JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
26 September 2002 *

In Case T-199/99,

Sgaravatti Mediterranea Srl, established in Capoterra (Italy), represented by M. Merola and P.A.M. Ferrari, lawyers, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented initially by F.P. Ruggeri Laderchi, J. Guerra Fernández and L. Visaggio, and, subsequently, by C. Cattabriga, acting as Agents, assisted by M. Moretto, lawyer, with an address for service in Luxembourg,

defendant,

* Language of the case: Italian.

APPLICATION for annulment of Commission Decision C(1999) 1502 of 4 June 1999 cancelling financial assistance previously granted to the applicant by the European Agricultural Guidance and Guarantee Fund, Guidance Section (EAGGF Guidance Section).

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

composed of: J.D. Cooke, President, R. García-Valdecasas and P. Lindh, Judges,

Registrar: J. Palacio González, Administrator,,

having regard to the written procedure and further to the hearing on 5 March 2002,

gives the following

Judgment

Legal background

1 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) lays down in Article 5(2) the forms of financial assistance which may be provided under the Structural Funds. It states in Article 5(2)(e), that financial assistance may take the form of 'support for technical assistance and studies in preparation for operations'.

2 The first indent of 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 Guidance Section (OJ 1988 L 374, p. 25) provides that the contribution by the EAGGF to the assistance provided for in Article 5(2)(e) of Regulation No 2052/88 may cover the carrying out of pilot projects for promoting the development of rural areas, including the development and exploitation of woodland.

3 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, hereinafter 'Regulation No 4253/88, as amended'), contains in Title IV (Articles 14 to 16) provisions concerning the processing of applications for financial assistance from the Structural Funds, conditions of eligibility for financial assistance and certain specific provisions.

4 Regulation No 4253/88, as amended, also lays down provisions in Title VI ('Financial Provisions') relating to payments of financial assistance (Article 21), financial control (Article 23) and the reduction, suspension and cancellation of such assistance (Article 24).

5 Article 23(1) of Regulation No 4253/88, as amended, states that in order to guarantee 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. They are to inform the Commission regularly of the progress of administrative and judicial proceedings. They must keep available all appropriate national control reports on the measures provided for in the programmes and on the operations concerned.

6 Article 23(2) provides that, without prejudice to checks carried out by Member States in accordance with national laws, regulations and administrative provisions, Commission officials or servants may carry out on-the-spot checks, including sample checks, in respect of operations financed by the Structural Funds and management and control systems. Officials or servants of the Member State concerned may take part in such checks. The Commission is to ensure that the checks it carries out are performed in a coordinated manner so as to avoid repeating checks in respect of the same subject-matter during the same period. The Member State concerned and the Commission are immediately to exchange any relevant information concerning the results of the checks carried out.

7 Article 24(1) of Regulation No 4253/88, as amended, entitled '[r]eduction, suspension and cancellation of assistance', provides that if an operation or measure appears to justify neither part nor 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.

8 Article 24(2) of the same regulation provides that, following that examination, the Commission may reduce or suspend assistance in respect of the operation or a measure concerned if the examination reveals an irregularity or in particular a

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

Facts of the case

1. *Grant of the Community financial assistance*

9 On 28 April 1992, the company Sgaravatti Mediterranea Srl, a major tree nursery company, submitted an application for financial assistance from the EAGGF Guidance Section pursuant to the first indent of Article 8 of Regulation 4256/88, for a 'pilot project concerning replanting and engineering techniques in the Mediterranean environment' (project No 91.IT.06.015, hereinafter the 'project').

10 In the project, the applicant was proposing to find solutions to various problems of environmental degradation through the replanting of polluted substrata, the consolidation and reforestation of lands subject to landslide and of eroded areas, the reclamation of damp areas, the setting-up of a tree nursery composed of species indigenous to Sardinia and the management of vegetation cover on lands no longer used for cultivation. For each of those measures, the project provided for the creation of a specific demonstration area (sub-project), in which pre-determined environmental restoration techniques would be tested and perfected.

11 The application for assistance also indicated the specific staffing requirements and the necessary equipment for the carrying out of each sub-project. The project was to be spread out over a period of 48 months, from November 1992 to November 1996.

12 The total cost of the project was EUR 1 185 771. The eligible cost was estimated at EUR 1 012 741, 75% (EUR 759 555) of which was the subject of the application for assistance. The balance of the total cost (EUR 426 216) remained to be covered by the beneficiary by way of co-financing.

13 By decision C(92) 2435 of 12 October 1992 (hereinafter the 'decision to grant the assistance'), the Commission approved the project and granted assistance in the amount of EUR 759 555. Article 3 of the decision to grant the assistance states:

'If the final cost shows a reduction of eligible expenses as compared to those originally forecast, the amount of the aid shall be reduced proportionally when the final payment is made.'

14 Annex I to that decision contains a description of the project. It states *inter alia* that reclamation of the damp areas is to be carried out using mechanical and manual means for the digging phases and transplanting of wild plant species. For the creation of the tree nursery composed of indigenous species, it provides for the use of 'wild local species introduced through transplanting, seeding or cuttings' and the taking of reproductive material 'from the corresponding natural ecosystems, so as to optimise the cohesion and genetic stability of the plants produced'. The project also includes the drawing up of an instruction manual for the restoration and management of deteriorated areas.

15 The financial conditions applicable for the decision to grant the assistance are set out in Annex II to the decision. That annex provides in paragraph 3 that '[s]taffing costs... must relate directly to completion of the project and correspond to that completion'. In paragraph 4 it provides for the payment of an initial instalment of EUR 303 822, equal to 40% of the amount of financial assistance granted, and then the payment of a second instalment of EUR 227 866, equal to 30% of the amount of assistance when, on the basis of reports submitted to it by the beneficiary, the Commission finds that the performance of the operations is sufficiently advanced and it is certain that at least half of the first instalment has been used in accordance with the objectives of the project and Article 21(3) of Regulation 4253/88, as amended. The remainder is to be paid once all of the expenses have been incurred and approved, and after receipt and approval *inter alia* of a report from the beneficiary on the performance of all of the work provided for in the decision to grant the assistance.

16 Under paragraph 5 of the same Annex, in order to check on the financial reports on the various expenses, the Commission may ask to examine any supporting documents, by carrying out an on-the-spot check or asking for the documents to be sent to it. Otherwise, it reserves the right to ask a competent authority in the Member State or an independent body to carry out the checks. According to paragraph 10 of the Annex:

'if the abovementioned conditions are not complied with or if actions which are not provided for in Annex I are undertaken, the Community may suspend, reduce or cancel its assistance and demand repayment of the amounts paid. If it should become necessary to recover amounts unduly paid, the Commission may require payment of appropriate interest. In that case, the beneficiary shall be given the opportunity to present its comments within a time period prescribed by the Commission, prior to the adoption of any decision concerning suspension, reduction or cancellation, or any recovery of amounts unduly paid.'

17 The Commission paid the first two instalments referred to above in 1992 and 1994, respectively. In its request for payment of the second instalment, the

applicant had declared, on the basis of supporting documents provided, that 63% of the first instalment had been spent on carrying out the project.

18 On 20 December 1995, the applicant asked the Commission for authorisation to transfer 40% of the amounts granted for the item 'leasing, software, hardware and other equipment' to the items 'agricultural equipment' and 'innovative greenhouse technology'. By letter of 23 January 1996, the Commission asked the applicant to supply it with detailed information concerning all of the expenses actually incurred as at 31 December 1995, as well as a complete list of the equipment and the respective costs for each of the items referred to in the aforementioned request. In its reply of 28 February 1996, the applicant sent to the Commission a 'summary of expenses printed 22.12.95', detailing the costs vouched for by supporting documents for a total amount equal to ITL 1 209 581 058.

2. *The investigation conducted by the national authorities*

19 Following the bringing of proceedings before the local judicial authorities in December 1995 by the Ufficio Distrettuale delle Imposte Dirette di Cagliari (Cagliari District Direct Taxation Office), which had detected false costs being attributed to the carrying out of the project, the Nucleo Regionale di Polizia Tributaria (District Tax Police Unit) of the Guardia di Finanza de Cagliari 'anti-fraud group' (hereinafter the 'Guardia di Finanza') was charged with the task of carrying out an investigation into presumed fraud in respect of the EAGGF Guidance Section. As part of that investigation, copies of supporting documents of expenses incurred to carry out the project were sequestrated, as shown by the report of 25 September 1996 (hereinafter the 'report') of the Guardia di Finanza.

20 The report was notified on 25 September 1996 to Mme R. Zuliani, the sole director of the applicant at the time of the facts, on 26 September 1996 to Mr

Liori, owner of the sole proprietorship of the same name and sole director of the company AGR.IN.TEC Srl, and on 27 September 1996 to Mrs Floris, the mother of Mr Liori. The Guardia di Finanza sent the Commission a report dated 1 October 1996, which reproduced the content of the report.

21 According to the report, the Guardia di Finanza conducted an examination of the abovementioned documents, which had been sequestrated, relating to the expenses attributed to the project, and compared them to the depositions gathered from employees who, according to the pay slips, had been employed in connection with the project. The examination was detailed as to the various headings of expenses referred to in the decision to grant the assistance, particularly staffing expenses for the overall coordination of the project as well as scientific coordination, rentals and fees (for renting plots of land, greenhouses, various premises and an excavator), agricultural supplies (including organic goat manure, topsoil, peat, compost, clumps of indigenous grasses, cuttings and bushes of indigenous species), heating and insulation equipment for greenhouses, based on innovative technologies, and computer equipment.

22 In the report, the Guardia di Finanza established two types of irregularities: first, the issuing of invoices attributed to the project for nonexistent services or supplies, as well as the renting of two plots of land which did not belong to the lessors, Mrs Floris and Mr Liori, one of which was used as a vineyard; second, expenses attributed to the project by a letter of 28 February 1996 which were three times as much as those found by the Guardia di Finanza.

23 Consequently, the Guardia di Finanza found that assistance had been unduly obtained from the EAGGF Guidance Section. It noted that the costs which were declared and documented by the applicant as at 22 December 1995 totalled ITL 1 209 581 058, but that the costs it could have incurred for the project only amounted to ITL 386 971 677. It also stated that Article 3 of the Italian Act No 898 of 23 December 1986 provided for an administrative penalty for

infringement of the first indent of Article 8 of Regulation No 4256/88, namely, the restitution of the sums unduly received, in this case ITL 650 303 232, being the difference between the total amount of instalments received by the applicant (ITL 940 531 989) and ITL 290 228 757, being 75% of the costs which the applicant could have incurred for the project, to be covered by the Community, as well as a fine for the same amount.

24 This procedure led to the adoption by the competent administrative authority on 20 April 2001 of the order imposed jointly on Mrs Zuliani and the applicant to pay an administrative fine of ITL 650 303 232, which was notified on 22 May following. That order referred to the Commission Decision of 4 June 1999, contested in the present action, which cancelled the assistance granted to the applicant company for the pilot project contemplated therein. The parties concerned contested the order for payment before the Tribunale di Cagliari (Regional Court, Cagliari) and the enforcement proceedings were suspended by order of 28 June 2001 of that court, pending final judgment.

25 The criminal proceedings brought against Mrs Zuliani have been brought to an end, following an agreement between Mrs Zuliani and the Italian public prosecution authorities, pursuant to Article 444 of the Italian Code of Penal Procedure, by 'pattegiamento' (settlement) judgment No 187 of 8 April 1999 of the Tribunale di Cagliari, which gave her a suspended sentence of one year and eight months in prison.

3. *The administrative procedure and the content of the contested decision*

26 By letter of 17 June 1998, the Commission notified the applicant of the opening of the examination procedure provided for in Article 24 of Regulation 4253/88,

as amended. It expressly pointed out that, in the report, the Guardia di Finanza, on the basis of the examination of the declaration of expenses made by the applicant on 22 December 1995 and the supporting documents sent by it to the Commission on 28 February 1996, had established the following facts. First, the declared expenses (ITL 1 209 581 058) actually attributable to the project could only have been one third of that amount (ITL 386 971 677) and the amount of assistance unduly received by the applicant was ITL 650 303 232. Second, the applicant declared fictitious costs by invoicing nonexistent operations in order to receive Community assistance unlawfully. The Commission stated that these factors could constitute an irregularity within the meaning of Article 24 of Regulation No 4253/88, as amended, and possibly justify the recovery of EUR 531 688 already received by the applicant, as well as the cancellation of the assistance itself. Accordingly, the Commission gave the applicant six weeks to furnish proof, supported by accounting and administrative documents, of the proper performance of the obligations imposed on it by the decision to grant the assistance.

27 By letter of 4 August 1998, the applicant provided the Commission with a summarised list of the expenses pertaining to the project, copies of the corresponding invoices, a brief technical report, and also a summarised description of the tasks carried out by some people with a view to completing the project. In that letter, it asked to be allowed to submit the attached documentation in person in order to supply proof of the proper performance of the project. By letter of 11 September 1998, the Commission refused that request.

28 On 9 December 1998, according to the information supplied by the Commission, civil servants of the Commission met with the investigators of the Guardia di Finanza in Cagliari, in order to examine the documents provided by the applicant. The purpose of the meeting was, first, to verify that the eligibility criteria for the expenses applied by the Italian authorities complied with the Community rules in force and, second, to compare the documents sent by the applicant to the Commission with the findings made in the course of the investigation, in order to ascertain whether those documents were such as to remove the doubts raised in the letter of 17 June 1998 advising of the opening of the investigative procedure.

29 By decision of 4 June 1999 (hereinafter the 'contested decision'), the Commission cancelled the assistance from the EAGGF Guidance Section granted to the applicant for the project, and ordered it to repay EUR 531 688 already received within 60 days of the notification of the decision. It stated that, in its reply of 4 August 1998, the applicant had not provided arguments sufficient to rebut the specific findings referred to by the Commission in its letter of 17 June 1998. It concluded that there were the following irregularities:

'[t]he abovementioned report from the Guardia di Finanza indicates that the beneficiary declared and documented fictitious expenses and invoiced nonexistent operations with a view to receiving Community funds to which it was not entitled; in the presentation of costs for the project sent to the Commission's offices on 22 December 1995, and in the sending of the supporting documents on 28 February 1996, the beneficiary declared that the total costs attributable to the project amounted to ITL 1 209 581 058, whereas the total actual costs found by the Guardia di Finanza amounted to ITL 386 971 677.'

Procedure and forms of order sought by the parties

30 By application lodged at the Registry of the Court of First Instance on 9 September 1999 the applicant brought the present action.

31 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber) decided to open the oral procedure. In the context of measures of organisation of procedure, the parties were asked to produce certain documents and to supply, preferably before the date of the hearing, details in writing concerning the national administrative and criminal penalties imposed on Mrs Zuliani as sole director of the applicant. The parties complied with those requests.

32 The parties presented oral argument and replied to the questions put to them orally by the Court at the hearing on 5 March 2000.

33 The applicant claims that the Court should:

— annul the contested decision;

— in the alternative, reduce the amount of the assistance which must be paid back to the Commission, to an amount deemed appropriate at the end of the present proceedings;

— order the defendant to pay the costs.

34 The defendant contends that the Court should:

— dismiss the application in its entirety;

— order the applicant to pay the costs.

Law

A — *Principal claim*

35 In support of its principal claim, that is, for the annulment of the contested decision, the applicant relies on a number of pleas which must be grouped together and examined as follows: first, the alleged failure by the Commission to conduct a suitable examination of the case, contrary to Article 24 of Regulation No 4253/88, as amended; second, the alleged infringement of the right to be heard; third, the alleged manifest error of assessment of the facts; fourth, the alleged failure to give sufficient reasons; fifth, the alleged disregard of the principle of protection of legitimate expectations; and, sixth, the alleged infringement of Article 24(2) of Regulation No 4253/88, as amended, and the principle of proportionality.

Alleged failure by the Commission to conduct a suitable examination of the case

Arguments of the parties

36 The applicant claims that the Commission failed to conduct a suitable examination of the case, as required by Article 24(1) and (2) of Regulation No 4253/88, as amended. Those provisions require the Commission to assess independently whether, first of all, the facts which are brought to its knowledge constitute irregularities within the meaning of the abovementioned Article 24, and, secondly, whether those facts affect the nature or conditions of implementation of the project in question, thereby justifying application of one of the penalties provided for therein.

37 In the present case, following notification of the report, the Commission should have proceeded with an independent assessment of the measures implemented and the allegedly overestimated costs. However, both in its letter of 17 June 1998 informing the applicant of the opening of the examination procedure and in the contested decision, the Commission limited itself to referring to evidence gathered by the national authorities in the context of a check for tax purposes. At the hearing, the applicant stated that the Guardia di Finanza is solely empowered to record in its reports facts gathered based *inter alia* on documentary proof and depositions in the context of its tax police work, with a view to forwarding those reports to the public prosecution authorities. In the present case, the Guardia di Finanza made numerous specific assessments of, for instance, the question of whether or not the tasks performed by a worker form part of the carrying-out of such a complex replanting project.

38 The applicant adds that judgment No 187 of 8 April 1999 of the Tribunale di Cagliari, which put an end to the criminal proceedings, was of a purely procedural nature and did not rest on any examination of the facts, meaning that the guilt of Mrs Zuliani, sole director of the applicant, had not been established.

39 The applicant asks for the production of all the internal reports, minutes, accounting and administrative analyses and memoranda used by the Commission in drawing up the contested decision.

40 The Commission argues that the report gave it all the facts it needed for its examination for the purposes of application of Article 24 of Regulation No 4253/88, as amended. More specifically, at the meeting on 9 December 1998 with the investigators of the Guardia di Finanza, it ascertained whether the check had been carried out using criteria which complied with Community law, as confirmed by the mission report of the same day, referred to by the defendant at the hearing. The Commission did conduct an in-depth analysis of the various invoices and relevant accounting documents.

41 Lastly, at the hearing, the Commission argued that the irregularities in question had been confirmed in judgment No 698 of 24 October 2001 of the Corte d'appello di Cagliari (Cagliari Court of Appeal), which put an end to the criminal proceedings against Mr Liori, based on the same facts.

Findings of the Court

42 As a preliminary point, it is useful to recall the legal framework of the examination by the Commission of whether any irregularities committed by the beneficiary of Community financial assistance, in the light of the conditions which the decision to grant the assistance imposes on the payment of that assistance, justify a reduction, suspension or cancellation of the assistance, pursuant to Article 24 of Regulation No 4253/88, as amended.

43 As regards checks to verify compliance with the financial obligations of beneficiaries of assistance, Article 23 of Regulation No 4253/88, as amended, entitled 'Financial control', institutes a system of close cooperation between the Commission and the Member States (see, with respect to, e.g., the European Social Fund, Case T-126/97 *Sonasa* v *Commission* [1999] ECR II-2793, paragraph 52 and the case-law cited).

44 Thus, under Article 23(2) of Regulation No 4253/88, as amended, the Commission may carry out checks '[w]ithout prejudice to checks carried out by Member States, in accordance with national laws, regulations and administrative provisions'. Furthermore, the same provision also requires the Member State concerned and the Commission to exchange immediately any relevant information concerning the results of the checks carried out. In the present case, moreover, paragraph 5 of Annex II to the decision to grant the assistance expressly states that the Commission reserves the right to request the competent authority of the Member State or an independent body to carry out financial

checks. Lastly, the defendant is fully entitled to point out that the system for monitoring the use of Community financial assistance is based on close cooperation between the Commission and the competent national authorities, who are required to assist it in the achievement of its tasks, pursuant to Article 10 EC.

45 In this context, when the national authorities have carried out an in-depth check of whether a beneficiary of Community assistance has complied with its financial obligations, the Commission may legitimately rely on their detailed findings of facts and determine whether those findings serve to establish the existence of irregularities justifying penalties pursuant to Article 24(2) of Regulation No 4253/88, as amended. It cannot be required to carry out a fresh investigation, a point moreover expressly acknowledged by the applicant. A repeat check would undermine the cooperation with the national authorities and run counter to the principle of sound administration.

46 In the present case, the applicant complains that the defendant did no more than ratify the findings and assessment allegedly made by the Guardia di Finanza for the purposes of a tax check, instead of gathering the observations of the national authorities under the partnership arrangement pursuant to Article 24(1) of Regulation No 4253/88, as amended, and then making its own assessment of the scope of the alleged irregularities and their effect on the performance of the essential obligations inherent in performance of the project.

47 That complaint cannot be accepted. The report explicitly states (in particular on pages 2 and 25 to 27) that the check carried out by the Guardia di Finanza was aimed specifically at verifying whether the EAGGF Guidance Section assistance granted for the project had been obtained contrary to the first indent of Article 8 of Regulation No 4256/88, and not at detecting the existence of possible tax evasion, as maintained by the applicant. An analysis of the report shows,

moreover, that the Guardia di Finanza made its findings following an in-depth, systematic examination of the costs declared and those actually incurred by the applicant, having regard to the various categories of expenses referred to in the decision to grant the assistance.

48 In this context, the Commission, in its letter of 17 June 1998 notifying the applicant of the opening of the examination procedure under Article 24(2) of Regulation No 4253/88, as amended, rightly relied on the findings contained in the report, which highlighted certain relevant facts for the purposes of application of that article. In the letter, the Commission stressed that the comparison made by the Guardia di Finanza of the expenses allegedly approved as at 22 December 1995 with the supporting documents sent by the beneficiary on 28 February 1996 revealed certain facts which might constitute irregularities within the meaning of Article 24 of Regulation No 4253/88, as amended.

49 In its assessment of the abovementioned facts, the Commission legitimately confined itself, first, to verifying at the meeting of 9 December 1998 with the investigators of the Guardia di Finanza whether their check had been carried out on the basis of assessment criteria which complied with the applicable Community law, and, second, whether the evidence thus gathered by the Guardia di Finanza made it possible to establish the existence of irregularities within the meaning of Article 24 of Regulation No 4253/88, as amended, having regard to the comments of the applicant in its letter of 4 August 1998.

50 Furthermore, as regards the applicant's argument that its liability was not established by judgment No 187 of 8 April 1999 of the Tribunale di Cagliari, suffice it to state that the contested decision, which was adopted after the end of the criminal proceedings against Mrs Zuliani in her capacity as sole director of the applicant company, based on the same facts and the same infringement of Community law, is not affected by that judgment, the scope of which is purely procedural.

51 It follows that the plea that the Commission failed to conduct a suitable examination of the case in accordance with Article 24(1) of Regulation No 4253/88, as amended, must be dismissed as unfounded, without its being necessary to order the production of preparatory documents as requested by the applicant.

Alleged infringement of the rights of the defence

Arguments of the parties

52 The applicant claims that it was not able to present its comments on the evidence on the allegations against it. It argues that the Commission, in its letter of 17 June 1998 notifying it of the opening of the examination procedure under Article 24 of Regulation No 4253/88, as amended, and inviting it to submit proof of due performance of its obligations, restricted itself to referring generally to the report. The Commission neglected to specify which facts it considered relevant for proving that the applicant had not performed its obligations.

53 In that context, the applicant complains that the Commission did not allow its request to comment, at a meeting with the competent departments, on the documents it sent to it by letter of 4 August 1998 with a view to showing that the project had been carried out properly. Such a meeting would have allowed the applicant to obtain clarifications about the matters laid to its charge and to present its point of view on the reasons for which the Commission believed that the abovementioned documents did not establish that the project had been duly carried out.

54 The Commission, for its part, contends that the applicant was heard on all of the irregularities of which it stands accused.

Findings of the Court

55 It is settled case-law that observance of the right to be heard is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the proceedings. That principle requires that the addressees of decisions which significantly affect their interests should be placed in a position in which they may effectively make known their views (Case C-32/95 P *Commission* v *Lisrestal* [1996] ECR I-5373, paragraph 21).

56 In the present case, the case-file shows that the applicant was duly heard on all of the charges levelled against it prior to the adoption of the contested decision.

57 In its letter of 17 June 1998, the Commission clearly indicated that the matters contained in the report, which had been notified to the applicant and clearly set out the facts against it, were liable to constitute irregularities within the meaning of Article 24 of Regulation No 4253/88, as amended, and to justify the possible cancellation of the financial assistance in question and recovery of the amounts previously paid out. It made express reference to two types of irregularities: one, a sizeable difference between the cost as declared by the beneficiary up to December 1995 (ITL 1 209 581 058) and the actual cost of the project as established at the end of the check by the Guardia di Finanza (ITL 386 971 677) and, two, the declaration of the fictitious costs, as supported by invoices for nonexistent operations, with a view to obtaining Community financial assistance unlawfully.

58 In those circumstances, the applicant had the opportunity, of which it availed itself in its letter of 4 August 1998, to express its comments on all of the irregularities attributed to it, by the deadline set by the Commission in its letter of 17 June 1998. Accordingly, the Commission was not required to permit the applicant to submit its comments orally at a subsequent time.

59 The plea alleging an infringement of the rights of the defence must therefore be dismissed as unfounded.

Alleged manifest error of assessment

60 The applicant claims that the contested decision is vitiated by a manifest error of assessment of the facts regarding the two types of irregularities found, that is, the declaration of costs allegedly not attributable to the completion of the project and the costs for allegedly nonexistent services.

1. Costs not attributable to the project

61 The applicant disputes the findings of the Guardia di Finanza as to the costs not associated with the project, such as staff costs, hire of greenhouses and fees for a consultant, Mr Salvago.

(a) Staff and greenhouse hire costs

62 The applicant points out that, in complaining of the allegedly false and approximate declaration of staffing costs, the national authorities relied only on statements taken from some of the applicant's employees, who were not in a position to estimate the number of hours spent on project-related activities, given the diversity of those activities and how they can be broken down in terms of the time spent on each. Likewise, the finding that the applicant improperly attributed costs for greenhouse hire and agricultural materials to the project is based solely on statements taken from employees of the applicant. The cross-checking carried out by the Guardia di Finanza to find tax irregularities cannot be used as a sufficient basis for evidence to show that the costs could not be attributed to the project.

63 The Commission contests this line of argument, pointing out that the staffing costs listed in the report are set out in a very precise and detailed manner.

64 The Court notes that the applicant has not put forward any evidence capable of casting doubt on the findings of the report. In particular, the supporting documents sent by the applicant by way of annex to its letter of 4 August 1998 to the Commission do not give any precise or detailed information on this point.

65 Nor can the national authorities be blamed for having relied on the statements of the employees concerned. Contrary to the allegations of the applicant, the very purpose of the project and the specific objects of the various sub-projects allowed

for easy identification of the activities needed for their completion. Accordingly, since the applicant had not produced any documents, such as attendance sheets showing the hours or days of work completed by each worker as part of the project, which would allow for quantification of the time devoted to the project by the staff, the Guardia di Finanza was fully entitled to make its own calculations based *inter alia* on statements taken from the employees.

66 As for the costs for greenhouse hire and agricultural materials, suffice it to note that, not only is this complaint unfounded, but it also neglects to specify the amount of the costs for the greenhouses and agricultural materials in question.

(b) The fees paid to Mr Salvago

67 The applicant maintains that the argument that the fees collected by Mr Salvago (ITL 37 950 000) cannot be attributed to the project is contradicted by the fact that he was engaged for completion of the project and for a period coinciding with the duration thereof. Mr Salvago himself confirmed, moreover, that his activities for the applicant concerned principally, and not exclusively, the carrying out of the project. He supplied a fresh written statement to this effect dated 13 March 2000, at the request of the applicant, which is attached as Annex 5 to the reply.

68 The Commission begins by contesting the production of the statement of 13 March 2000 of Mr Salvago, pursuant to Article 48(1) of the Rules of Procedure of the Court of First Instance. On the substantive point, the Commission disagrees with the applicant's argument.

69 The Court of First Instance finds that the applicant has neglected to provide the slightest indication which might be liable to rebut the evidence on which the Guardia di Finanza relied to find that the fees could not be attributed to the project, which evidence consists of: first, the sworn statement of Mr Salvago, according to which he had been assigned the task of providing general technical and administrative consulting services relating to the organisation and management of the company on such matters as public contracts, relations with other companies and order management; second, the letter of appointment of Mr Salvago dated 24 September 1992, which contained no reference to the project; and, third, the statement of Mr Salvago that the applicant asked him to include an explicit reference to the project in his accounts.

70 The letter of 13 March 2000 from Mr Salvago, which was subsequent to the commencement of the present proceedings and concerns the dispute between the parties, cannot be considered to be delayed within the meaning of Article 48(1) of the Rules of Procedure, which expressly offers the parties the possibility of introducing additional evidence in support of their arguments in the reply and rejoinder. The letter cannot, however, cast doubt on the abovementioned findings. In the letter, Mr Salvago does not recant the statement he gave to the Guardia di Finanza, which indicates that, in reality, his activities for the applicant during the period in question concerned the project only to a very limited extent. He confines himself in the letter to referring, by way of example, to a number of functions carried out in connection with the project. In any event, such a statement, made at the request of the applicant and almost seven years after the fact, cannot rebut the specific, corroborating evidence referred to in the preceding paragraph.

71 It follows that the applicant has not demonstrated that the Commission, in relying in the contested decision on the findings contained in the report concerning the costs for staffing and Mr Salvago's fees, has committed a manifest error of assessment of the facts.

2. The allegedly fictitious costs

72 The applicant maintains that it did actually incur the costs declared by it and which concern: (a) the renting of two plots of land for the project, pursuant to leases concluded on 10 October 1993 with Mrs Floris and Mr Liori, respectively; (b) the hire of an excavator belonging to the company AGR.IN.TEC Srl to carry out earth removal work; (c) various planting supplies.

(a) Renting of the plots of land

73 First, as regards costs totalling ITL 20 000 000 for the renting of two plots of land allegedly used for the project, the applicant states that Mr Liori had the plots at his disposal in his capacity as agent of their owner, pursuant to a special power of attorney dated 25 March 1993. In that capacity, he acquired the plots of land partly in his own name and partly on behalf of AGR.IN.TEC, of which he was the sole director.

74 The applicant states that the plots in question were mistakenly identified in the report, following a material transcription error of the land registry number in the leases concluded on 10 October 1993 by Mr Liori and the applicant.

75 The applicant adds, in the alternative, that the duly registered lease was, in any event, the source of a cost actually borne by it, regardless of the questions relating to the ownership of the plots, which are irrelevant to the present proceedings.

76 The applicant also argues that the allegations of the Commission to the effect that one of the plots was used as a vineyard is based on a mistaken reading of the land register.

77 The Commission begins by referring to Article 48(1) of the Rules of Procedure to contest the production by the applicant of the special power of attorney for Mr Liori at the stage of the reply. It adds that the power of attorney does not prove that the plots in question were purchased by Mr Liori and AGR.IN.TEC. Nor is AGR.IN.TEC mentioned in either of the two leases produced by the applicant.

78 The Court of First Instance begins by noting that, according to the report, these costs relate to annual rents of ITL 10 000 000 as laid down in leases concluded by the applicant with Mr Liori and Mrs Floris, mother of Mr Liori, respectively.

79 As regards the leases themselves, the applicant legitimately produced, at the reply stage, a special power of attorney for Mr Liori in support of its argument that he was, in fact, entitled to dispose of the plots of land in question, having allegedly acquired them from the Deledda brothers. The production of that document, which concerns the dispute between the parties, cannot be considered to be delayed within the meaning of Article 48(1) of the Rules of Procedure, which expressly offers the parties the possibility of introducing additional evidence in support of their arguments in the reply and rejoinder.

80 As regards the plots of land for which Mr Liori held the special power of attorney, however, the leases produced by the applicant refer to land registry numbers which are completely different from those in the power of attorney. In the absence of any evidence adduced by the applicant, it cannot be presumed that a mere transcription error did occur in the leases, as the applicant claims.

81 It must be emphasised that the applicant did not present any evidence, either at the administrative stage or before the Court of First Instance, to establish that the two plots allegedly leased by it were actually used for the project. In particular, it did not produce any evidence which might call into question the finding contained in the report that the plot allegedly leased to the applicant by Mrs Floris was used as a vineyard.

82 Furthermore, even on the assumption that, as the applicant maintains, the two plots mentioned in the special power of attorney were purchased by Mr Liori from the Deledda brothers for ITL 120 000 000 — which the cheques drawn by AGR.IN.TEC in favour of the Deledda brothers are not sufficient to establish — this circumstance by itself does not prove that the plots were really leased by the applicant and used for the project, in the absence of the slightest element of proof to that effect.

83 In those circumstances, the applicant has not adduced any serious evidence which would give grounds for assuming that the Commission committed a manifest error of assessment of the facts when it relied in the contested decision on the finding made in the report that the costs of the alleged lease of the two plots were fictitious.

(b) Hire of an excavator

84 The applicant maintains that, contrary to the assertions of the defendant, AGR.IN.TEC did in fact have an excavator, which it hired out to the applicant. The owner is one of the members of AGR.IN.TEC.

85 The Commission observes that this argument is unsubstantiated.

86 Suffice it to note that the argument of the applicant to the effect that one of the members of AGR.IN.TEC had put the excavator at its disposal is not supported by any evidence. Moreover, the findings of the Guardia di Finanza (page 15 of the report) confirm the fictitious nature of the rental.

(c) Agricultural supplies

87 The applicant argues that, in order to find that the costs for the supplies of goat manure, topsoil, peat, compost, clumps of grasses, indigenous cuttings and bushes for a total amount of ITL 115 065 600 (EUR 59 426), the Commission relies entirely on, first, the statements of the applicant's employees taken by the Guardia di Finanza and, second, the assessment of an agricultural expert appointed by the Procura de Cagliari (Public Prosecutor's Office, Cagliari).

88 The expert, however, did not take into account the fact that the land in question was to be used for the cultivation of about 75 species of plants obtained through seedlings or cuttings. The essential successive transplantation operations required the use of the abovementioned supplies. Moreover, the reason for which soil analyses did not show any traces of peat or organic manure is that the land slopes steeply and rain erodes it. Lastly, the assessment conducted by Professor Segale at the request of the applicant confirms that the disputed costs can actually be attributed to the project.

89 The Commission begins by contesting, on the basis of Article 48(1) of the Rules of Procedure, the admissibility of Professor Segale's report, produced by the applicant at the stage of the reply. Next, it contends that it has been clearly established that the invoices from the Liori company for the supply of goat manure, topsoil, peat, compost, clumps of grasses, indigenous cuttings and bushes did not relate to actual services provided.

90 The Court notes that the findings in the report, according to which the invoices from the Liori company (total amount ITL 115 065 600, or EUR 59 426) for the supply of goat manure, topsoil, peat, compost, clumps of grasses, indigenous cuttings and bushes did not relate to actual services provided, are duly substantiated. The statements of the applicant's employees recorded in the report are clear, precise and corroborative. All of the witnesses stated that the seeds and cuttings were not purchased but rather gathered freely and at no cost, as moreover is indicated by the applicant in the technical report it sent to the Commission. Those statements are, furthermore, in line with the project description in the decision to grant the assistance. The witnesses also confirmed that goat manure was never used, because that would have risked burning the roots of the plants, and that the deliveries of peat and topsoil, in bags, came from non-Sardinian companies and not the company which invoiced them.

91 In those circumstances, the explanations given by the applicant for the absence of traces of peat and organic manure in the soil, recorded in an expert assessment carried out at the request of the Procura di Cagliari, are not convincing. According to Professor Segale's expert report dated 28 March 2000, those explanations presuppose that 1.70 m of peat and 40 cm of manure could actually disappear due to gully erosion by the rain. Even if it were to be accepted that this theory is plausible, that would not prove that the expenses attributed to the project were actually incurred by the applicant or that the materials were actually used to carry out the project.

92 Moreover, the expert's report drawn up by Professor Segale, which post-dates the lodging of the application and which, consequently, was duly produced by the applicant at the reply stage, does not contain anything specific which might invalidate the findings in the report regarding the fictitious nature of the expenses in question.

93 It follows that, by relying as it did in the contested decision on the findings of the Guardia di Finanza concerning the supply of the disputed agricultural supplies, the Commission did not commit a manifest error of assessment of the facts.

94 For all of those reasons, the plea based on a manifest error of assessment of the facts must be dismissed as unfounded.

Alleged failure to state sufficient reasons

Arguments of the parties

95 The applicant claims that the contested decision should have indicated clearly the reasons for cancellation of the assistance. On the one hand, the decision does not make it possible to identify the allegations directed at the applicant. Nor, on the other hand, does it contain any explanation as to why the Commission did not accept the probative value of the documents produced by the applicant.

96 Neither the contested decision nor the Commission's letter of 17 June 1998 informing the applicant of the opening of the examination procedure makes it possible to identify specific allegations directed at the applicant. The contested decision (seventh and eighth recitals in the preamble thereto) mistakenly states that, in its letter of 17 June 1998, the Commission 'informed the beneficiary of the facts liable to constitute irregularities' and that 'in its reply of 4 August 1998, the beneficiary did not provide arguments rebutting the specific facts referred to by the Commission'. In its letter of 17 June 1998, the Commission made merely a general reference to the report.

97 In those circumstances, the applicant was not in a position to examine fully the lawfulness of the contested decision, which led it to dispute, simply by way of example, a number of the complaints against it, as part of its plea based on manifest error of assessment of the facts.

98 Furthermore, in the contested decision the Commission does not discuss the reasons for which it cancelled the assistance, instead of reducing it proportionally to the expenses actually incurred.

99 The Commission replies that the contested decision contains sufficient reasons.

Findings of the Court

100 It is well-established in case-law 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. The extent of the obligation to state reasons must be assessed in the light of its context and of all of the legal rules applicable to the subject-matter in question (see Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraphs 15 and 16; *Sonasa* v *Commission*, cited above, paragraph 64).

101 In view in particular of the fact that a decision reducing the amount of Community financial assistance has serious consequences for the beneficiary of that assistance, the decision must clearly show the grounds which justify a reduction of the amount of the assistance initially authorised (Case T-85/94 *Branco* v *Commission* [1995] ECR II-45, paragraph 33; and *Sonasa* v *Commission*, cited above, paragraph 65).

102 Moreover, a decision of the Commission reducing financial assistance may be regarded as adequately reasoned if it either clearly sets out itself the reasons which justify the reduction in assistance, or refers with sufficient clarity to a measure of the competent national authorities of the Member State concerned in which those authorities set out clearly the reasons for such a reduction, in so far as the undertaking in question has been able to take cognisance of the measure (*Branco* v *Commission*, cited above, paragraph 36; Joined Cases T-551/93 and T-231/94 to T-234/94 *Industrias Pesqueras Campos and Others* v *Commission* [1996] ECR II-247, paragraphs 142 to 144; Case T-72/97 *Proderec* v *Commission* [1998] II-2847, paragraphs 104 and 105; and *Sonasa* v *Commission*, cited above, paragraph 68).

103 In the present case, it is necessary to examine whether the contested decision clearly sets out the reasons for the cancellation of the financial assistance. The decision states: 'The aforementioned report from the Guardia di Finanza states that the beneficiary declared and documented fictitious costs and invoiced for nonexistent operations with a view to receiving Community funds to which it was

not entitled; in the presentation of the costs relating to the project made to the Commission on 22 December 1995, and in the supporting documents sent on 28 February 1996, the beneficiary declared that the total cost of the project was ITL 1 209 581 058, whilst the actual total cost found by the Guardia di Finanza was ITL 386 971 677.' This shows that the contested decision specifies the irregularities found (declaration of fictitious costs as well as costs not wholly attributable to the project) by indicating the amount of the costs which were actually attributable to the project. It is, moreover, expressly based on the report notified to Mrs Zuliani, sole director of the applicant, by the national authorities in 1996. The report thus becomes part and parcel of the contested decision. It also contains a particularly detailed and thorough discussion of all of the irregularities ascribed to the applicant.

104 The Commission also rightly points out that the letter of 4 August 1998 from the applicant shows that it was in no doubt as to the specific complaints against it.

105 Moreover, contrary to the allegations of the applicant, the contested decision clearly shows why the applicant's comments set out in its letter of 4 August 1998 do not refute the complaints against it, according to the Commission. The contested decision states that the applicant did not put forward arguments which refuted the specific facts referred to in the letter of 17 June 1998 notifying it of the opening of the examination procedure. It is to be noted that the applicant does not dispute the allegation of the Commission that the documents sent with the letter of 4 August 1998 (summarised list of the expenses attributed to the project, copies of the corresponding invoices, technical report on the work performed and a summary description of the tasks accomplished by the persons interviewed for the completion of the project) are essentially the same as those on which the Guardia di Finanza based its findings of irregularities.

106 It follows that the plea based on a failure to state sufficient reasons must be dismissed as unfounded.

Alleged infringement of the principle of protection of legitimate expectations

Arguments of the parties

107 The applicant argues that the contested decision infringes the principle of protection of legitimate expectations. It states that it implemented all of the actions and measures provided for by the decision to grant the assistance. Accordingly, the conduct of the Commission caused the applicant to have a legitimate expectation that its actions were lawful, before the letter of 17 June 1998 from the Commission notifying it of the opening of the examination procedure. Under the terms of the decision to grant the assistance, the second instalment (EUR 227 866) was paid on condition *inter alia* that the Commission be 'certain that at least half of the first instalment (EUR 303 822) was duly spent in accordance with the objectives of the project...'. By paying out the second instalment, the Commission was therefore confirming that the amounts hitherto received had been properly used.

108 That legitimate expectation was, moreover, supported by the fact that the Commission did not consider it necessary, in its letter of 11 September 1998, to allow the applicant's request to provide oral comments on the documents intended to prove the due performance of the project, or to carry out an on-the-spot check.

109 Given the legitimate expectation thus created on the part of the applicant, there cannot be any manifest infringement of the rules in force, as maintained by the defendant, unless there were fraudulent conduct or gross misconduct by the applicant. Consequently, even if an irregularity were proven, it could not preclude the application of the principle of protection of legitimate expectations to the present case.

110 The Commission, for its part, maintains that the fraud committed by the applicant precludes it from being able to rely on any legitimate expectations as to the proper use of the financial assistance.

Findings of the Court

111 The right to rely on the principle of protection of legitimate expectations extends to any economic operator to whom an institution has given justified hopes. However, the principle of protection of legitimate expectations may not be relied upon by an undertaking which has committed a manifest infringement of the rules in force (*Sonasa* v *Commission*, cited above, paragraphs 33 and 34).

112 In the present case, the Court has already held that the Commission rightly found in the contested decision that the applicant had unduly inflated the amount of assistance for which it could apply, by sending false invoices and declaring costs which were only partly related to the completion of the project. In this way the applicant disregarded fundamental financial obligations which must be complied with if assistance is to be granted.

113 In those circumstances, the applicant cannot in any way rely on any legitimate expectation that its actions were proper.

114 In addition, and in any event, the facts relied on by the applicant: the payment of the first two instalments and the lack of on-the-spot checks by the Commission,

as well as its refusal to hear the applicant's oral comments following its written observations, were not of such a nature as to foster such legitimate expectations.

115 The checks which precede the payment of instalments and the balance are carried out subject to the emergence of subsequent facts, following an on-the-spot check by the Commission pursuant to Article 23 of Regulation No 4253/88, as amended, or by the competent national authorities, pursuant to the relevant provisions in force in their internal legal order. Any other interpretation would undermine the obligation of the Commission and the Member States to ensure that Community financial assistance is properly used. The Commission may open an examination procedure at any time, including after completion of the work and cancel, if necessary, Community financial assistance, if a beneficiary has failed to fulfil some of its obligations (see, by analogy, Case T-461/93 *An Taisce and WWF UK* v *Commission* [1994] ECR II-733, paragraph 36).

116 Nor can the lack of on-the-spot checks and the decision not to allow the applicant to present oral comments have given the applicant any expectation whatsoever that the assistance had been used correctly. The absence of on-the-spot checks by the Commission is explained by the fact that the competent national authorities had already conducted a thorough check. Likewise, as held earlier, the refusal to allow oral comments was justified by the fact that the applicant had already been given the opportunity to provide all relevant justifications in its defence.

117 Consequently, the plea alleging a breach of the principle of the protection of legitimate expectations is not well founded.

Alleged infringement of Article 24(2) of Regulation No 4253/88, as amended, and of the principle of proportionality

Arguments of the parties

118 The applicant maintains that the contested decision cancelling the financial assistance in its entirety infringes Article 24(2) of Regulation No 4253/88, as amended, as well as the principle of proportionality enshrined therein. In accordance with that provision, assistance can be cancelled or reduced only if there is an irregularity which is serious enough to affect the nature or conditions of operation of the project. There can be no reduction or cancellation then, where, as in the present case, the principal obligation of the beneficiary has been performed, i.e., to carry out the project in accordance with the conditions set out in the decision to grant the assistance. In particular, Article 24(2), which explicitly states that 'the Commission may reduce or suspend assistance in respect of the operation or measure concerned if the examination reveals an irregularity and in particular a significant change affecting the nature or conditions of the operations or measure', does not provide for the cancellation of assistance in the event of failure to comply with the financial conditions. Nor, in the present case, did the specific provisions contained in Annex II to the decision to grant the assistance empower the Commission to cancel the assistance in such an event. Indeed, Article 3 of the operative part of the decision states that, in the event of discrepancy between the expenses actually incurred and those initially provided for, the amount of assistance would be 'reduced accordingly'.

119 In that light, the legal framework of the present case differs from that in *Industrias Pesqueras Campos and Others* v *Commission*, relied on by the defendant, which concerned the granting of aid pursuant to Council Regulation (EEC) No 4028/86 of 18 December 1986 on Community measures to improve and adapt structures in the fisheries and aquaculture sector (OJ 1986 L 376, p. 7).

Article 44 of that regulation expressly provides for reduction or cancellation of the assistance if the project is not completed as stipulated or if some of the conditions imposed are not complied with.

120 In the present case, the financial irregularities allegedly found by the Commission essentially relate to the costs of staffing for the project. They are not based on any fraudulent intent and are of a purely formal nature. Neither the applicable rules nor the decision to grant the assistance required the production of detailed accounts of the hours of work spent by each employee on each sub-project. The applicant attributed a percentage of the total work-hours of each employee to the project, in accordance with the indications it received from the Commission at a meeting intended to clarify the methods for drawing up technical and financial reports. In the event, the project was completed and the objectives of the financial assistance were achieved. The alleged irregularities would at most justify a reduction of the Community assistance up to the alleged difference between the expenses declared and those attributable to the project. By virtue of the principle of proportionality, infringement of a secondary obligation cannot be penalised as severely as failure to comply with a primary obligation, compliance with which is of fundamental importance to the proper functioning of the Community system (Case 181/84 *Man (Sugar)* [1985] ECR 2889, paragraph 20; and Case 21/85 *Maas* [1986] ECR 3537, paragraph 23 and following).

121 The applicant argues that, contrary to the line of argument put forward by the defendant, the reduction of financial assistance would not provide an incentive to fraud, since the reduction would entail considerable hardship for the applicant, in terms of both finances and image. The applicant maintains that all of the instalments already paid out have been put towards completion of the project, a point not disputed by the Commission.

122 The applicant asks the Court of First Instance, first, to include in the case-file a videocassette and slides relating to the project and, second, to order a technical accounting expert assessment in order to establish that it really did achieve the proportional share of self-financing, by checking the accounting documentation produced by it, and a technical expert assessment in order to examine the results of the project in terms of both completion of the work and disclosure of the knowledge acquired, as well as an evaluation of those results.

123 Lastly, at the hearing, the applicant criticised the Commission for not having taken into account the fact that the Italian legislation provided for a financial administrative penalty for infringements of the EAGGF Guidance Section rules. The obligation to repay all of the Community financial assistance, imposed in the contested decision by way of administrative penalty, is thus not only contrary to the principle of proportionality, but also to the general requirement of equity and the principle *non bis in idem*.

124 The Commission contends that, in the light of the deliberate character and the quantitative importance of the irregularities found, the cancellation of the financial assistance complies with both Article 24(2) of Regulation No 4253/88, as amended, and the principle of proportionality.

125 Furthermore, at the hearing, the Commission argued that there was no problem of cumulative administrative penalties. The obligation imposed in the contested decision to repay all of the Community assistance granted is not an administrative penalty, but merely a recovery measure, justified by the fact that the Commission does not gain any benefit in return for the repayment. Moreover, the order referred to earlier is subsequent to the contested decision, meaning that it is rather

the national authorities which must take account of the contested decision, in accordance with the principle of proportionality. The Commission argued, moreover, that, in any event, the double administrative penalty alleged by the applicant is merely theoretical, since the enforcement of the order of 20 April 2001 imposing an administrative fine had been suspended.

Findings of the Court

126 To begin with, under Article 2(2) of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests (OJ 1995 L 312, p. 1), no administrative penalty may be imposed unless a Community act prior to the irregularity has made provision for it. The case-law confirms, moreover, that a penalty, even an administrative one, cannot be imposed unless it rests on a clear and unequivocal legal basis (Case 117/83 *Könecke* [1984] ECR 3291, paragraph 11; Case C-172/89 *Vandemoortele* v *Commission* [1990] ECR I-4677, paragraph 9).

127 In the present case, the obligation to repay all the financial assistance, totalling EUR 531 688, paid to the applicant, including the EUR 164 060 portion which the Commission does not contest was actually used by the applicant for the project, was imposed in the contested decision in order to serve as a deterrent, as pointed out by the Commission, and thereby constitutes a penalty. Consequently, it is necessary to examine whether it complies with the principle of legality of the penalties.

128 It must be pointed out that paragraph 10 of Annex II to the decision to grant the assistance, which defines the applicable financial conditions for *inter alia* justification of the expenses connected with the project, expressly provides that,

in the event of failure to comply with one of the conditions, the Commission may suspend, reduce or cancel the assistance and demand repayment of the amounts paid out.

129 Contrary to the applicant's submissions, moreover, the Commission was empowered to include in the decision to grant the assistance the possibility of cancelling financial assistance by way of penalty in the event of the beneficiary's infringing one of its fundamental obligations.

130 In the system for the granting of structural funds assistance and control of the projects subsidised under Regulation No 4253/88, as amended, the Commission is empowered to grant assistance with a view to assisting the carrying-out of a specific project approved by it, in its entirety, in the decision to grant assistance. It follows that, under that system, the Commission has, in principle, the power to cancel the Community contribution in its entirety where there is an infringement of the financial provisions laid down in the decision to grant assistance. The financial obligations of the beneficiary set out in that decision form part of the fundamental obligations which constitute the consideration for the Community financial contribution, and compliance with which is a precondition for the granting of the assistance, which is at the discretion of the Commission pursuant to Community law and within the framework of the partnership with the Member State concerned. According to the case-law, the obligation to comply with the financial conditions in the decision to grant the assistance constitutes one of the beneficiary's fundamental obligations, on the same footing as the obligation to carry out the project (Case T-216/96 *Conserve Italia* v *Commission* [1999] ECR II-3139, paragraph 71).

131 In that light, Article 24(1) and (2) of Regulation No 4253/88, as amended, must be interpreted as authorising the Commission to provide for the cancellation of the financial assistance granted in the event of infringement of the financial conditions laid down for carrying out the project. Like Article 44 of Regulation No 4028/86 referred to by the applicant, that provision aims at guaranteeing the correct use of Community funds and penalising fraudulent conduct on the part of beneficiaries. The purpose of the EAGGF financial assistance is to fund a certain percentage of the actual costs posted in accordance with the conditions for

granting assistance. In that context, applicants for Community aid must submit reliable information; this is essential for the effective functioning of the system of checks and supporting documents set up to ascertain whether the conditions for the granting of aid have been met (see Case C-500/99 P *Conserve Italia* v *Commission* [2002] ECR I-867, paragraphs 85 to 89; Case T-216/96 *Conserve Italia* v *Commission*, cited above, paragraphs 71 and 92).

132 Lastly, contrary to the interpretation advocated by the applicant, Article 3 of the decision to grant the assistance does not aim to limit the power conferred on the Commission to cancel the financial assistance in order to penalise infringement of the financial conditions. As pointed out by the defendant, that article refers only to a situation in which the Commission is duly informed by the beneficiary that the actual costs incurred for the project have proven to be lower than those initially forecast.

133 It follows that the contested decision does not infringe either Article 24(2) of Regulation No 4253/88, as amended, or the provisions of the contested decision. At this stage, it is appropriate to examine whether the contested decision complies with the principle of proportionality.

134 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 (Case T-216/96 *Conserve Italia* v *Commission*, cited above, paragraph 101).

135 Furthermore, the infringement of obligations observance of which 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 T-216/96 *Conserve Italia* v *Commission*, cited above, paragraphs 101 to 103).

136 In addition, in a case of manifest infringement of the financial conditions, any penalty other than the cancellation of the assistance would be likely to invite fraud, since intending beneficiaries would be tempted to inflate the investment amount stated in their application for the granting of the aid in order to obtain greater Community financial assistance, at the risk only of having that aid reduced by the amount of the overvaluation contained in the decision to grant the assistance (*Industrias Pesqueras Campos and Others* v *Commission*, cited above, paragraph 163).

137 In the present case, the conclusion is inescapable that the applicant acted in serious disregard of its financial obligations, by attributing to the project costs which related to nonexistent operations and costs which did relate to actual activities but which had only a partial bearing on the project, as has already been found. Thus, on the basis of the report, the Commission found in the contested decision that the total amount of expenses actually incurred by the applicant for the project at the end of 1995 amounted to only ITL 386 971 677. It is apparent also that the amounts unduly declared, i.e., ITL 822 609 381, accounted for 87% of the total amount of the two first instalments (ITL 940 531 989) paid up to that date. The good faith claimed by the applicant cannot, in those circumstances, be accepted.

138 Moreover, the argument developed by the applicant at the hearing to the effect that the contested decision disregards the principle of proportionality as well as the principle *non bis in idem*, in so far as the same facts also led to an administrative penalty imposed at national level, is unfounded. The order of 20 April 2001, which imposed a financial administrative penalty on the applicant, is subsequent to the contested decision. In those circumstances, the Commission — which has power to require, by way of administrative penalty, the repayment of the Community aid received, as held earlier — could not take that penalty into account. Consequently, any infringement of the principles *non bis in idem* or proportionality could result only from the national penalty which did not take into account the Community penalty.

139 For all the foregoing reasons, the pleas based on infringement of Article 24 of Regulation No 4253/88, as amended, and of the principle of proportionality are unfounded and must be dismissed without its being necessary to allow the applicant's request that an expert accounting and technical assessment be ordered, and that the videocassette and slides produced by it be included in the case-file. Those requests were intended, as the applicant has stated, to show that the project had indeed been carried out by it, as it maintains it was. That issue, however, exceeds the scope of the present proceedings, since the Commission, in the contested decision, relied solely on the applicant's non-performance of its financial obligations and did not go into the material completion of the project.

140 The principal claim for annulment of the contested decision must, accordingly, be dismissed.

B — *Alternative claim*

141 The claim for the reduction of the assistance to be repaid is, in any event, inadmissible inasmuch as the Court of First Instance, in an action seeking the annulment of a decision, is not entitled to substitute another decision for the contested decision or to amend that decision (order in Case C-428/98 P *Deutsche Post* v *IECC and Commission* [2000] I-3061, paragraph 28).

142 Accordingly, the application must be dismissed in its entirety.

Costs

143 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, as applied for by the defendant.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber),

hereby:

1. **Dismisses the action;**

2. **Orders the applicant to pay all the costs.**

Cooke García-Valdecasas Lindh

Delivered in open court in Luxembourg on 26 September 2002.

H. Jung
Registrar

J.D. Cooke
President