

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)

14 June 2001 *

In Case T-143/99,

Hortiplant SAT, established in Amposta (Spain), represented by C. Fernández Vicién and Iglesias Roa, lawyers,

applicant,

v

Commission of the European Communities, represented by L. Visaggio, acting as Agent, and J. Guerra Fernández, lawyer, with an address for service in Luxembourg,

defendant,

APPLICATION for the annulment of the Commission decision of 4 March 1999 to cancel the financial assistance granted to Hortiplant SAT by Commission Decision C(92) 3125 of 3 December 1992 concerning the granting of aid from the EAGGF Guidance Section pursuant to Council Regulation (EEC) No 4256/88

* Language of the case: Spanish.

in the context of a project entitled 'Initiative in the form of a pilot project to demonstrate a new and highly efficient method of producing seedlings, as applied to ornamental and woodland species',

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

composed of: P. Mengozzi, President, V. Tiili and R.M. Moura Ramos, Judges,
Registrar: H. Jung,

having regard to the written procedure and further to the hearing on
12 December 2000,

gives the following

Judgment

Legal background

- 1 On 24 June 1988 the Council adopted Regulation (EEC) No 2052/88 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).

- 2 Article 5 of that regulation, which lists the different forms of assistance, sets out in paragraph 2 the forms of financial assistance which may be provided under the Structural Funds. Article 5(2)(e) provides that financial assistance may take the form of ‘support for technical assistance and studies in preparation for operations’.

- 3 Article 8 of Council Regulation (EEC) No 4256/88 of 19 December 1988 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards the EAGGF [European Agricultural Guidance and Guarantee Fund], Guidance Section (OJ 1988 L 374, p. 25) states that assistance from the Fund for the measures provided for in Article 5(2)(e) of Regulation (EEC) No 2052/88 may cover *inter alia* carrying out pilot projects for promoting the development of rural areas, including the development and exploitation of woodland (first indent) and carrying out demonstration projects to show farmers the real possibilities of systems, methods and techniques of production which are in accordance with the objectives of the reform of the common agricultural policy (fourth indent).

- 4 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), contains in Title IV (Articles 14 to 16) provisions concerning the processing of applications for financial assistance from the Structural Funds, eligibility for financial assistance and certain specific provisions.

- 5 The 12th recital in the preamble to Regulation No 4253/88 states that assistance from the Funds envisaged in the Community support frameworks should be provided mainly in the form of part-financing of operational programmes. The conditions under which such assistance is to be granted are laid down in Article 17 of that regulation, as amended.

- 6 Regulation No 4253/88, as amended, also lays down provisions relating to payments of financial assistance (Article 21), control of operations carried out (Article 23) and the reduction, suspension and cancellation of such assistance (Article 24).

- 7 Article 23(1) of that regulation states that in order to guarantee successful completion of operations carried out by public or private promoters, Member States are to take the necessary measures, first, to verify on a regular basis that operations financed by the Community have been properly carried out, second, to prevent and to take action against irregularities, and third, to recover any amounts lost as a result of an irregularity or negligence.

- 8 Article 23(2) of the regulation provides that, without prejudice to checks carried out by Member States, Commission officials may carry out on-the-spot checks, including sample checks, in respect of operations financed by the Structural Funds and the arrangements for administering and supervising them. Officials of the Member State concerned may take part in such monitoring.

- 9 Article 24(1) of Regulation No 4253/88 provides that if an operation or measure appears not to justify either part or all of the assistance allocated, the Commission is to conduct a suitable examination of the case in the framework

of the partnership with the Member State concerned, in particular requesting that the Member State or other authorities designated by it to implement the operation submit their comments within a specified period of time.

- 10 Under Article 24(2) of that regulation, following this examination, the Commission may reduce or suspend financial assistance in respect of the operation or measure concerned if the examination reveals an irregularity or a significant change affecting the nature or conditions of the operation or measure for which the Commission's approval has not been sought.

Facts

- 11 On 3 December 1992 the Commission, pursuant to the first and fourth indents of Article 8 of Regulation No 4256/88, granted assistance from the EAGGF (Guidance Section) to Hortiplant SAT ('Hortiplant' or 'the applicant') by decision C(92) 3125 ('the decision to grant assistance'). That assistance was granted for a project entitled 'Initiative in the form of a pilot projet to demonstrate a new and highly efficient method of producing seedlings, as applied to ornamental and woodland species' ('the project').

- 12 In 1992, Azienda agricola Resteya ('Resteya') found that the growth and productivity of seedlings improved following the use of a new type of container known as a 'Fitton Plant'. This was an open-ended cylinder made of biodegradable cellulose and filled with compressed substrate, which was particularly suited to the production of ornamental and woodland tree and shrub species requiring specific soil depths in order to take root and develop

properly. Prototype machines had been developed to manufacture the new containers and to mechanise the process for the commercial production of seedlings using the containers.

- 13 The applicant had been appointed to manage the change-over to industrial production of the new containers.
- 14 The project was initially scheduled to take 25 months from November 1992, but this was subsequently extended until 31 December 1995.
- 15 The total cost of the project was ECU 1 227 875 and the eligible cost ECU 1 184 624; the financial contribution from the Community was limited to a maximum of ECU 731 992 and the balance was to be financed by Hortiplant (ECU 247 942) and Resteya (ECU 247 941). The Commission paid a total of ECU 512 393 by way of an advance on that assistance.
- 16 In December 1995, when the project was nearing completion, Hortiplant sent the Commission all the vouchers relating to the expenditure in order to obtain the amount of the subsidy that was outstanding. That was done through Mr Tacias who, according to the applicant, is the agronomist who put it in touch with Resteya and who subsequently assumed responsibility for the technical management of the project and all contacts with the Commission.
- 17 Following an audit by the Court of Auditors of the European Communities on 10 February 1997, the Commission decided to carry out a series of inspections of a number of pilot projects which were receiving financial assistance under Article 8 of Regulation No 4256/88, because it suspected the existence of an

organised network intent on fraudulently obtaining Community subsidies. The project was among those inspected.

18 During August 1997 Hortiplant was requested to send the Commission all the supporting documents relating to the implementation of the project. The relevant documents were sent on 17 September 1997.

19 On 29 and 30 September 1997, an on-the-spot investigation into the implementation of the project was carried out under Article 23 of Regulation No 4253/88 by officials from the Commission's Directorates-General for Agriculture and for Financial Affairs, and from the Unit on Coordination of Fraud Prevention (UCLAF). The officials from the last two services subsequently drafted reports setting out their conclusions. An official from the Intervención General del Estado (a division of the Spanish Finance Ministry) was present during the inspections by the Community officials.

20 By letter of 10 October 1997, Hortiplant requested the Commission to remove from the file invoices from Genforsa amounting to 13 563 828 Spanish pesetas (ESP), and from its partners amounting to ESP 13 563 828, which had been sent in error.

21 Following the abovementioned inspection, the Commission sent the file to the Office of the Spanish Public Prosecutor.

22 By letter of 3 April 1998, the Commission informed Hortiplant that it had carried out an examination, under Regulation No 4253/88, into the implementation of the project and that the checks which had been made had uncovered facts which might constitute irregularities.

- 23 The Commission granted Hortiplant a period of six weeks in which to send it explanations, together with administrative records and accounts as evidence that the project had been correctly implemented, otherwise the sums already paid would have to be refunded and the assistance would be cancelled. At the same time the Commission sent the Kingdom of Spain a request for observations.
- 24 By letter of 26 May 1998, Hortiplant submitted some observations in response to the Commission's claims.
- 25 On 26 October 1998, the Office of the Spanish Public Prosecutor instituted proceedings against Hortiplant's partners and against Mr Tacias and two of Resteya's directors on the grounds that they had produced forged business papers.
- 26 By decision of 4 March 1999, the Commission, under Article 24(2) of Regulation No 4253/88 cancelled the financial assistance granted to Hortiplant ('the contested decision').
- 27 In the contested decision, the Commission states that the examination conducted under Article 24(1) of Regulation No 4253/88 confirmed the existence of the following irregularities:

— Annex 1 to the [decision to grant assistance] states that the eligible costs of the project not covered by the Commission's financial contribution, namely

ECU 495 883, should be part-financed by [Hortiplant] and Resteya, each company paying half; the findings made during the abovementioned inspection raised serious doubts with regard to part-financing by those two companies;

- [Hortiplant] submitted by way of vouchers during the course of the checks invoices from Genforsa amounting to [ESP] 5 836 310 (approximately ECU 37 800) for the production of woodland seedlings and for transporting and planting them; during the inspection it was found that the seedlings used in the project were produced by [Hortiplant] and planted by Poblador, whose invoice had been charged to the project; [Hortiplant] submitted other invoices from Genforsa amounting to [ESP] 7 727 608 (approximately ECU 50 100) in respect of work involved in evaluating the Fitton Plant container; however, no contract between the two companies, or any technical report on the services provided, was submitted to the Commission's inspectors; there is therefore no guarantee that the invoices from Genforsa submitted by [Hortiplant] reflect the true position;

- [Hortiplant] also paid, through Codema, an invoice from Cedarcliff dated 11 January 1993 for ECU 29 280 for lobbying the Commission on behalf of the project: Cedarcliff's lobbying is not one of the operations provided for in the [decision to grant assistance] and does not constitute an eligible expense;

- about one third of [Hortiplant's] total staffing costs for 1993 and 1994 (before the machines were installed in October 1994) were charged to the project, and nearly 95% of the total costs for 1995; the proportions of the costs charged to the project are not accompanied by any evidence showing that the costs so charged related solely to operations in connection with the project⁷.

Procedure and forms of order sought

- 28 The applicant brought this action by application lodged at the Registry of the Court of First Instance on 12 June 1999.
- 29 By separate document lodged at the Registry of the Court of First Instance on the same day, the applicant brought an application for interim relief, seeking suspension of the operation of the contested decision. That application was dismissed by order of the President of the Second Chamber of the Court of First Instance in Case T-143/99 R *Hortiplant v Commission* [1999] ECR II-2451.
- 30 The written procedure closed on 21 January 2000.
- 31 By fax of 5 December 2000, addressed to the Registry of the Court of First Instance, the applicant sought leave to produce four new documents. The Court decided on the basis of the first subparagraph of Article 48(2) of the Rules of Procedure to grant the applicant's request.
- 32 The parties presented oral argument and replied to the questions put by the Court at the hearing on 12 December 2000.
- 33 The applicant claims that the Court should:
- find that the application is admissible and well founded;

- find that the contested decision should be annulled;

- in the alternative, annul the contested decision in part and reduce the financial assistance which was granted to it;

- order the Commission to pay all the costs of the proceedings.

34 The defendant contends that the Court should:

- dismiss the application as unfounded;

- order the applicant to pay the costs.

Law

35 The applicant bases its main claim on five pleas in law, alleging, respectively, misapplication of Article 24 of Regulation No 4253/88, an error in assessing the facts, the absence of a legal basis for cancelling the financial assistance,

infringement of the right to a fair hearing since the Commission had failed to comply with the essential procedural requirements during the administrative procedure, and failure to state adequate reasons. In support of its claim in the alternative, the applicant puts forward a sixth plea, alleging infringement of the principle of proportionality.

I — *The main claim*

36 It is appropriate to consider the third plea first.

The third plea, alleging the absence of a legal basis for cancelling the financial assistance

Arguments of the parties

37 By this plea, the applicant seeks to show that under Article 24(2) of Regulation No 4253/88, the Commission may reduce or suspend financial assistance but not cancel it. This is clear from the wording of that article, which provides only for the first two possibilities. Moreover, if the drafters of that article had wanted to confer on the Commission the power to cancel financial assistance granted under the Structural Funds they would have made express provision to that effect.

- 38 Although Article 24(2) of Regulation No 4253/88 provides solely for the reduction or suspension of financial assistance, the Commission considers that, none the less, pursuing that provision to its logical conclusion, it may cancel the assistance completely.

Findings of the Court

- 39 Article 24(2) of Regulation No 4253/88 does not make any express provision under which the Commission may cancel financial assistance. However, Article 24(1) begins: '[i]f an operation or measure appears to justify neither part nor the whole of the assistance allocated'. That paragraph, therefore, accepts implicitly that the Commission has the power to cancel the assistance concerned altogether. Since Article 24 must be understood in the light of all its provisions, Article 24(2) must be interpreted as including the possibility of cancelling financial assistance altogether.

- 40 Article 24 is, moreover, entitled 'Reduction, suspension and cancellation of assistance'. It is settled case-law that where there is a discrepancy between the wording of a provision and the title thereof, both must be construed in such a manner that all the terms employed serve a useful purpose. Consequently, Article 24(2) of Regulation No 4253/88 should be interpreted as meaning that it allows the Commission to cancel financial assistance granted within the framework of the EAGGF in the event of irregularity.

- 41 It follows that the plea alleging the absence of a legal basis empowering the Commission to cancel the financial assistance in question must be rejected.

The first plea, alleging misapplication of Article 24 of Regulation No 4253/88, and the second plea, alleging an error in the assessment of the facts

Arguments of the parties

42 By its first plea, the applicant seeks to show that three of the four irregularities mentioned by the Commission in the contested decision do not exist, namely the failure to fulfil the obligation to provide part-financing, and charging to the project ineligible expenses and staffing costs unconnected with implementation of the project (see paragraph 27 above). As regards the fourth irregularity, namely charging Genforsa's invoices to the project, the applicant, whilst acknowledging that it submitted those invoices to the Commission, seeks, by its second plea, to show that the Commission committed an error in its assessment of the facts by failing to take into account its request to remove those invoices from the file.

43 As a preliminary point, the applicant contends that Article 24 of Regulation No 4253/88, which sets out the measures the Commission may take where the conditions for granting financial assistance are not met by the recipient, applies only where the operation financed by the Community has not been carried out in full or in part. In that regard, it argues that the project was carried out in full and that any irregularity found was the result of a management problem, due probably to the fact that it is a small company and lacks experience. However, it challenges the existence of the irregularities raised by the Commission.

— Compliance by Hortiplant and Resteya with the obligation to provide part-financing for the project

44 The applicant contends that, although the Commission casts doubt on whether the two companies did actually part-finance the project, it has not been able to

substantiate its suspicions. However, evidence of the part-financing has been made available to the Commission.

- 45 Furthermore, the applicant stresses that investment in the project was not solely in the form of money. In this regard it mentions, in particular, the fact that Mr Poblador, a farmer who contributed to the project, only issued a token invoice, in view of his interest in the project. Likewise, the sub-contractors based in Aragon did not make any charge for either rent for the land or for their work, but kept as recompense all the seedlings that were planted. The applicant's four partners, being agronomists, contributed to the project through their own work. The same applies as regards Resteya, which made available expensive equipment and all its technical knowledge.
- 46 The applicant claims that the investigation of its accounts for the years 1993 to 1995 provided proof of its financial capacity to bear the costs of the project. It reduced its debts by over ESP 31 million and received payments in cash from its partners of over ESP 4.5 million.
- 47 Lastly, the applicant denies the Commission's allegation that it failed to keep separate accounts for the project, an obligation which was not mentioned in the conditions governing implementation of the project.
- 48 The Commission replies that as the applicant was in charge of the project it had an obligation to show that the project was in fact being part-financed. In that regard, it is essential to keep separate accounts, even if it is not expressly provided

for in the legislation or by the decision to grant assistance, because that is the only way to prove irrefutably what expenditure has been incurred in connection with the project.

- 49 Moreover, the vouchers submitted do not show that the two companies which were under an obligation to do so did provide part-financing. Indeed, a brief inspection of the applicant's accounts suffices to show that it was impossible for it to meet that obligation.
- 50 The Commission accepts that the share of the financing incumbent on the applicant could have been provided in kind, that is to say, by providing services. It states, however, that the applicant submitted vouchers in respect of expenditure totalling ESP 84 928 079 (approximately ECU 510 000), which were said to relate to expenditure incurred in carrying out the project, and that no services in kind were accounted for. Since the applicant did not have the financial capacity to meet such expenditure since it had no funds of its own, it must be inferred that the expenditure was paid for in full out of the Community assistance.

— Cedarcliff's invoice

- 51 The applicant denies that it can be accused of irregularity in that one company paid an invoice from another company where neither company was under its control. If the Commission considers that the invoice concerned was an ineligible expense, it should accuse Codema of irregularity since it was the company which paid the invoice. In any event, there are no grounds for asserting that Hortiplant paid Cedarcliff's invoice through Codema. As was established during the investigations by the Community inspectors, Hortiplant was not only unaware of the existence of that invoice but also of the existence of Cedarcliff and its activities.

- 52 In any event, the applicant is of the view that provision was made for the services performed by Cedarcliff in the decision to grant assistance. Those services, referred to as 'lobbying Commission staff on behalf of the project' were included in the 'Project management' costs, budgeted for in Point 8 of Annex 1 to the decision to grant assistance at a total of ECU 215 340. That cost even appears in the application for financial assistance submitted by the applicant.
- 53 The defendant contends, first of all, that it is common ground that Hortiplant paid Codema certain sums for services which included a third party (Cedarcliff) lobbying Commission staff in favour of the project. It therefore considers that Hortiplant, since it was in charge of the project, was required to ascertain the purpose of all the payments made. If the applicant had made the necessary checks it would have found that Codema's invoice related, at least in part, to a service which was not eligible under the decision to grant assistance.
- 54 So far as the reference to engaging a professional is concerned, which appeared in the application for financial assistance submitted by Hortiplant, it does not mean that the Commission implicitly accepted the participation of such a person in the project as being an eligible expense. The only valid reference point is the decision to grant assistance and the annexes thereto, and none of those documents mentions the engagement of an undertaking or a professional to lobby the Commission, although the various phases of the project were set out in detail. So far as the project management costs provided for in Point 8 of Annex 1 to the decision to grant assistance are concerned, the Commission considers that they do not include the cost of lobbying services such as those provided by Cedarcliff.
- 55 The Commission recognises however that this is an irregularity which, in normal circumstances, could have been attributed to an error and would merely have led to the financial assistance being reduced by the amount of the contested invoice.

However, the seriousness of the other irregularities discovered in this case meant that the only solution was to cancel the assistance altogether.

— Staffing costs

- 56 The applicant submits that since it was impossible to calculate the staffing costs actually chargeable to the project on the basis of documentary evidence, due to the rural and particular nature of the project, it is necessary to apply the criterion of what is reasonable. Thus, as regards 1993 and 1994, although the machinery had not yet been introduced, it could be considered reasonable to charge one third of the staffing costs to the project, in view of the preparation work carried out to ensure proper implementation of the project. As regards 1995, it is necessary to take into account the fact that the machinery was installed during that year and Hortiplant worked almost entirely on the project, because it was in its final phase and it was necessary to see it through to the end.
- 57 The applicant adds that the higher turnover in 1995 was not due to greater use of its staff for its normal work, but to an overall improvement in sales due to the work carried out in previous years, to a net reduction in returns of products sold and the reduction of stocks to reasonable levels.
- 58 The Commission replies that, even using the criterion of what is reasonable, it is clear from the figures supplied by the applicant that in 1995 it achieved a 60% increase in turnover compared with 1994, with a sevenfold reduction in staffing costs for its normal work compared with 1994 and deploying 95% of its staff on the project. The Commission concludes from this that Hortiplant charged to the project staffing costs that were in fact related to its normal work, which constitutes a serious irregularity.

— Submission of Genforsa's invoices

59 The applicant challenges the Commission's accusation regarding the submission of Genforsa's invoices to it. The applicant states that it twice asked the Commission not to take them into account and that the Commission had removed the invoices of the company's partners, which had also been sent in error.

60 In the applicant's view, the Commission's claim that the irregularity in Genforsa's invoices justifies cancelling the financial assistance is also incorrect. It contends, first, that its request for the invoices to be removed from the file was not an admission of their irregularity but was due to the fact that it had realised, shortly after sending them, that it could not decide, or state with certainty, that the services invoiced by Genforsa related to the project. That uncertainty was the result of the amount of time which had passed and the fact that the accountant in charge during the relevant period was no longer with the company. Second, contrary to the Commission's contentions, a set of invoices headed 'supply woodland seedlings, transport and work at various demonstration sites', made no mention of the Fitton Plant project. The Commission's argument that Genforsa's invoices were irregular because the company did not have the necessary equipment to provide the services for which the invoices were issued was likewise incorrect. The applicant contends that such equipment is necessary only for mass production of Fitton Plant containers and for the mechanisation of the process for growing seedlings on a large scale, not for small-scale trials. Lastly, as regards the absence of any contract between Genforsa and Hortiplant for providing the services concerned and the absence of technical reports on those services, those absences in themselves do not constitute sufficient reason to cast doubt on whether the work was actually carried out.

61 The defendant replies that, although it is true that Hortiplant requested that Genforsa's invoices be removed because they had been sent in error, it only did so after the Community inspection when the irregularities had already been

discovered. Furthermore, by requesting that the invoices be removed, Hortiplant was acknowledging that the relevant work had not been carried out. It was in fact stated on almost all the invoices that they were issued in connection with the project, which shows that there was no error involved but rather an attempt to mislead the Commission into believing that work had been carried out when that was not the case.

- 62 In the Commission's view, the applicant's total inability to provide evidence of the work for which the invoices were issued constitutes a serious irregularity. If, in addition, as in this case, the invoices do not relate to work which was actually carried out, the irregularity is so serious that it justifies cancellation of the financial assistance, under Article 24 of Regulation No 4253/88, even if no other irregularities are established.

Findings of the Court

- 63 Article 24 of Regulation No 4253/88 provides that the Commission may decide to adopt measures for repayment of financial assistance if, as stated in Article 24(2), 'the examination reveals an irregularity and in particular a significant change affecting the nature or conditions of the operation or measure for which the Commission's approval has not been sought'.
- 64 That provision also refers expressly to irregularities concerning the conditions under which the operation financed is carried out, which includes irregularities in the project management. It cannot therefore be argued, as the applicant does as a preliminary, that the penalties provided for in Article 24 of Regulation No 4253/88 are applicable only where the operation financed by the Community has not been carried out in full or in part.

65 Moreover, the system of subsidies introduced under the Community rules relies in particular on the performance by recipients of a number of obligations which entitles them to receive the financial assistance envisaged. If the recipient does not comply with all those obligations, Article 24(2) of Regulation No 4253/88 authorises the Commission to reconsider the extent of the obligations it assumes under the decision to grant assistance (see by analogy Joined Cases T-551/93 and T-231/94 to T-234/94 *Industrias Pesqueras Campos and Others v Commission* [1996] ECR II-247, paragraph 161).

66 Applicants for and recipients of Community assistance are, in particular, required to supply the Commission with reliable information which is not likely to mislead, otherwise the system of supervision and rules of evidence introduced in order to check whether the conditions for granting assistance have been met cannot operate correctly. Without reliable information, assistance might be granted for projects which do not meet the necessary conditions. It follows that the obligation incumbent upon applicants for and recipients of assistance to provide information and act in good faith is inherent in the system of EAGGF aid and essential for its proper operation.

67 The production of invoices and the charging of costs which are not genuine, together with failure to comply with the obligation to provide part-financing, if established, constitute a serious infringement of the conditions for granting the financial assistance in question and of the obligation to provide information and act in good faith, which is incumbent upon the recipient of such assistance and, consequently, must be regarded as irregularities for the purposes of Article 24 of Regulation No 4253/88.

— Compliance by Hortiplant and Resteya with the obligation to provide part-financing for the project

68 It is clear from Article 17 of Regulation No 4253/88, as amended, that part-financing of the operation in question by recipients of Community assistance is one of the essential conditions for granting such assistance.

- 69 In this case, Article 3 of the decision to grant assistance shows clearly that the eligible cost of the project was ECU 1 184 624 and that the Community's financial contribution was set at a maximum of ECU 731 992. Moreover, Point 7 of Annex 1 to the decision to grant assistance provided that the balance was to be financed by Hortiplant (ECU 247 942) and Resteya (ECU 247 941). The part-financing of the project by the applicant and Resteya was, consequently, also expressly provided for as a condition for granting financial assistance.
- 70 It should be observed first of all that it is common ground that Hortiplant did not keep separate accounts for the project. It is true that separate accounts were not required either under the Community rules or by the decision to grant assistance and consequently that fact cannot in itself constitute an irregularity. However, in the absence of specific documentation confirming the costs of the project, the Commission could only take the company's general accounts as the basis for checking compliance with the conditions laid down in the decision to grant assistance and, in particular, whether the project had indeed been financed by Hortiplant to the extent stipulated in that decision.
- 71 In that regard, the Commission's view that a brief inspection of Hortiplant's accounts was sufficient to show that it was almost impossible for the company to meet the obligation to provide part-financing is well founded. It is clear from the file that the applicant had insufficient funds of its own to cover cash expenditure of around ECU 500 000 and that it had incurred heavy losses during the final years of implementing the project. Even if, as the applicant maintains, his partners did contribute in kind, the fact remains that the expenditure the applicant incurred in implementing the project was covered exclusively by Community subsidies.
- 72 Lastly, the applicant's argument that the reduction of ESP 31 million in its debts and the existence of ESP 4 million in contributions from its partners show that it was in a position to finance the project cannot be accepted. On the one hand, the

reduction in the debts, although it shows that the applicant had improved its financial situation, does not prove that sufficient capital was available to finance the project and, on the other hand, contributions of ESP 4 million were clearly inadequate for that purpose.

— Cedarcliff's invoice

- 73 The irregularity the Commission found in connection with Cedarcliff's invoice, unlike the other irregularities, does not concern whether the services for which the invoice was issued were genuine but rather whether they were eligible.
- 74 In that regard it should be noted, first, that eligible expenditure incurred in connection with an operation financed by the Community is only that expressly indicated in the decision to grant the financial assistance (see Article 14(4) of Regulation No 4253/88). Therefore, the defendant's contention that the fact that engagement of a professional appeared in the application for assistance submitted by Hortiplant does not mean that participation by that professional was implicitly accepted as an eligible expense must be upheld.
- 75 Second, as regards the expenditure on project management, provided for in Point 8 of Annex 1 to the decision to grant assistance, which according to the applicant included the contested lobbying, it should be pointed out that that category of expenditure is provided for in Phase B of the project, under the heading 'Demonstration and publication of results'. It follows that the category of expenditure in question covers only on-the-spot project management and publication of the results. The lobbying in respect of which Cedarcliff submitted an invoice does not therefore fall into that category.

— Staffing costs

- 76 It is clear from the file that in 1993, in the course of its normal work, that is to say discounting implementation of the project, the applicant's turnover was approximately ESP 29 million with staffing costs of ESP 5.4 million and, in 1994, its turnover was approximately ESP 32 million with staffing costs of ESP 6.5 million. In 1995, however, the applicant's turnover was in excess of ESP 54 million with staffing costs below ESP 900 000, that is to say, a sevenfold reduction on 1994, whilst employing over 95% of its staff on the project.
- 77 The applicant's explanation that the increase in turnover in 1995 was not due to a greater use of its staff for its normal work but to a general improvement in sales, a net reduction in returns of products sold and the reduction of stocks to reasonable levels, does not justify such large differences between the turnover and the staffing costs. Moreover, it should be pointed out that during 1996 the applicant's turnover suffered a downturn (ESP 42 million) although the staffing costs increased (ESP 10 million).
- 78 Consequently, in the absence of a convincing explanation of the reasons for that imbalance, the Commission quite justifiably found that there was no evidence that the staffing costs charged to the project were genuine.

— Submission of Genforsa's invoices

- 79 It is common ground that Hortiplant submitted to the Commission invoices issued by Genforsa which did not relate to services performed in connection with

the project. The applicant's response is merely that the invoices were submitted in error, and so the Commission cannot accuse it of irregularity as a result of Genforsa's invoices having been put on the file, because on two occasions it had requested the Commission not to take them into account.

80 It is also appropriate to note that the services described in the invoices were performed by another company, which had submitted proper invoices for them and that the corresponding expenditure had been charged to the project.

81 Since the applicant did not adduce any evidence to show that Genforsa's invoices corresponded to services which had actually been performed by that company or that they had been submitted to the Commission in error, the Commission was justified in considering that the submission of those invoices constituted an irregularity for the purposes of Article 24 of Regulation No 4253/88.

82 It follows that the applicant has not shown that the Commission was wrong in finding that the abovementioned irregularities did exist.

83 That conclusion is not affected by the arguments which the applicant bases on the documents lodged at the Registry of the Court of Justice on 5 December 2000.

- 84 It must be said that those documents are of no relevance whatever as regards assessing the legality of the contested decision.
- 85 First, by producing the order of the Juzgado de Primera Instancia de Amposta giving a provisional discharge, and the statement the applicant submitted in its insolvency proceedings, the applicant is seeking to substantiate the view that there was no fraud on its part in its financial dealings with the Commission. In that regard, suffice it to say that the concept of irregularity for the purposes of Article 24 of Regulation No 4253/88 does not mean that the Commission need establish any fraudulent intent on the part of the recipient of Community assistance. Moreover, in the contested decision the Commission does not claim the existence of fraud on the applicant's part in order to justify cancelling the assistance in question.
- 86 Second, the applicant has produced the report prepared by the official receiver and the minutes of the meeting of the creditors, including the Commission. Those documents certify, according to the applicant, that there were no irregularities in its accounts. In that regard, suffice it to say that those documents concern only the fact that the applicant complied with the 'rules and procedures of accountancy' in the running of its business. Those documents are of no relevance as regards investigating whether and to what extent the applicant complied with its obligations in respect of the grant of the assistance concerned and assessing whether it committed irregularities within the meaning of Article 24 of Regulation No 4253/88. In addition, the report prepared by the official receiver states that the management of the subsidies paid by the Commission was done as 'part of the normal course of the company's activities', which is precisely one of the anomalies in the management of the assistance in question, for which the Commission criticises the applicant both in the contested decision and during the administrative procedure.
- 87 In the light of the foregoing, the first and second pleas must be rejected as unfounded.

The fourth plea, alleging infringement of the right to a fair hearing

Arguments of the parties

88 The applicant contends that its right to a fair hearing was infringed during the administrative procedure because certain minimum procedural safeguards were not observed, in particular in view of the fact that criminal proceedings were brought against it by the Spanish Public Prosecutor's Office. The applicant considers that the Commission's letter of 3 April 1998 was unclear as regards the statement of accusations made against it which might constitute irregularities. This constitutes an infringement of the rights which the applicant was entitled to assert for the proper defence of its interests.

89 First, as regards the part-financing, the Commission considered that the results of the inspections raised serious doubts in that regard. At no time did the Commission explain the basis for those doubts, and the applicant has not been able to check to what extent the Commission took into account the documents the applicant sent it on 17 September 1997.

90 Second, the applicant notes that the Commission accused it of not enabling the latter's officials to inspect its account books. However, in its letter of 26 May 1998, Hortiplant stated that those books had been placed at the Commission's disposal during the inspection. Since no mention is made of the account books in the contested decision, the Commission's initial accusation raises the suspicion

that the decision was adopted without any account being taken of the inspection of those books, which the Commission inspectors nevertheless did carry out during the inspection on 29 September 1997.

- 91 Third, as regards the accusations concerning Genforsa's invoices, the applicant notes that it sent the Commission a letter explaining that the invoices in question had been sent in error and that they should therefore not be taken into account. The same argument was repeated in the applicant's reply to the Commission dated 26 May 1998. However, the Commission blatantly infringed the applicant's right to a fair hearing by failing to respond to the letters the applicant had sent it and by taking further steps in the proceedings without the applicant being able to state its position on the matter.
- 92 Fourth, the applicant claims that the Commission did not explain why it accused it of irregularity with regard to Codema's payment of Cedarcliff's invoice, when neither of those companies had anything to do with the applicant.
- 93 In addition, as regards the staffing costs, the Commission did not state whether it had taken account of the documents which the applicant had sent, or even whether and why it considered them to be inadequate. It did not state either what documents the applicant could have provided in order to prove that the expenditure concerned was actually incurred in connection with the project. Not having this information, the applicant was unable to defend its interests or put forward other arguments to challenge the reasons which had led the Commission to consider that the expenditure had been irregularly charged to the project.
- 94 Lastly, the applicant contends that the Commission adopted the contested decision without waiting to receive the observations of the Kingdom of Spain, in breach of Article 24(1) and (2) of Regulation No 4253/88.

- 95 The Commission, for its part, considers that all the procedural safeguards provided for in law were complied with. It argues that the last point in Annex 2 to the decision to grant assistance provides that the recipient may submit its observations within a period of time specified by the Commission, before the financial assistance is suspended, reduced or cancelled. The Commission scrupulously respected that safeguard by informing the applicant of the reasons for cancelling the assistance in question and by asking it to submit its observations. Since the applicant's observations appeared to it to be unsatisfactory, the Commission forthwith cancelled the assistance. The Commission also denies that the procedure was designed to impose any penalties. The Commission simply drew the appropriate conclusions from the applicant's failure to comply with the obligations previously agreed between the parties.
- 96 As regards the need to receive observations from the Member State concerned, the Commission contends that it complied scrupulously with the provisions of Article 24(1) and (2) of Regulation No 4253/88. The Commission contends that the Kingdom of Spain was invited to submit observations but did not reply to that request within the specified period of time. The Commission concluded therefore that the Kingdom of Spain had chosen not to submit any observations.

Findings of the Court

- 97 Point 10 of Annex 2 to the decision to grant assistance provides that if the Commission considers that the conditions for granting financial assistance have not been met it may reduce, suspend or cancel that assistance, after inviting the recipient to submit its observations within a specified period of time. On the basis of that provision, by letter of 3 April 1998, the Commission invited Hortiplant to submit its observations.
- 98 The applicant states that its right to a fair hearing was infringed because the letter was particularly obscure, which prevented it from defending itself properly. The

fact remains, however, that the contents of that letter are perfectly clear: they are in fact repeated in the contested decision, in which the same irregularities are set out again, although in greater detail, as they are required to be in a decision to cancel Community assistance. In addition, the letter of 3 April 1998 mentions several times the results of the inspection in which the applicant itself took part. In those circumstances, the applicant is not justified in maintaining that it was not in a position to submit its observations properly.

- 99 This view is corroborated by the fact that, in its reply of 26 May 1998, the applicant expresses its views on all the points made by the Commission in its letter of 3 April 1998, apart from the question of part-financing, on which it states that it has not understood the institution's reasoning.
- 100 As regards part-financing, it should be pointed out that in its letter of 3 April 1998 the Commission merely states that it has serious doubts with regard to whether it had been put into effect, but it does refer to the results of the inspections, from which it was clear that Hortiplant did not have the necessary financial capacity to part-finance the project. The applicant was therefore aware of the claims and arguments which the Commission intended to put forward on this point.
- 101 As regards the argument that the Commission did not take account of the applicant's letters requesting it to remove Genforsa's invoices from the file, this is of no relevance as regards possible infringement of the applicant's right to a fair hearing, since the applicant had the opportunity to reiterate its view in its reply of 26 May 1998 and, therefore, to defend itself against the Commission's allegations with regard to those invoices.
- 102 Likewise, the fact that the Commission adopted the contested decision after Hortiplant submitted its observations and did not subsequently ask it for any clarifications with regard to staffing costs in particular, does not constitute an infringement of the right to a fair hearing either. Following its investigations and

in the light of the applicant's observations the Commission was in possession of all the information it needed to make its assessment, and the applicant had had the opportunity to state its views as regards the irregularities which had been found.

- 103 Lastly, as regards the alleged need for the Commission to receive the observations of the Member State concerned before cancelling financial assistance, it should be noted that Article 24 of Regulation No 4253/88 provides only that the Commission is to conduct a suitable examination of the case, in particular requesting that the Member State concerned or other authorities designated by it to implement the operation submit their comments within a specified period of time, and that, following this examination, the Commission may take the necessary measures if the examination reveals an irregularity.
- 104 It does not follow from the wording of that article that the Commission must receive observations from the Member State concerned before cancelling the financial assistance if the examination it has conducted confirms an irregularity.
- 105 In the light of the foregoing, this plea must be rejected.

The fifth plea, alleging an inadequate statement of reasons

Arguments of the parties

- 106 According to the applicant, the contested decision contains an inadequate statement of reasons because it is impossible, on the basis of the analysis it

contains, to ascertain whether the facts which are given as the reason for its adoption exist and whether the facts have been properly classified in law. The applicant considers that the Commission did not set out clearly and consistently in the contested decision the reasons of fact and law on which it was based, with the result that neither the person to whom the decision was addressed nor the Court of First Instance is in a position to be aware of its reasoning. This is all the more serious since the Community proceedings have resulted in criminal proceedings against the applicant at national level.

- 107 The Commission contends that the contested decision is properly reasoned and that the applicant was well aware of the reasons for cancelling the assistance in question.

Findings of the Court

- 108 It is well-established in case-law, first, that, pursuant to Article 253 EC, the reasons stated for a measure must disclose clearly and unequivocally the reasoning of the Community authority which adopted it, so as to make the persons concerned aware of the reasons for the measure and thus enable them to defend their rights, and so as to enable the Community judicature to exercise its supervisory jurisdiction, and, secondly, that the extent of the obligation to state reasons must be assessed in the light of its context (see *Industrias Pesqueras Campos and Others v Commission*, cited above, paragraph 140 and the case-law cited).
- 109 In this case, the Commission refers in the contested decision to the various stages in the administrative procedure, in particular to the inspections carried out by its staff, and states that the irregularities found justified cancellation of the assistance in question under Article 24(2) of Regulation No 4253/88. In addition, it describes in detail the four irregularities of which the applicant is accused, namely, failing to comply with the obligation to provide part-financing for the project and charging to the project expenditure which did not relate to services actually provided by Genforsa, ineligible expenditure and unjustified staffing

costs. Moreover, the evidence provided in support of those findings is not of a general nature, since the Commission refers to various accounting figures and mentions vouchers submitted by the applicant, the validity of which is in doubt. Lastly, it is common ground that Hortiplant was subjected to an inspection which lasted several days, during which it was made clear to it, *inter alia*, which supporting documents were required, and it was given the opportunity to provide evidence both of part-financing and that expenses charged to the project were genuine.

110 The conclusion is, therefore, that the reasons stated demonstrated clearly and unequivocally the defendant's reasoning and permitted the applicant to defend its rights and the Community judicature to exercise its powers of review.

111 It is clear, moreover, from the arguments put forward by the applicant in relation to its pleas that it understood the reasoning which led the defendant to take the contested decision.

112 It is clear from the foregoing that the contested decision contains an adequate statement of the reasons on which it is based for the purposes of Article 253 EC and so the plea must be rejected.

II — *The plea submitted in the alternative*

Arguments of the parties

113 The applicant contends, in support of its application in the alternative, that the Commission infringed the principle of proportionality since the financial

assistance was cancelled completely, although it is clear from the documents the applicant sent to the Commission that the project was implemented in full.

- 114 In any event, the applicant considers that the Commission should not act with such severity that the interests of individuals are jeopardised to an extent far beyond what could normally be expected, and thereby exceed the limits of its powers by affecting those interests to a greater extent than would appear necessary from careful analysis of the interests at stake.
- 115 The applicant also contends that it has not committed any fraud against the Commission. The latter was of the opinion that there was fraudulent intent in view of Mr Tasiás's participation in the project, despite the fact that in this case there was no such irregularity or sign of any such intent. In that regard, the Commission cannot rely on the fact that proceedings have been brought in the Spanish courts when it is the Commission itself which prompted them.
- 116 The Commission considers that the total cancellation of the assistance in question is fully justified since a number of serious irregularities were found to exist; the applicant not only failed to comply with its obligation to justify the expenditure incurred, it also charged to the project invoices for services which were not performed.

Findings of the Court

- 117 The principle of proportionality requires that the measures adopted by Community institutions must not exceed what is appropriate and necessary for attaining the objective pursued (see, in particular, the judgment of the Court of Justice in Case 15/83 *Denkavit Nederland* [1984] ECR 2171, paragraph 25, and

of the Court of First Instance in Case T-260/94 *Air Inter v Commission* [1997] ECR II-997, paragraph 144).

118 The Court has held that the infringement of obligations whose observance is of fundamental importance to the proper functioning of a Community system may be penalised by forfeiture of a right conferred by Community legislation, such as entitlement to aid (Case C-104/94 *Cereol Italia* [1995] ECR I-2983, paragraph 24 and the case-law cited).

119 The purpose of Regulation No 2052/88, and of Regulations Nos 4253/88 and 4256/88 implementing Regulation No 2052/88, is to promote, through the EAGGF, as part of the support for economic and social cohesion and with a view to reform of the common agricultural policy, the adjustment of agricultural structures and the development of rural areas. It is also clear from the 20th recital in the preamble to Regulation No 4253/88 and Article 23 of that regulation that the legislature intended to introduce an effective monitoring procedure in order to ensure compliance by recipients with the conditions laid down at the time the EAGGF assistance is granted, in order to achieve the abovementioned objectives correctly. Lastly, it is clear from paragraph 66 above that the provision of reliable information by applicants for and recipients of Community assistance is essential for the proper operation of the system of monitoring and of providing evidence, introduced in order to check whether the conditions are met for granting the assistance concerned.

120 It is clear from the above consideration of the first and second pleas that the fact that the invoices produced and the costs charged to the project were not genuine and the condition concerning part-financing was not met constitute serious infringements of essential obligations which would justify cancellation of the assistance in question.

121 Also, it would be reasonable for the Commission to consider in this case that any measure short of total cancellation of the assistance in question might be regarded

as encouragement to infringe the conditions for granting assistance. If the only penalty incurred was for assistance to be reduced by the amount of the investment that did not meet a condition for granting assistance, recipients might be tempted to supply false information, or to conceal other information, in order to increase artificially the amount of investment eligible for financing and thereby obtain more Community financial assistance.

- 122 The applicant has therefore not shown that cancellation of the assistance in question was disproportionate in the light of the infringements of which it is accused and the objective of the regulations in question.
- 123 It follows that the alleged infringement of the principle of proportionality has not been proved and that the application in the alternative must be rejected.
- 124 In the light of the foregoing, the application must be dismissed in its entirety.

Costs

- 125 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 applicant has been unsuccessful in its submissions, it must be ordered to pay the costs, including the costs in the proceedings for interim relief, as sought by the defendant.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber),

hereby:

1. Dismisses the application;
2. Orders the applicant to bear its own costs and those of the Commission, including those in the proceedings for interim relief.

Mengozzi

Tiili

Moura Ramos

Delivered in open court in Luxembourg on 14 June 2001.

H. Jung

P. Mengozzi

Registrar

President