measure in question has been implemented in an irregular fashion and payment of the whole amount of the assistance is not justified. The irregularities in implementation contemplated by Article 24 must be regarded as including failure to comply with the closure date for Community assistance.

129 As the Advocate General stated at point 208 of her Opinion, according to the Court's case-law, when adopting a decision based on Article 24 of Regulation No 4253/88, the Commission is not required to request repayment of the financial assistance in full, but may decide to set the proportion to be repaid. However, the Commission must exercise this power in a manner that is consistent with the principle of proportionality, in such a way that repayments which it orders are not disproportionate to the irregularities committed (see Case C-240/03 P *Comunità montana della Valnerina* v *Commission* [2006] ECR I-731, paragraph 140).

130 It follows that, in the present case, the interpretation of the Court of First Instance concerning the application of the principle of proportionality is incorrect.

131 However, such an error of law cannot, in the present case, lead to the setting aside of the judgment under appeal, because the appellant did not adduce any evidence before the court adjudicating on the substance from which it could have been concluded that, in so far as it entailed a reduction of virtually all the assistance originally granted, the contested decision did not take account of factors which could have justified an abatement of the reduction imposed by the Commission.

132 In support of its ground alleging infringement of the principle of proportionality, the appellant argues that the VCF did not invest sufficiently in SMEs due to a misinterpretation of the rules applicable and not to fraud to the detriment of the Community.

133 Such a fact cannot in itself warrant a lesser reduction in the amount of assistance than that imposed by the Commission.

134 Whilst fraud may justify an increase in the reduction to be made from the amount of assistance originally granted, the absence of fraud is not a valid reason for maintaining grants which are not used in a manner that is consistent with the applicable rules.

135 The ground of appeal alleging infringement of the principle of proportionality must therefore be rejected, since the court adjudicating on the substance was entitled to find that the factors relied on by the appellant did not justify an abatement of the reduction imposed by the Commission.

The part of the judgment under appeal relating to the claim for damages

The ground of appeal alleging insufficient reasoning and an error of law

— Arguments of the parties

136 The appellant submits that, in response to its claim for damages based on the unlawfulness of the contested decision, the Court of First Instance simply stated that, since it had not found that the decision was unlawful, one of the conditions necessary for recognising entitlement to compensation was not met. That court did not therefore rule on the other requirements for a finding on non-contractual liability and nor did it give reasons for rejecting the claim alleging non-material damage. Nor did it rule on the appellant's arguments relating to liability for a lawful act, arising in particular from the Commission's conduct during the monitoring procedure, which was alleged to have caused the appellant unusual and special damage.

137 The Commission is of the view that, having found that one of the three conditions necessary for the European Union to incur non-contractual liability was not met, the Court of First Instance was perfectly entitled not to proceed with its examination of the other two conditions. It also states that the appellant's argument concerning liability for a lawful act is based, in actual fact, on the purported unlawfulness of the Commission's conduct and must therefore be rejected. Moreover, since the intermediary body was aware of the conditions under which assistance is granted under the ERDF, it was not exposed to an unusual economic risk above and beyond that which is normally associated with the activities of VCFs in the context of global grants.

— Findings of the Court

138 It should be noted, first, as stated in the judgment under appeal, that according to the established case-law of the Court of Justice, the European Union may incur non-contractual liability for the purposes of the second paragraph of Article 340 TFEU only if three conditions are fulfilled, namely the unlawfulness of the conduct of which the Union institutions are accused, the occurrence of actual damage and the existence of a causal link between that conduct and the harm alleged (see, inter alia, Case C-257/98 P *Lucaccioni* v *Commission* [1999] ECR I-5251, paragraph 11, and Joined Cases C-162/01 P and C-163/01 P *Bouma and Beusmans* v *Council and Commission* [2004] ECR I-4509, paragraph 43).

139 With regard to the findings of the Court of First Instance on the appellant's claim alleging unlawful conduct, that court was correct in concluding — and stated sufficient reasons for so doing — that the Commission could not have incurred liability on the part of the Union as a result of adopting the contested decision, since that decision is not marred by illegality and, therefore, one of the conditions necessary for establishing such liability is lacking.

140 At first instance, the appellant also pleaded non-fault liability on the part of the European Union, claiming to have suffered harm because the Commission had failed, during the monitoring procedure, to carry out any checks and verifications of the procedures followed in implementing the measure in question.

141 However, there is no need for the Court to adjudicate on the possibility of liability being incurred on the part of the European Union for harm caused by a lawful act in circumstances such as those in the present case and it is sufficient to state that the Court of First Instance was entitled, without erring in law, to reject that plea, since the material and non-material damage alleged by the appellant are not, in any event, unusual or special. Any economic loss, even if it existed, and the alleged damage to the appellant's reputation are consequences to be expected by an experienced operator as

a result of a decision adopted on the basis of Article 24 of Regulation No 4253/88 to reduce the amount of assistance originally granted.

142 Consequently, in so far as it rules out non-contractual liability on the part of the Union, the judgment under appeal is not vitiated by an error of law and the ground of appeal in question must be rejected.

143 It follows from the foregoing that none of the grounds relied on by the appellant in support if its appeal can be accepted and, accordingly, the appeal must be dismissed in its entirety.

Costs

144 Under Article 69(2) of the Rules of Procedure of the Court of Justice, which applies to appeal proceedings by virtue of Article 118 of those rules, 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 and the grounds of appeal relied upon by the appellant have been unsuccessful, the appellant must be ordered to pay the costs.

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

1. Dismisses the appeal;

2. Orders Sviluppo Italia Basilicata SpA to pay the costs.

[Signatures]